



FEDERAL REGISTER

Title 3--

The President

Manual for Courts-Martial, United States, 1984

Executive Order 12473 of April 13, 1984

49 FR 17152

April 23, 1984

[PART ONE OF FOUR]

**TEXT:** By virtue of the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (Uniform Code of Military Justice), I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, United States, 1984."

This Manual shall take effect on August 1, 1984, with respect to all court-martial processes taken on and after that date; *Provided*, That nothing contained in this Manual shall be construed to invalidate any restraint, investigation, referral of charges, designation or detail of a military judge or counsel, trial in which arraignment had been had, or other action begun prior to that date, and any such restraint, investigation, trial, or other action may be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; *Provided further*, That Rules for Courts-Martial 908, 1103(j), 1105-1107, 1110-1114, 1201, and 1203 shall not apply to any case in which the findings and sentence were adjudged by a court-martial before August 1, 1984, and the post-trial and appellate review of such cases shall be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; *Provided further*, That nothing contained in this Manual shall be construed to make punishable any act done or omitted prior to August 1, 1984, which was not punishable when done or omitted; *Provided further*, That nothing in part IV of this Manual shall be construed to invalidate the prosecution of any offense committed before the effective date of this Manual; *Provided further*, That the maximum punishment for an offense committed prior to August 1, 1984, shall not exceed the applicable limit in effect at the time of the commission of such offense; *Provided further*, That for offenses committed prior to August 1, 1984, for which a sentence is adjudged on or after August 1, 1984, if the maximum punishment authorized in this Manual is less than that previously authorized, the lesser maximum authorized punishment shall apply; *And provided further*, That Part V of this Manual shall not apply to nonjudicial punishment proceedings which were initiated before August 1, 1984, and nonjudicial punishment proceedings in such cases shall be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed.

The Manual for Courts-Martial, 1969, United States (Revised edition), prescribed by Executive Order No. 11476, as amended by Executive Order Nos. 11835, 12018, 12198, 12233, 12306, 12340, 12383, and 12460 is hereby

rescinded, effective August 1, 1984.

The Secretary of Defense shall cause this Manual to be revised annually and shall recommend to the President any appropriate amendments.

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

/s/ Ronald Reagon

The White House, *April 13, 1984.*

Billing code 3195-01-M

## PART I

### PREAMBLE

1. Sources of military jurisdiction. The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.

2. Exercise of military jurisdiction.

(a) Kinds. Military jurisdiction is exercised by:

(1) A government in the exercise of that branch of the municipal law which regulates its military establishment. (Military law).

(2) A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require. (Martial law).

(3) A belligerent occupying enemy territory. (Military government).

(4) A government with respect to offenses against the law of war.

(b) Agencies. The agencies through which military jurisdiction is exercised include:

(1) Courts-martial for the trial of offenses against military law and, in the case of general courts-martial, of persons who by the law of war are subject to trial by military tribunals. See Parts II, III, and IV of this Manual for rules governing courts-martial.

(2) Military commissions and provost courts for the trial of cases within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.

(3) Courts of inquiry for the investigation of any matter referred to such court by competent authority. See Article 135. The Secretary concerned may prescribe regulations governing courts of inquiry.

(4) Nonjudicial punishment proceedings of a commander under Article 15. See Part V of this Manual.

3. Nature and purpose of military law. Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the

jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

4. Structure and application of the Manual for Courts-Martial. The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Parts I-V). This Manual shall be applied consistent with the purpose of military law.

## PART II

### RULES FOR COURTS-MARTIAL

#### CHAPTER I. GENERAL PROVISIONS

##### Rule 101. Scope, title

(a) In general. These rules govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities.

(b) Title. These rules may be known and cited as the Rules for Courts-Martial (R.C.M.).

##### Rule 102. Purpose and construction

(a) Purpose. These rules are intended to provide for the just determination of every proceeding relating to trial by court-martial.

(b) Construction. These rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

##### Rule 103. Definitions and rules of construction

The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.

(1) "Article" refers to articles of the Uniform Code of Military Justice unless the context indicates otherwise.

(2) "Capital case" means a general court-martial to which a capital offense has been referred without an instruction that the case be treated as noncapital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.C.M. 810(d).

(3) "Capital offense" means an offense for which death is an authorized punishment under the code and Part IV of this Manual or under the law of war.

(4) "Code" refers to the Uniform Code of Military Justice, unless the context indicates otherwise.

(5) "Commander" means a commissioned officer in command or an officer in charge except in Part V or unless the context indicates otherwise.

(6) "Convening authority" includes a commissioned officer in command for the time being and successors in command.

(7) "Copy" means an accurate reproduction, however made. Whenever necessary and feasible, a copy may be made by handwriting.

(8) "Court-martial" includes, depending on the context:

(A) The military judge and members of a general or special court-martial;

(B) The military judge when a session of a general or special court-martial is conducted without members under Article 39(a);

(C) The military judge when a request for trial by military judge alone has been approved under R.C.M. 903;

(D) The members of a special court-martial when a military judge has not been detailed; or

(E) The summary court-martial officer.

(9) "Days." When a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall not count, but the date on which the period ends shall count as one day.

(10) "Detail" means to order a person to perform a specific, temporary duty, unless the context indicates otherwise.

(11) "Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. § 232(5) or 844(j).

(12) "Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

(13) "Joint" in connection with military organization connotes activities, operations, organizations, and the like in which elements of more than one military service of the same nation participate.

(14) "Members." The members of a court-martial are the voting members detailed by the convening authority.

(15) "Military judge" means the presiding officer of a general or special court-martial detailed in accordance with Article 26. Except as otherwise expressly provided, in the context of a summary court-martial "military judge" includes the summary court-martial officer or in the context of a special court-martial without a military judge, the president. Unless otherwise indicated in the context, "the military judge" means the military judge detailed to the court-martial to which charges in a case have been referred for trial.

(16) "Party." Party, in the context of parties to a court-martial, means:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

(17) "Staff judge advocate" means a judge advocate so designated in the Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate.

(18) "Sua sponte" means that the person involved acts on that person's initiative, without the need for a request, motion, or application.

(19) "War, time of." For purposes of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV

and V of this Manual only, "time of war" means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a "time of war" exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.

(20) The definitions and rules of construction in 1 U.S.C. §§ 1 through 5 and in 10 U.S.C. §§ 101 and 801.

Rule 104. Unlawful command influence

(a) General prohibitions.

(1) Convening authorities and commanders. No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(2) All persons subject to the code. No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

(3) Exceptions.

(A) Instructions. Subsections (a)(1) and (2) of this rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial.

(B) Court-martial statements. Subsections (a)(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel.

(C) Professional supervision. Subsections (a)(1) and (2) of this rule do not prohibit action by the Judge Advocate General concerned under R.C.M. 109.

(D) Offense. Subsections (a)(1) and (2) of this rule do not prohibit appropriate action against a person for an offense committed while detailed as a military judge, counsel, or member of a court-martial, or while serving as individual counsel.

(b) Prohibitions concerning evaluations.

(1) Evaluation of member or defense counsel. In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may:

(A) consider or evaluate the performance of duty of any such person as a member of a court-martial; or

(B) give a less favorable rating or evaluation of any defense counsel because of the zeal with which such counsel represented any accused.

(2) Evaluation of military judge.

(A) General courts-martial. Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review

any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to the performance of duty as a military judge.

(B) Special courts-martial. The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command, influence in the rating or evaluation of the military judge's judicial performance.

Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates

(a) Convening authorities and staff judge advocates. Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.

(b) Among staff judge advocates and with the Judge Advocate General. The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.

Rule 106. Delivery of military offenders to civilian authorities

Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civilian authority may be delivered, upon request, to the civilian authority for trial. A member may be placed in restraint by military authorities for this purpose only upon receipt of a duly issued warrant for the apprehension of the member or upon receipt of information establishing probable cause that the member committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for such time as is reasonably necessary to effect the delivery.

Rule 107. Dismissed officer's right to request trial by court-martial

If a commissioned officer of any armed force is dismissed by order of the President under 10 U.S.C. § 1161(a)(3), that officer may apply for trial by general court-martial within a reasonable time.

Rule 108. Rules of court

The Judge Advocate General concerned and persons designated by the Judge Advocate General may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings. Such rules shall be disseminated in accordance with procedures prescribed by the Judge Advocate General concerned or a person to whom this authority has been delegated. Noncompliance with such procedures shall not affect the validity of any rule of court with respect to a party who has received actual and timely notice of the rule or who has not been prejudiced under Article 59 by the absence of such notice. Copies of all rules of court issued under this rule shall be forwarded to the Judge Advocate General concerned.

Rule 109. Professional supervision of military judges and counsel

(a) In general. Each Judge Advocate General may prescribe rules not inconsistent with this Manual to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. After notice and the opportunity to be heard, counsel and military judges may be suspended, for violations of such rules, from practice in courts-martial and in the Courts of Military Review only by the Judge Advocate General of the armed force of such court. The Judge Advocate General concerned may upon good cause shown modify or revoke suspensions.

(b) Action without further hearing. When a Judge Advocate General suspends a person from practice or the Court of Military Appeals disbars a person, any Judge Advocate General may suspend that person from practice upon notice and opportunity to respond in writing, but without further hearing.

## CHAPTER II. JURISDICTION

### Rule 201. Jurisdiction in general

(a) Nature of courts-martial jurisdiction.

(1) The jurisdiction of courts-martial is entirely penal or disciplinary.

(2) The code applies in all places.

(3) The jurisdiction of a court-martial with respect to offenses under the code is not affected by the place where the court-martial sits. The jurisdiction of a court-martial with respect to military government or the law of war is not affected by the place where the court-martial sits except as otherwise expressly required by this Manual or applicable rule of international law.

(b) Requisites of court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:

(1) The court-martial must be convened by an official empowered to convene it;

(2) The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here "personnel" includes only the military judge, the members, and the summary court-martial;

(3) Each charge before the court-martial must be referred to it by competent authority;

(4) The accused must be a person subject to court-martial jurisdiction; and

(5) The offense must be subject to court-martial jurisdiction.

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

(d) Exclusive and nonexclusive jurisdiction.

(1) Courts-martial have exclusive jurisdiction of purely military offenses.

(2) An act or omission which violates both the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic, or, subject to R.C.M. 907(b)(2)(C) and regulations of the Secretary concerned, by both.

(3) Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, foreign or domestic, the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused.

(e) Reciprocal jurisdiction.

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

(2) So much of the authority vested in the President by Article 22(a)(7) to empower any officer of the armed forces

who is the commander of a joint command or joint task force to convene a general court-martial for the trial of members of any of the armed forces in accordance with Article 17(a) and this rule is delegated to the Secretary of Defense. A commander who has been empowered to convene courts-martial under this rule by the President or the Secretary of Defense may expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force who is authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces under regulations which the superior commander may prescribe.

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

(A) the court-martial is convened by a commander of a joint command or joint task force who has been specifically empowered by the President, the Secretary of Defense, or a superior commander under the provisions of subsection (e)(2) of this rule to refer such cases for trial by courts-martial; or

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

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

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

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

(f) Types of courts-martial.

(1) General courts-martial.

(A) Cases under the code.

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

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

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

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

(b) The case has been referred as noncapital.

(B) Cases under the law of war.

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

(a) The law of war; or



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

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

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

(2) Special courts-martial.

(A) In general. Except as otherwise expressly provided, special courts-martial may try any person subject to the code for any noncapital offense made punishable by the code and, as provided in this rule, for capital offenses.

(B) Punishments.

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

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

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

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

(C) Capital offenses.

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

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

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

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

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

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

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

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

(c) Attachment of jurisdiction over the person.

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

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

Rule 203. Jurisdiction over the offense

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

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.

Rule 302. Apprehension

(a) Definition and scope.

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

(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.

(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;

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

(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.

(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.

(d) How an apprehension may be made.

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

(2) Warrants. Neither warrants nor any other authorization shall be required for an apprehension under these rules except as required in subsection (e)(2) of this rule.

(3) Use of force. Any person authorized under these rules to make an apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

(e) Where an apprehension may be made.

(1) In general. An apprehension may be made at any place, except as provided in subsection (e)(2) of this rule.

(2) Private dwellings. A private dwelling includes dwellings, on or off a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, or rented by the residents, or assigned, and may be occupied on a temporary or permanent basis. "Private dwelling" does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places. No person may enter a private dwelling for the purpose of making an apprehension under these rules unless:

(A) Pursuant to consent under Mil.R.Evid. 314(e) or 316(d)(2);

(B) Under exigent circumstances described in Mil.R.Evid. 315(g) or 316(d)(4)(B);

(C) In the case of a private dwelling which is military property or under military control, or nonmilitary property in a foreign country,

(i) if the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or

(ii) If the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to

believe that the person to be apprehended is or will be present at the time of the entry;

(D) In the case of a private dwelling not included in subsection (e)(2)(C) of this rule,

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority.

A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in this subsection ((e)(2)) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

#### Rule 303. Preliminary inquiry into reported offenses

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

#### Rule 304. Pretrial restraint

(a) Types of pretrial restraint. Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) Conditions on liberty. Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) Restriction in lieu of arrest. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) Arrest. Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) Confinement. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. See R.C.M. 305.

(b) Who may order pretrial restraint.

(1) Of civilians and officers. Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

(2) Of enlisted persons. Any commissioned officer may order pretrial restraint of any enlisted person.

(3) Delegation of authority. The authority to order pretrial restraint of civilians and commissioned and warrant

officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) Authority to withhold. A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) When a person may be restrained. No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

- (1) An offense triable by court-martial has been committed;
- (2) The person to be restrained committed it; and
- (3) The restraint ordered is required by the circumstances.

(d) Procedures for ordering pretrial restraint. Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the code. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) Notice of basis for restraint. When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

(f) Punishment prohibited. Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

(g) Release. Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

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

#### Rule 305. Pretrial confinement

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

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

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

(d) When a person may be confined. No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

(e) Advice to the accused upon confinement. Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;

(2) The right to remain silent and that any statement made by the person may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed.

(f) Military counsel. If requested by the prisoner, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(g) Who may direct release from confinement. Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

(h) Notification and action by commander.

(1) Report. Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

(2) Action by commander.

(A) Decision: Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

(B) Requirements for confinement. The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(b) the prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

(C) Memorandum. If continued pretrial confinement is approved, the commander shall prepare a written memorandum which states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the reviewing officer under subsection (i) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared. However, additional information may be added to the memorandum at any time.

(i) Procedures for review of pretrial confinement.

(1) In general. A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement.

(2) By whom made. The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

(3) Nature of review.

(A) Matters considered. The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner, and the prisoner's counsel, if any, shall be allowed to appear before the reviewing officer and make a statement, if practicable. A representative of command may appear before the reviewing officer to make a statement.

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

(C) Standard of proof. The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(4) Extension of time limit. The reviewing officer may, for good cause, extend the time limit for completion of the initial review to 10 days after the imposition of pretrial confinement.

(5) Action by reviewing officer. Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(6) Memorandum. The reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(7) Reconsideration of approval of continued confinement. The reviewing officer shall, after notice to the parties,

reconsider the decision to confine the prisoner upon request based upon any significant information not previously considered.

(j) Review by military judge. Once the charges for which they accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) Release. The military judge shall order release from pretrial confinement only if:

(A) the reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) information not presented to the reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) the provisions of subsection (i)(2) or (3) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) Credit. The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or of failure to comply with the provisions of subsection (f), (h), or (i) of this rule.

(k) Remedy. The remedy for noncompliance with subsection (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of one day credit for each day of confinement served as a result of such noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit, using the conversion formula under R.C.M. 1003(b)(6) and (7), shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, if adjudged. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(1) Confinement after release. No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

(m) Exceptions.

(1) Operational necessity. The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) At sea. Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Rule 306. Initial disposition



(a) Who may dispose of offenses. Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

(b) Policy. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

(c) How offenses may be disposed of. Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

(1) No action. A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

(2) Administrative action. A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

(3) Nonjudicial punishment. A commander may consider the matter pursuant to Article 15, nonjudicial punishment. See Part V.

(4) Disposition of charges. Charges may be disposed of in accordance with R.C.M. 401.

(5) Forwarding for disposition. A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

(d) National security matters. If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

#### Rule 307. Preferral of charges

(a) Who may prefer charges. Any person subject to the code may prefer charges.

(b) How charges are preferred; oath. A person who prefers charges must:

(1) Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief.

(c) How to allege offenses.

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

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

(3) Specification. A specification is a plain, concise, and definite statement of the essential facts constituting the

offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. No particular format is required.

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

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

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

#### Rule 308. Notification to accused of charges

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

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

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

### CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

#### Rule 401. Forwarding and disposition of charges in general

(a) Who may dispose of charges. Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

(b) Prompt determination. When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline.

(c) How charges may be disposed of. Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).

(1) Dismissal. When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred.

#### (2) Forwarding charges.

(A) Forwarding to a superior commander. When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

(B) Other cases. When charges are forwarded to a commander who is not a superior of the forwarding commander,

no recommendation as to disposition may be made.

(3) Referral of charges. See R.C.M. 403, 404, 407, 601.

(d) National security matters. If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority.

Rule 402. Action by commander not authorized to convene courts-martial

When in receipt of charges, a commander authorized to administer nonjudicial punishment but not authorized to convene courts-martial may:

- (1) Dismiss any charges; or
- (2) forward them to a superior commander for disposition.

Rule 403. Action by commander exercising summary court-martial jurisdiction

(a) Recording receipt. Immediately upon receipt of sworn charges, an officer exercising summary court-martial jurisdiction over the command shall cause the hour and date of receipt to be entered on the charge sheet.

(b) Disposition. When in receipt of charges a commander exercising summary court-martial jurisdiction may:

- (1) Dismiss any charges;
- (2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;
- (3) Forward any charges to a superior commander for disposition;
- (4) Subject to R.C.M. 601(d), refer charges to a summary court-martial for trial; or

(5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Rule 404. Action by commander exercising special court-martial jurisdiction

When in receipt of charges, a commander exercising special court-martial jurisdiction may:

- (a) Dismiss any charges;
- (b) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;
- (c) Forward any charges to a superior commander for disposition;
- (d) Subject to R.C.M. 601(d), refer charges to a summary court-martial or to a special court-martial for trial; or

(e) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Rule 405. Pretrial investigation

- (a) In general. Except as provided in subsection (k) of this rule, no charge or specification may be referred to a

general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

(b) Earlier investigation. If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused after being informed of the charge. A demand by the accused for further investigation entitles the accused to recall witnesses for further cross-examination and to offer new evidence.

(c) Who may direct investigation. Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) Personnel.

(1) Investigating officer. The commander directing an investigation under this rule shall detail a commissioned officer, not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

(2) Defense counsel.

(A) Detailed counsel. Except as provided in subsection (d)(2)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) Individual military counsel. The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b). When the accused is represented by individual military counsel, counsel detailed to represent the accused shall ordinarily be excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed counsel. The investigating officer shall forward any request by the accused for individual military counsel to the commander who directed the investigation. That commander shall follow the procedures in R.C.M. 506(b).

(C) Civilian counsel. The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(2)(A) and (B) of this rule.

(3) Others. The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) counsel to represent the United States;

(B) a reporter; and

(C) an interpreter.

(e) Scope of investigation. The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges.

(f) Rights of the accused. At any pretrial investigation under this rule the accused shall have the right to:

(1) Be informed of the charges under investigation;

- (2) Be informed of the identity of the accuser;
  - (3) Except in circumstances described in R.C.M. 804(b)(2), be present throughout the taking of evidence;
  - (4) Be represented by counsel;
  - (5) Be informed of the witnesses and other evidence then known to the investigating officer;
  - (6) Be informed of the purpose of the investigation;
  - (7) Be informed of the right against self-incrimination under Article 31;
  - (8) Cross-examine witnesses who are produced under subsection (g) of this rule;
  - (9) Have witnesses produced as provided for in subsection (g) of this rule;
  - (10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule;
  - (11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and
  - (12) Make a statement in any form.
- (g) Production of witnesses and evidence; alternatives.
- (1) In general.

(A) Witnesses. Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1) through (6), is not "reasonably available."

(B) Evidence. Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

(2) Determination of reasonable availability.

(A) Military witnesses. The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).

(B) Civilian witnesses. The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

(C) Evidence. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the

parties. Otherwise, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

(D) Action when witness or evidence is not reasonably available. If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) Witness expenses. Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

(4) Alternatives to testimony.

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath;

(iv) Depositions;

v) Stipulations of fact or expected testimony;

(vi) Unsworn statements; and

(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(1) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath; and

(iv) Depositions

of that witness.

(5) Alternatives to evidence.

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

(h) Procedure.

(1) Presentation of evidence.

(A) Testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

(B) Other evidence. The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) Defense evidence. The defense shall have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) Objections. Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

(3) Access by spectators. Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.

(4) Presence of accused. The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present, whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present); or

(B) After being warned by the investigating officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(i) Military Rules of Evidence. The Military Rules of Evidence -- other than Mil. R. Evid. 301, 302, 303, 305, and Section V -- shall not apply in pretrial investigations under this rule.

(j) Report of investigation.

(1) In general. The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

(2) Contents. The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or it not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer's conclusion whether the charges and specifications are in proper form;

(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

(3) Distribution of the report. The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) Objections. Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges or taking other action within the 5-day period.

(k) Waiver. The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

#### Rule 406. Pretrial advice

(a) In general. Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

(b) Contents. The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(1) Conclusion with respect to whether each specification alleges an offense under the code;

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense;



and

(4) Recommendation of the action to be taken by the convening authority.

(c) Distribution. A copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

Rule 407. Action by commander exercising general court-martial jurisdiction

(a) Disposition. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

(1) Dismiss any charges;

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

(3) Forward any charges to a superior commander for disposition;

(4) Refer charges to a summary court-martial or a special court-martial for trial;

(5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, after which additional action under this rule may be taken;

(6) Subject to R.C.M. 601(d), refer charges to a general court-martial.

(b) National security matters. When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be inimical to the prosecution of a war or harmful to national security, that commander, unless otherwise prescribed by regulations of the Secretary concerned, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to a superior authority.

#### CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL; CONVENING COURTS-MARTIAL

Rule 501. Composition and personnel of courts-martial

(a) Composition of courts-martial.

(1) General courts-martial. General courts-martial shall consist of:

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

(B) Except in capital cases, of the military judge alone if requested and approved under R.C.M. 903.

(2) Special courts-martial. Special courts-martial shall consist of:

(A) Not less than three members;

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

(C) A military judge alone if a military judge is detailed and if requested and approved under R.C.M. 903.

(b) Counsel in general and special courts-martial. Military trial and defense counsel shall be detailed to general and special courts-martial. Assistant trial and associate or assistant defense counsel may be detailed.

(c) Other personnel. Other personnel, such as reporters, interpreters, bailiffs, clerks, escorts, and orderlies, may be

detailed or employed as appropriate but need not be detailed by the convening authority personally.

Rule 502. Qualifications and duties of personnel of courts-martial

(a) Members.

(1) Qualifications. The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:

(A) a commissioned officers;

(B) a warrant officer, except when the accused is a commissioned officer; or

(C) an enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

(2) Duties. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except the president of a special court-martial without a military judge may use such materials in open session.

(b) President.

(1) Qualifications. The president of a court-martial shall be the detailed member senior in rank then serving.

(2) Duties. The president shall have the same duties as the other members and shall also:

(A) Preside over closed sessions of the members of the court-martial during their deliberations;

(B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and,

(C) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge except as otherwise expressly provided.

(c) Qualifications of military judge. A military judge shall be a commissioned officer on active duty in the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which the military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge.

(d) Counsel.

(1) Certified counsel required. Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel or associate defense counsel in general or special courts-martial or as trial counsel in general

courts-martial.

(2) Other military counsel. Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel or assistant defense counsel in general or special courts-martial. The Secretary concerned may establish additional qualifications for such counsel.

(3) Qualifications of individual military and civilian defense counsel. Individual military or civilian defense counsel who represents an accused in a court-martial shall be:

(A) a member of the bar of a Federal court or of the bar of the highest court of a State; or

(B) if not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.

(4) Disqualifications. No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(A) the accuser;

(B) an investigating officer;

(C) a military judge; or

(D) a member.

No person who has acted as counsel for a party may serve as counsel for an opposing party in the same case.

(5) Duties of trial and assistant trial counsel. The trial counsel shall prosecute cases on behalf of the United States and shall cause the record of trial of such cases to be prepared. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the service.

(6) Duties of defense and associate or assistant defense counsel. Defense counsel shall represent the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged. Under the supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service.

(e) Interpreters, reporters, escorts, bailiffs, clerks, and guards.

(1) Qualifications. The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under subsection (e)(2) of this rule may serve as escort, bailiff, clerk, or orderly, subject to removal by the military judge.

(2) Disqualifications. In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, or orderly in any case in which that person is or has been in the same case:

(A) the accuser;

(B) a witness;

(C) an investigating officer;

(D) counsel for any party; or

(E) a member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) Duties. In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties.

(A) Interpreters. Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

(B) Reporters. Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) Others. Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) Payment of reporters, interpreters. The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

(f) Action upon discovery of disqualification or lack of qualifications. Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

#### Rule 503. Detailing members, military judge, and counsel

(a) Members.

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

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

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

(b) Military judge.

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

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

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

(c) Counsel.

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

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

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

Rule 504. Convening courts-martial

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

(b) Who may convene courts-martial.

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

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

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

(B) Determination. If a commander is in doubt whether the command is separate or detached, the matter shall be determined:

(i) in the Army or the Air Force, by the officer exercising general court-martial jurisdiction over the command; or

(ii) in the Naval Service or Coast Guard, by the flag or general officer in command or the senior officer present who designated the detachment.

(3) Summary courts-martial. See R.C.M. 1302(a).

(4) Delegation prohibited. The power to convene courts-martial may not be delegated.

(c) Disqualification.

(1) Accuser. An accuser may not convene a general or special court-martial for the trial of the person accused.

(2) Other. A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) Action when disqualified. When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

(d) Convening orders.

(1) General and special courts-martial. A convening order for a general or special court-martial shall designate the type of court-martial and detail the members and may designate where the court-martial will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

(2) Summary courts-martial. A convening order for a summary court-martial shall designate that it is a summary court-martial and detail the summary court-martial, and may designate where the court-martial will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

(3) Additional matters. Additional matters to be included in convening orders may be prescribed by the Secretary concerned.

(e) Place. The convening authority shall ensure that an appropriate location and facilities for courts-martial are provided.

Rule 505. Changes of members, military judge, and counsel

(a) In general. Subject to this rule, the members, military judge, and counsel may be changed by an authority competent to detail such persons. Members also may be excused as provided in subsections (c)(1)(B)(ii) and (c)(2)(A) of this rule.

(b) Procedure. When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge, such persons shall be detailed in accordance with R.C.M. 503. An order changing the members of the court-martial, except one which excuses members without replacement, shall be reduced to writing before authentication of the record of trial.

(c) Changes of members.

(1) Before assembly.

(A) By convening authority. Before the court-martial is assembled, the convening authority may change the members of the court-martial without showing cause.

(B) By convening authority's delegate.

(i) Delegation. The convening authority may delegate, under regulations of the Secretary concerned, authority to excuse individual members to the staff judge advocate or legal officer or other principal assistant to the convening authority.

(ii) Limitations. Before the court-martial is assembled, the convening authority's delegate may excuse members without cause shown; however, no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority's delegate in any one court-martial. After assembly the convening authority's delegate may not excuse members.

(2) After assembly.

(A) Excusal. After assembly no member may be excused, except:

(i) By the convening authority for good cause shown on the record;

(ii) By the military judge for good cause shown on the record; or

(iii) As a result of challenge under R.C.M. 912.

(B) New members. New members may be detailed after assembly only when, as a result of excusals under subsection (c)(2)(A) of this rule, the number of members of the court-martial is reduced below a quorum, or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third the total membership.

(d) Changes of detailed counsel.

(1) Trial counsel. An authority competent to detail trial counsel may change the trial counsel and any assistant trial counsel at any time without showing cause.

(2) Defense counsel.

(A) Before formation of attorney-client relationship. Before an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail defense counsel may exclude or change such counsel without showing cause.

(B) After formation of attorney-client relationship. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) under R.C.M. 506(b)(3);

(ii) upon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c); or

(iii) for other good cause shown on the record.

(e) Change of military judge.

(1) Before assembly. Before the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge, without cause shown on the record.

(2) After assembly. After the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge only when, as a result of disqualification under R.C.M. 902 or for good cause shown, the previously detailed military judge is unable to proceed.

(f) Good cause. For purposes of this rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to

normal conditions of military life.

Rule 506. Accused's rights to counsel

(a) In general. The accused has the right to be represented before a general or special court-martial by civilian counsel if provided at no expense to the Government, and either by the military counsel detailed under Article 27 or military counsel of the accused's own selection if reasonably available. The accused is not entitled to be represented by more than one military counsel.

(b) Individual military counsel.

(1) Reasonably available. Subject to this subsection, the Secretary concerned shall define "reasonably available." While so assigned, the following persons are not reasonably available to serve as individual military counsel because of the nature of their duties or positions:

(A) a general or flag officer;

(B) a trial or appellate military judge;

(C) a trial counsel;

(D) an appellate defense or government counsel;

(E) a principal legal advisor to a command, organization, or agency and, when such command, organization, or agency has general court-martial jurisdiction, the principal assistant of such an advisor;

(F) an instructor or student at a service school or academy;

(G) a student at a college or university;

(H) a member of the staff of the Judge Advocate General of the Army, Navy, or Air Force, the Chief Counsel of the Coast Guard, or the Director, Judge Advocate Division, Headquarters, Marine Corps.

The Secretary concerned may determine other persons to be not reasonably available because of the nature or responsibilities of their assignments, geographic considerations, exigent circumstances, or military necessity. A person who is a member of an armed force different from that of which the accused is a member shall be reasonably available to serve as individual military counsel for such accused to the same extent as that person is available to serve as individual military counsel for an accused in the same armed force as the person requested. The Secretary concerned may prescribe circumstances under which exceptions may be made to the prohibitions in this subsection when merited by the existence of an attorney-client relationship regarding matters relating to a charge in question. However, if the attorney-client relationship arose solely because the counsel represented the accused on review under Article 70, this exception shall not apply.

(2) Procedure. Subject to this subsection, the Secretary concerned shall prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through the trial counsel to the convening authority. If the requested person is among those not reasonably available under subsection (b)(1) of this rule or under regulations of the Secretary concerned, the convening authority shall deny the request and notify the accused, unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or investigation for which requested, be among those so listed as not reasonably available. If the accused's request makes such a claim, or if the person is not among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. That authority shall make an administrative determination



whether the requested person is reasonably available in accordance with the procedure prescribed by the Secretary concerned. This determination is a matter within the sole discretion of that authority. An adverse determination may be reviewed upon request of the accused through that authority to the next higher commander or level of supervision, but no administrative review may be made which requires action at the departmental or higher level.

(3) Excusal of detailed counsel. If the accused is represented by individual military counsel, detailed defense counsel shall normally be excused. The authority who detailed the defense counsel, as a matter of discretion, may approve a request from the accused that detailed defense counsel shall act as associate counsel. The action of the authority who detailed the counsel is subject to review only for abuse of discretion.

(c) Excusal or withdrawal. Except as otherwise provided in R.C.M. 505(d)(2) and subsection (b)(3) of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

(d) Waiver. The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

(e) Nonlawyer present. Subject to the discretion of the military judge, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under R.C.M. 502.

## CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

### Rule 601. Referral

(a) In general. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

(b) Who may refer. Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

(c) Disqualification. An accuser may not refer charges to a general or special court-martial.

(d) When charges may be referred.

(1) Basis for referral. If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (d)(2) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(2) General court-martial. The convening authority may not refer a specification under a charge to a general court-martial unless --

(A) There has been substantial compliance with the pretrial investigation requirements of C.R.M. 405; and

(B) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406.

These requirements may be waived by the accused.

(e) How charges shall be referred.

(1) Order, instructions. Referral shall be by the personal order of the convening authority. The convening authority may include proper instructions in the order.

(2) Joinder of offenses. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

(3) Joinder of accused. Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

(f) Superior convening authorities. Except as otherwise provided in those rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral.

#### Rule 602. Service of charges

The trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet. In time of peace, no person may, over objection, be brought to trial -- including an Article 39(a) session -- before a general court-martial within a period of five days after service of charges, or before a special court-martial within a period of three days after service of charges. In computing these periods, the date of service of charges and the date of trial are excluded; holidays and Sundays are included.

#### Rule 603. Changes to charges and specifications

(a) Minor changes defined. Minor changes in charges and specifications are any except those which add a party, offense, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged.

(b) Minor changes before arraignment. Any person forwarding, acting upon, or prosecuting charges on behalf of the United States except an investigating officer appointed under R.C.M. 405 may make minor changes to charges or specifications before arraignment.

(c) Minor changes after arraignment. After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

(d) Major changes. Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

#### Rule 604. Withdrawal of charges

(a) Withdrawal. The convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

(b) Referral of withdrawn charges. Charges which have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

## CHAPTER VII. PRETRIAL MATTERS

### Rule 701. Discovery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

proceedings; and

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

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

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

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

(C) Reduce the punishment.

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

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

(2) Mental responsibility. If the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the guilt of the accused, the defense shall, before the beginning of trial on the merits, notify the trial counsel of such intention.

(3) Documents and tangible objects. If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) Reports of examinations and tests. If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall (except as provided in R.C.M. 706 and Mil. R. Evid. 302) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, which are within the possession, custody, or control of the defense which the defense intends to introduce as evidence in the defense case-in-chief at trial or which were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) Inadmissibility of withdrawn defense. If an intention to rely upon a defense under subsection (b)(1) or (2) of this rule is withdrawn, evidence of such intention and of disclosures by the accused or defense counsel made in connection with such intention is not admissible in any court-martial against the accused who gave notice of the intention.

(c) Failure to call witness. The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) Continuing duty to disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) Access to witnesses and evidence. Each party shall have adequate opportunity to prepare its case and equal

opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

(f) Information not subject to disclosure. Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) Regulation of discovery.

(1) Time, place, and manner. The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) Protective and modifying orders. Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) Failure to comply. If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

- (A) Order the party to permit discovery;
- (B) Grant a continuance;
- (C) Prohibit the party from introducing evidence or raising a defense not disclosed; and
- (D) Enter such other order as is just under the circumstances.

This rule shall not limit the right of the accused to testify in the accused's behalf.

(h) Inspect. As used in this rule "inspect" includes the right to photograph and copy.

#### Rule 702. Depositions

(a) In general. A deposition may be ordered whenever, after referral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

(b) Who may order. A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

(c) Request to take deposition.

(1) Submission of request. At any time after charges have been preferred, any party may request in writing that a deposition be taken.

(2) Contents of request. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined;

(C) A statement of the reasons for taking the deposition; and

(D) Whether an oral or written deposition is requested.

(3) Action on request.

(A) In general. A request for a deposition may be denied only for good cause.

(B) Written deposition. A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

(C) Notification of decision. The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(D) Waiver. Failure to renew before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

(d) Action when request is approved.

(1) Detail of deposition officer. When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

(2) Assignment of counsel. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

(3) Instructions. The convening authority may give instructions not inconsistent with this rule to the deposition officer.

(e) Notice. The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(f) Duties of the deposition officer. In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

- (6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;
- (7) Record, but not rule upon, objections or motions and the testimony to which they relate;
- (8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and
- (9) Report to the convening authority any substantial irregularity in the proceeding.

(g) Procedure.

(1) Oral depositions.

(A) Rights of accused. At an oral deposition, the accused shall have the rights to:

(i) Be present except when: (a) the accused, absent good cause shown, fails to appear after notice of the time and place of the deposition; (b) the accused is disruptive within the meaning of R.C.M. 804(b)(2); or (c) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in R.C.M. 506.

(B) Examination of witnesses. Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

(2) Written depositions.

(A) Rights of accused. The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial.

(B) Presence of parties. No party has a right to be present at a written deposition.

(C) Submission of interrogatories to opponent. The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

(D) Examination of witnesses. The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(3) How recorded. In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

(h) Objections.

(1) In general. A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition waives such objection.

(2) Oral depositions. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

(3) Written depositions. Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is waived. Objections to answers in a written deposition may be made at trial.

(i) Deposition by agreement not precluded.

(1) Taking deposition. Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) Use of deposition. Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

#### Rule 703. Production of witnesses and evidence

(a) In general. The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) Unavailable witness. Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been presented by the requesting party.

(c) Determining which witnesses will be produced.

(1) Witnesses for the prosecution. The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) Witnesses for the defense.

(A) Request. The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) Contents of request.

(i) Witnesses on merits or interlocutory questions. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if



known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) Witnesses on sentencing. A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(e).

(C) Time of request. A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) Determination. The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

(d) Employment of expert witnesses. When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

(e) Procedures for production of witnesses.

(1) Military witnesses. The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the witness' presence is required and requesting the commander to issue any necessary orders to the witness.

(2) Civilian witnesses -- subpoena.

(A) In general. The presence of witnesses not on active duty may be obtained by subpoena.

(B) Contents. A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

(C) Who may issue. A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.

(D) Service. A subpoena may be served by the person authorized by this rule to issue it, a United States marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the

person named and by tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned.

(E) Place of service.

(i) In general. A subpoena requiring the attendance of a witness at a deposition, court-martial, or court of inquiry may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) Foreign territory. In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) Occupied territory. In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(F) Relief. If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.

(G) Neglect or refusal to appear.

(i) Issuance of warrant of attachment. The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.

(ii) Requirements. A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear.

(iii) Form. A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.

(iv) Execution. A warrant of attachment may be executed by a United States marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such nondeadly force as may be necessary to bring the witness before the court-martial or other proceeding may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify as soon as practicable and be released.

(v) Definition. For purposes of subsection (e)(2)(G) of this rule "military judge" does not include a summary court-martial or the president of a special court-martial without a military judge.

(f) Right to evidence.

(1) In general. Each party is entitled to the production of evidence which is relevant and necessary.

(2) Unavailable evidence. Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

(3) Determining what evidence will be produced. The procedures in subsection (c) of this rule shall apply to a determination what evidence will be produced, except that any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence.

(4) Procedures for production of evidence.

(A) Evidence under the control of the Government. Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

(B) Evidence not under the control of the Government. Evidence not under the control of the Government may be obtained by subpoena issued in accordance with subsection (e)(2) of this rule.

(C) Relief. If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to Mil. R. Evid. 505 and 506, the military judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted.

#### Rule 704. Immunity

(a) Types of immunity. Two types of immunity may be granted under this rule.

(1) Transactional immunity. A person may be granted transactional immunity from trial by court-martial for one or more offenses under the code.

(2) Testimonial immunity. A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

(b) Scope. Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify; or

(2) Use in a court-martial under subsection (b)(1) of this rule of testimony or statements derived from such testimony or statements.

(c) Authority to grant immunity. Only a general court-martial convening authority may grant immunity, and may do so only in accordance with this rule.

(1) Persons subject to the code. A general court-martial convening authority may grant immunity to any person subject to the code. However, a general court-martial convening authority may grant immunity to a person subject to the code extending to a prosecution in a United States district court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

(2) Persons not subject to the code. A general court-martial convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

(3) Other limitations. The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority.

(d) Procedure. A grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

(e) Decision to grant immunity. Unless limited by superior competent authority, the decision whether to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) the witness' testimony would be of such central importance to the defense case that it is essential to a fair trial; and

(2) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify.

#### Rule 705. Pretrial agreements

(a) In general. Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

(b) Nature of agreement. A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

(c) Terms and conditions.

(1) Prohibited terms or conditions.

(A) Not voluntary. A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) Deprivation of certain rights. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of posttrial and appellate rights.

(2) Permissible terms or conditions. Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit an accused from offering the following additional conditions with an offer to plead guilty:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) Procedure.

(1) Offer. An offer to plead guilty or to enter a confessional stipulation must originate with the accused and defense counsel, if any.

(2) Negotiation. Upon the initiation of the defense, the convening authority, the staff judge advocate, or the trial counsel may negotiate the terms and conditions of a pretrial agreement with the defense. All negotiations shall be with defense counsel unless the accused is not represented.

(3) Ormal submission. After negotiation, if any, under subsection (d)(2) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

(4) Acceptance. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement. The decision is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

(5) Withdrawal.

(A) By accused. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) By convening authority. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(e) Nondisclosure of existence of agreement. Except in a special court-martial without a military judge, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to

the members.

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

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

(b) Ordering an inquiry.

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

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

(c) Inquiry.

(1) By whom conducted. When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board of one or more physicians for their observation and report as to the mental capacity or mental responsibility, or both, of the accused. Ordinarily at least one member of the board shall be a psychiatrist.

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

(A) At the time of the alleged criminal conduct did the accused have a mental disease or defect? (The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.)

(B) What is the clinical psychiatric diagnosis?

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

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

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

Other appropriate questions may also be included.

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

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

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

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

(4) Additional examinations. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) Disclosure to trial counsel. No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

#### Rule 707. Speedy trial

(a) In general. The accused shall be brought to trial within 120 days after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304, whichever is earlier.

#### (b) Accountability.

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

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

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

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

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

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

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

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

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

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

to stand trial:

(C) Any session on pretrial motions;

(D) Any appeal filed under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit; and

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

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

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

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

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

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

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

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

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

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

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

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

## CHAPTER VIII. TRIAL PROCEDURE GENERALLY

### Rule 801. Military judge's responsibilities; other matters

(a) Responsibilities of military judge. The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;



(2) Ensure that the dignity and decorum of the proceedings are maintained.

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

(b) Rules of court; contempt. The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) Obtaining evidence. The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) Uncharged offenses. If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.

(e) Interlocutory questions and questions of law. For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) Rulings by the military judge.

(A) Finality of rulings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final

(B) Changing a ruling. The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) Article 39(a) sessions. When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803

(2) Rulings by the president of a special court-martial without a military judge.

(A) Questions of law. Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) Questions of fact. Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) Changing a ruling. The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) Presence of members. Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered items

of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.

(A) Determination. The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) Instructions. When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) Voting. When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) Consultation. The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) Standard of proof. Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

(5) Scope. Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) Rulings on record. All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

#### Rule 802. Conferences

(a) In general. After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.

(b) Matters on record. Conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection shall waive this requirement.

(c) Rights of parties. A conference shall not proceed over the objection of any party. No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

(d) Accused's presence. The presence of the accused is neither required nor prohibited at a conference.

(e) Admission. No admissions made by the accused or defense counsel at a conference shall be used against the

accused unless the admissions are reduced to writing and signed by the accused and defense counsel.

(f) Limitations. This rule shall not be invoked in the case of an accused who is not represented by counsel, or in special courts-martial without a military judge.

#### Rule 803. Court-martial sessions without members under Article 39(a)

A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. Such sessions may be held before and after assembly of the court-martial, and when authorized in these rules, after adjournment and before action by the convening authority. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.C.M. 804 and 805, and shall be made a part of the record. For purposes of this rule "military judge" does not include the president of a special court-martial without a military judge.

#### Rule 804. Presence of the accused at trial proceedings

(a) Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and posttrial sessions, if any, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:

(1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or

(2) After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

#### (c) Appearance and security of accused.

(1) Appearance. The accused shall be properly attired in the uniform or dress prescribed by the military judge. An accused servicemember shall wear the insignia of grade and may wear any decorations, emblems, or ribbons to which entitled. The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the accused's commander shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired.

(2) Custody. Responsibility for maintaining custody or control of an accused before and during trial may be assigned, subject to R.C.M. 304 and 305, and subsection (c)(3) of this rule, under such regulations as the Secretary concerned may prescribe.

(3) Restraint. Physical restraint shall not be imposed on the accused during open sessions of the court-martial unless prescribed by the military judge.

#### Rule 805. Presence of military judge, members, and counsel

(a) Military judge. No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge, if detailed.

(b) Members. Unless trial is by military judge alone pursuant to a request by the accused, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 83; examination of members under R.C.M. 911(d); when the member has been excused under R.C.M. 505 or 911(f); or as

otherwise provided in R.C.M. 1102. No general court-martial proceeding requiring the presence of members may be conducted unless at least 5 members are present and, except as provided in R.C.M. 911(h), no special court-martial proceeding requiring the presence of members may be conducted unless at least 30 members are present. Except as provided in R.C.M. 503(b), when an enlisted accused has requested enlisted members, no proceeding requiring the presence of members may be conducted unless at least one-third of the members actually sitting on the court-martial are enlisted persons.

(c) Counsel. As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel.

(d) Effect of replacement of member or military judge.

(1) Members. When, after the presentation of evidence on the merits has begun, a new member is detailed under R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

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

#### Rule 806. Public trial

(a) In general. Except as otherwise provided in this rule, courts-martial shall be open to the public. For purposes of this rule, "public" includes members of both the military and civilian communities.

(b) Control of spectators. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

(c) Photography and broadcasting prohibited. Video and audio recording and the taking of photographs -- except for the purpose of preparing the record of trial -- in the courtroom during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R.C.M. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

#### Rule 807. Oaths

(a) Definition. "Oath" includes "affirmation."

(b) Oaths in courts-martial.

(1) Who must be sworn.

(A) Court-martial personnel. The military judge, members of a general or special court-martial, trial counsel, assistant trial counsel, defense counsel, associate defense counsel, assistant defense counsel, reporter, interpreter, and escort shall take an oath to perform their duties faithfully. For purposes of this rule, "defense counsel," "associate defense counsel," and "assistant defense counsel" include detailed and individual military and civilian counsel.

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

(2) Procedure for administering oaths. Any procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

#### Rule 808. Record of trial

The trial counsel of a general or special court-martial shall take such action as may be necessary to ensure that a record which will meet the requirements of R.C.M. 1103 can be prepared.

#### Rule 809. Contempt proceedings

(a) In general. Courts-martial may exercise contempt power under Article 48.

(b) Method of disposition.

(1) Summary disposition. When conduct constituting contempt is directly witnessed by the court-martial, the conduct may be punished summarily. In such cases, the regular proceedings shall be suspended while the contempt is disposed of.

(2) Disposition upon notice and hearing. When the conduct apparently constituting contempt is not directly witnessed by the court-martial, the alleged offender shall be brought before the court-martial and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.

(c) Procedure; who may punish for contempt.

(1) Members not present. When the conduct allegedly constituting contempt occurs during a session when the members are not present, the military judge shall determine whether to punish for contempt, and, if so, what the punishment shall be. The military judge may punish summarily under subsection (b)(1) only if the military judge recites the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the court-martial.

(2) Members present. When the conduct allegedly constituting contempt occurs during a session when the members are present, contempt proceedings may be initiated by the military judge or upon motion of any member, unless the military judge rules that as a matter of law, contempt has not been committed. If contempt proceedings are initiated the following procedures apply.

(A) Instructions. The military judge shall instruct the members so that they can properly decide the questions presented.

(B) Findings. The members shall decide in a closed session, upon vote by secret written ballot whether to hold an alleged offender in contempt. At least two-thirds of the members must concur in a finding of contempt to convict. If the proceedings are summary, no member may vote to convict unless that member directly witnessed the conduct in question in the presence of the court-martial and finds it to be contemptuous.

(C) Sentence. If the members find the offender in contempt, they shall, without reopening the court-martial determine the punishment in accordance with the procedures in R.C.M. 1006.

(D) Announcement. After reaching findings, and, if necessary, a sentence, the court-martial shall be reopened and the results announced by the president.

(d) Record; review. A record of the contempt proceedings shall be part of the record of the court-martial during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and forwarded to the convening authority for review. The convening authority may approve or disapprove all or part of the sentence. The action of the convening authority is not subject to further review or appeal.

(e) Sentence. A sentence of confinement pursuant to a finding of contempt shall begin to run when it is adjudged unless deferred, suspended, or disapproved by the convening authority. The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall be designated by the convening authority. A fine does not become effective until ordered executed by the convening authority. The military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings.

(f) Informing person held in contempt. The person held in contempt shall be informed by the convening authority in writing of the holding and sentence, if any, of the court-martial and of the action of the convening authority upon the sentence.

#### Rule 810. Procedures for rehearings, new trials, and other trials

(a) In general.

(1) Rehearings in full and new or other trials. In rehearings which require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure shall be the same as in an original trial except as otherwise provided in this rule.

(2) Rehearings on sentence only. In a rehearing on sentence only, the procedure shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule.

(A) Contents of the record. The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible under Mil.R.Evid. 804(b)(1) and whether or not it was given through an interpreter.

(B) Plea. The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based. However, if such a plea is found to be improvident, the rehearing shall be suspended and the matter reported to the authority ordering the rehearing.

(3) Combined rehearings. When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After findings on the merits are announced, the members, if any, shall be advised of the offenses on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure shall be the same as at an original trial, except as otherwise provided in this rule. A single sentence shall be adjudged for all offenses.

(b) Composition.

(1) Members. No member of the court-martial which previously heard the case may sit as a member of the court-martial at any rehearing, new trial, or other trial of the same case.

(2) Military judge. The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall

have no effect on the composition of a court-martial on rehearing.

(3) Accused's election. The accused at a rehearing or new or other trial shall have the same right to request enlisted members or trial by military judge alone as the accused would have at an original trial.

(c) Examination of record of former proceedings. No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except:

(1) When permitted to do so by the military judge after such matters have been received in evidence; or

(2) that the president of a special court-martial without a military judge may examine that part of the record of former proceedings which relates to errors committed at the former proceedings when necessary to decide the admissibility of offered evidence or other questions of law, and such a part of the record may be read to the members when necessary for them to consider a matter subject to objection by any member.

(d) Sentence limitations.

(1) In general. Except as otherwise provided in subsection (d)(2) of this rule, offense on which a rehearing, new trial, or other trial has been ordered shall not be the basis for punishment in excess of or more severe than the legal sentence adjudged at the previous trial or hearing, as ultimately reduced by the convening or higher authority, unless the sentence prescribed for the offense is mandatory. When a rehearing on sentencing is combined with trial on new charges, the maximum punishment shall be the maximum punishment for the offenses being reheard as limited above plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an "other trial" no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving a mandatory punishment or one otherwise considered capital.

(2) Pretrial agreement. If, after the earlier court-martial, the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the sentence as to the affected charges and specifications may include any otherwise lawful punishment not in excess of or more severe than that lawfully adjudged at the earlier court-martial.

(e) Definition. "Other trial" means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense.

#### Rule 811. Stipulations

(a) In general. The parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness.

(b) Authority to reject. The military judge may, in the interest of justice, decline to accept a stipulation.

(c) Requirements. Before accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission.

(d) Withdrawal. A party may withdraw from an agreement to stipulate or from a stipulation at any time before a stipulation is accepted; the stipulation may not then be accepted. After a stipulation has been accepted a party may withdraw from it only if permitted to do so in the discretion of the military judge.

(e) Effect of stipulations. Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so

stipulated does not admit the truth of the indicated testimony or document's contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Rules of Evidence apply to the contents of stipulations.

(f) Procedure. When offered, a written stipulation shall be presented to the military judge and shall be included in the record whether accepted or not. Once accepted, a written stipulation of expected testimony shall be read to the members, if any, but shall not be presented to them; a written stipulation of fact or of a document's contents may be read to the members, if any, presented to them, or both. Once accepted, an oral stipulation shall be announced to the members, if any.

#### Rule 812. Joint and common trials

In joint trials and in common trials, each accused shall be accorded the rights and privileges as if tried separately.

#### Rule 813. Announcing personnel of the court-martial and accused

(a) Opening sessions. When the court-martial is called to order for the first time in a case, the military judge shall ensure that the following is announced:

- (1) the order, including any amendment, by which the court-martial is convened;
- (2) the name, rank, and unit or address of the accused;
- (3) the name and rank of the military judge, if one has been detailed;
- (4) the names and ranks of the members, if any, who are present;
- (5) the names and ranks of members who are absent, if presence of members is required;
- (6) the names and ranks (if any) of counsel who are present; and
- (7) the names and ranks (if any) of counsel who are absent;
- (8) the name and rank (if any) of any detailed court reporter.

(b) Later proceedings. When the court-martial is called to order after a recess or adjournment or after it has been closed for any reason, the military judge shall ensure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present.

(c) Additions, replacement, and absences of personnel. Whenever there is a replacement of the military judge, any member, or counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge shall ensure the record reflects the change and the reason for it.

### CHAPTER IX. TRIAL PROCEDURE THROUGH FINDINGS

#### Rule 901. Opening session

(a) Call to order. A court-martial is in session when the military judge so declares.

(b) Announcement of parties. After the court-martial is called to order, the presence or absence of the parties, military judge, and members shall be announced.

(c) Swearing reporter and interpreter. After the personnel have been accounted for as required in subsection (b) of this rule, the trial counsel shall announce whether the reporter and interpreter, if any is present, have been properly



sworn. If not so sworn, the reporter and interpreter, if any, shall be sworn.

(d) Counsel.

(1) Trial counsel. The trial counsel shall announce the legal qualifications and status as to oaths of the members of the prosecution and whether any member of the prosecution has acted in any manner which might tend to disqualify that counsel.

(2) Defense counsel. The detailed defense counsel shall announce the legal qualifications and status as to oaths of the detailed members of the defense and whether any member of the defense has acted in any manner which might tend to disqualify that counsel. Any defense counsel not detailed shall state that counsel's legal qualifications, and whether that counsel has acted in any manner which might tend to disqualify that counsel.

(3) Disqualification. If it appears that any counsel may be disqualified, the military judge shall decide the matter and take appropriate action.

(4) Inquiry. The military judge shall, in open session:

(A) Inform the accused of the rights to be represented by military counsel detailed to the defense; or by individual military counsel requested by the accused, if such military counsel is reasonably available; and by civilian counsel, either alone or in association with military counsel, if such civilian counsel is provided at no expense to the United States;

(B) Inform the accused that, if afforded individual military counsel, the accused may request retention of detailed counsel as associate counsel, which request may be granted or denied in the sole discretion of the convening authority;

(C) Ascertain from the accused whether the accused understands these rights;

(D) Promptly inquire, whenever two or more accused in a joint or common trial are represented by the same detailed or individual military or civilian counsel, or by civilian counsel who are associated in the practice of law, with respect to such joint representation and shall personally advise each accused of the right to effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the military judge shall take appropriate measures to protect each accused's right to counsel; and

(E) Ascertain from the accused by whom the accused chooses to be represented.

(5) Unsworn counsel. The military judge shall administer the oath to any counsel not sworn.

(e) Presence of members. In cases in which a military judge has been detailed, the procedures described in R.C.M. 901 through 903, 904 when authorized by the Secretary concerned, and 905 through 910 shall be conducted without members present in accordance with R.C.M. 803.

Rule 902. Disqualification of military judge

(a) In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) Specific grounds. A military judge shall also disqualify himself or herself in the following circumstances:

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

(2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or

convening authority as to any offense charged or in the same case generally.

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

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

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

(A) Is a party to the proceeding;

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

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

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

(1) "proceeding" includes pretrial, trial, posttrial, appellate review, or other stages of litigation.

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

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

(d) Procedure.

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

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

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

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

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

(a) Time of elections.

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

(2) Request for trial by military judge alone. Before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether in a noncapital case, the

accused requests trial by the military judge alone. The accused may defer requesting trial by military judge alone until any time before assembly.

(b) Form of election.

(1) Request for enlisted members. A request for the membership of the court-martial to include enlisted persons shall be in writing and signed by the accused.

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

(c) Action on election.

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

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

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

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

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

(d) Right to withdraw request.

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

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

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

(f) Scope. For purposes of this rule, "military judge" does not include the president of a special court-martial without a military judge.

#### Rule 904. Arraignment

Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

#### Rule 905. Motions generally

(a) Definitions and form. A motion is an application to the military judge for particular relief. Motions may be oral

or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control.

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings);

(3) Motions to suppress evidence;

(4) Motions for discovery under R.C.M. 701 or for production of witnesses or evidence;

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

(6) Objections based on denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

(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.

(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.

(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.

(e) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make 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 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 finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

(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.

(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.

#### Rule 906. Motions for appropriate relief

(a) In general. A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.

(b) Grounds for appropriate relief. The following may be requested by motion for appropriate relief. This list is not exclusive.

(1) Continuances. A continuance may be granted only by the military judge.

(2) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

(3) Correction of defects in the Article 32 investigation or pretrial advice.

(4) Amendment of charges or specifications. A charge or specification may not be amended over the accused's objection unless the amendment is minor within the meaning of R.C.M. 603(a).

(5) Severance of a duplicitous specification into two or more specifications.

(6) Bill of particulars. A bill of particulars may be amended at any time, subject to such conditions as justice

permits.

(7) Discovery and production of evidence and witnesses.

(8) Relief from pretrial confinement in violation of R.C.M. 305.

(9) Severance of multiple accused, if it appears that an accused or the Government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.

(10) Severance of offenses, but only to prevent manifest injustice.

(11) Change of place of trial. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby.

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

(13) Preliminary ruling on admissibility of evidence.

(14) Motions relating to 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.

(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

(B) The specification fails to state an offense.

(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;

(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;

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

(iii) Constructive condonation of desertion established by unconditional restoration to duty without trial of a deserter by a general court-martial convening authority who knew of the desertion; or

(iv) Prior punishment under Articles 13 or 15 for the same offense, if that offense was minor.

(3) Permissible grounds. A specification may be dismissed upon timely motion by the accused if:

(A) the specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay; or

(B) the specification is multiplicitous with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice.

Rule 908. Appeal by the United States

(a) In general. In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification.

(b) Procedure.

(1) Delay. After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

(2) Decision to appeal. The decision whether to file notice of appeal under this rule shall be made within 72 hours of the ruling or order to be appealed. If the Secretary concerned so prescribes, the trial counsel shall not file notice of appeal unless authorized to do so by a person designated by the Secretary concerned.

(3) Notice of appeal. If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify 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.

(4) Effect on the court-martial. Upon written notice to the military judge under subsection (b)(3) of this rule, no session of the court-martial may proceed pending disposition by the Court of Military Review of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun,

(i) A severance may be granted upon request of all the parties;

(ii) A severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) Record. Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed. R.C.M. 1103(g), (h), and (i) shall apply and the record shall be authenticated in accordance with R.C.M. 1104(a). The military judge or the Court of Military Review may direct that additional parts of the proceeding be included in the record; R.C.M. 1104(d) shall not apply to such additions.

(6) Forwarding. Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe. The person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Military Review and notify the trial counsel of that decision.

(7) Appeal filed. If the United States elects to file an appeal, it shall be filed directly with the Court of Military Review, in accordance with the rules of that court.

(8) Appeal not filed. If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(c) Appellate proceedings.

(1) Appellate counsel. The parties shall be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule.

(2) Court of Military Review. An appeal under Article 62 shall, whenever practicable, have priority over all other proceedings before the Court of Military Review. In determining an appeal under Article 62, the Court of Military Review may take action only with respect to matters of law.

(3) Action following decision of Court of Military Review. After the Court of Military Review has decided any appeal under Article 62, the accused may petition for review by the Court of Military Appeals, or the Judge Advocate General may certify a question to the Court of Military Appeals. The parties shall be notified of the decision of the Court of Military Review promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Military Appeals for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate General, who shall forward a copy to the clerk of the Court of Military Appeals when required by the Court. If the decision by the Court of Military Review permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Military Appeals or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Military Appeals, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Military Review. If the case is reviewed by the Court of Military Appeals, R.C.M. 1204 and 1205 shall apply.

(d) Military judge. For purposes of this rule, "military judge" does not include the resident of a special court-martial without a military judge.



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

(a) In general. No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case.

(b) Presumption of capacity. A person is presumed to have the capacity to stand trial unless the contrary appears.

(c) Determination at trial.

(1) Nature of issue. The mental capacity of the accused is an interlocutory question of fact.

(2) Standard. When the issue of the accused's capacity to stand trial is raised, trial may not proceed unless it is established by a preponderance of the evidence that the accused possesses sufficient mental capacity to understand the nature of the proceedings against the accused and to conduct or cooperate intelligently in the defense of the case.

#### Rule 910. Pleas

(a) Alternatives.

(1) In general. An accused may plead not guilty or guilty. An accused may plead, by exceptions or by exceptions and substitutions, not guilty to an offense as charged, but guilty to an offense included in that offense. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

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

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

(c) Advice to accused. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) the nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

(2) in a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) that the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) that if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this rule; and

(5) that if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(d) Ensuring that the plea is voluntary. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) Determining accuracy of plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(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.

(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.

(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.

(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.

(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.

(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.

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

(a) Pretrial matters.

(1) Questionnaires. Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member written questions requesting the following information:

(A) date of birth;

(B) sex;

(C) race;

(D) marital status and sex, age, and number of dependents;

(E) home of record;

(F) civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) current unit to which assigned;

(H) past duty assignments;

(I) awards and decorations received;

(J) date of rank; and

(K) whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member.

(2) Other materials. A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) Challenge of selection of members.

(1) Motion. Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

(2) Procedure. Upon a motion under subsection (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) Waiver. Failure to make a timely motion under this subsection shall waive the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) Stating grounds for challenge. The trial counsel shall state any ground for challenge for cause against any member of which the trial counsel is aware.

(d) Examination of members. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

(e) Evidence. Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) Challenges and removal for cause.

(1) Grounds. A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been an investigating officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(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.

(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.

(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.

(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.

(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 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.

(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 or 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.

(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.

(c) Presentation of evidence. Each party shall have full opportunity to present evidence.

(1) Order of presentation. Ordinarily the following sequence shall be followed:

(A) Presentation of evidence for the prosecution;

(B) Presentation of evidence for the defense;

(C) Presentation of prosecution evidence in rebuttal;

(D) Presentation of defense evidence in surrebuttal;

(E) Additional rebuttal evidence in the discretion of the military judge; and

(F) Presentation of evidence requested by the military judge or members.

(2) Taking testimony. The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual.

(3) Views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all parties, the members (if any), and the military judge. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or

inspection by the escort, a party, the military judge, or any member shall be made part of the record.

(4) Evidence subject to exclusion. When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

(5) Reopening case. The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

#### Rule 914. Production of statements of witnesses

(a) Motion for production. After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by the trial counsel, in the possession of the United States; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

(b) Production of entire statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge shall order that the statement be delivered to the moving party.

(c) Production of excised statement. If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection, the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by the trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for examination of the statement. Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) Remedy for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

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

#### Rule 915. Mistrial

(a) In general. The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly

necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

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

(c) Effect of declaration of mistrial.

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

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

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

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

#### Rule 916. Defenses

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

(b) Burden of proof. Once a defense under this rule is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.

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

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

(e) Self-defense.

(1) Homicide or aggravated assault cases. It is a defense to a homicide or assault in which the accused intended to kill or inflict grievous bodily harm that the accused:

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

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

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

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

(B) in order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as



would be likely to cause death or grievous bodily harm.

(3) Other assaults. It is a defense to any assault punishable under Article 90, 91, or 128 and not listed in subsections (c)(1) or (2) of this rule that the accused:

(A) apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) believed that the force the accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

(4) Loss of right to self-defense. The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

(5) Defense of another. The principles of self-defense under subsections (e)(1) through (4) of this rule apply to defense of another. It is a defense to homicide, attempted homicide, assault with intent to kill, or any assault under Article 90, 91, or 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

(f) Accident. A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

(g) Entrapment. It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.

(h) Coercion or duress. It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

(i) Inability. It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

(j) Ignorance or mistake of fact. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(k) Lack of mental responsibility.

(1) General lack of mental responsibility. It is a defense to any offense that the accused was not mentally responsible for it. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity to appreciate the criminality of that person's conduct or to conform that person's conduct to the requirements of law. As used in this rule, the terms "mental disease or defect" do

not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior.

(2) Partial mental responsibility. A mental condition not amounting to a general lack of mental responsibility under subsection (k)(1) of this rule but which produces a lack of mental ability at the time of the offense to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defense to an offense having one of these states of mind as an element.

(3) Procedure.

(A) Presumption. The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until some evidence to the contrary is admitted.

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

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

(1) Not defenses generally.

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

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

Rule 917. Motion for a finding of not guilty

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

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

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

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

(e) Motion as to greater offense. A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

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

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

#### Rule 918. Findings

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

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

(2) As to a charge. General findings as to a charge may be: guilty; not guilty, but guilty of a violation of Article ; or not guilty.

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

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

#### Rule 919. Argument by counsel on findings

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

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

(c) Waiver of objection to improper argument. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection.

#### Rule 920. Instructions on findings

(a) In general. The military judge shall give the members appropriate instructions on findings.

(b) When given. Instructions on findings shall be given after arguments by counsel and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(c) Requests for instruction. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

(d) How given. Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) Required instructions. Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that --

(A) the accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

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

(C) if, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is no reasonable doubt; and

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

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

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

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

#### Rule 921. Deliberations and voting on findings

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

(b) Deliberations. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that

portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) Voting.

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

(2) Number of votes required to convict.

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

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

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

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

(5) Procedure for voting.

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

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

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

Rule 922. Announcement of findings

(a) In general. Findings shall be announced in the presence of all parties promptly after they have been determined.

(b) Findings by members. The president shall announce the findings by the members. If a finding is based on a plea of guilty, the president shall so state.

(c) Findings by military judge. The military judge shall announce the findings when trial is by military judge alone or when findings may be entered under R.C.M. 910(g).

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

announcement made before the final adjournment of the court-martial in the case.

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

#### Rule 923. Impeachment of findings

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

#### Rule 924. Reconsideration of findings

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

(b) Procedure. Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner the question whether to reconsider shall be determined the closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-third of the members vote for reconsideration. When the death penalty is mandatory, a request by any member for reconsideration of a guilty finding requires reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.C.M. 921 shall apply.

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

### CHAPTER X. SENTENCING

#### Rule 1001. Presentencing procedure

(a) In general.

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

(A) Presentation by trial counsel of:

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

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

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

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

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

(C) Rebuttal.

(D) Argument by the trial counsel on sentence.

(E) Argument by the defense counsel on sentence.

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

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

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

(b) Matter to be presented by the prosecution.

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

(2) Personal data and character of prior service of the accused. Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes all those records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

(3) Evidence of prior convictions of the accused.

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

(B) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of this rule until review has been completed pursuant to Article 65(c) or Article 66, if applicable. Evidence of the pendency of an appeal is admissible.

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

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

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

(c) Matter to be presented by the defense.

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

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

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

(2) Statement by the accused.

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

(B) Testimony of the accused. The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

(C) Unsworn statement. The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) Rules of evidence relaxed. The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(d) Rebuttal and surrebuttal. The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(e) Production of witnesses.

(1) In general. During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection (e)(2) of this rule.

(2) Limitations. A witness may be produced to testify during presentence proceedings through a subpoena or travel orders at Government expense only if --

(A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;



(B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) Other forms of evidence, such as oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(f) Additional matters to be considered. In addition to matters introduced under this rule, the court-martial may consider --

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

(g) Argument. After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

#### Rule 1002. Sentence determination

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment or any lesser punishment, or may adjudge a sentence of no punishment.

#### Rule 1003. Punishments

(a) In general. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.

(b) Authorized punishments. Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

(1) Reprimand. A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority;

(2) Forfeiture of pay and allowances. Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last. Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or foreign duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced;

(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;

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

(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;

(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;

(7) Hard labor without confinement. Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

(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;

(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;

(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. 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

(C) Bad-conduct discharge. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

(11) Death. Death may be adjudged only in accordance with R.C.M. 1004; and

(12) Punishments under the law of war. In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) Limits on punishments.

(1) Based on offenses.

(A) Offenses listed in Part IV.

(i) Maximum punishment. The maximum limits for the authorized punishments of confinement, forfeitures, and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) Other punishments. Except as otherwise specifically provided in this Manual, the types of punishments listed in subsections (b)(1), (3), (4), (5), (6), and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) Offenses not listed in Part IV.

(i) Included or related offenses. For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however, if an offense not listed is included in a listed offense and is closely related to another, or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) Not included or related offenses. An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period, the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) Multiplicity. When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided in paragraph 5 or Part IV, offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.

(2) Based on rank of accused.

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

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

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

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

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

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

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

(d) Circumstances permitting increased punishments.

(1) Three or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) Two or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) Two or more offenses. If an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

Rule 1004. Capital cases

(a) In general. Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The requirements of subsections (b) and (c) of this rule have been met.

(b) Procedure. In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases --

(1) Notice. Before arraignment, trial counsel shall give the defense written notice of which aggravating circumstances under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating circumstances under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating circumstances unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) Evidence of aggravating circumstances. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating circumstances in subsection (c) of this rule.

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

(4) Necessary findings. Death may not be adjudged unless the members find:

(A) Beyond a reasonable doubt that one or more of the aggravating circumstances under subsection (c) of this rule existed; and

(B) That any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances including such circumstances under subsection (c) of this rule as the members have found existed.

(5) Basis for findings. The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) Instructions. In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members on such aggravating circumstances under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) Voting. In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating circumstance under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating circumstance. After voting on all the aggravating circumstances on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) Announcement. If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating circumstances under subsection (c) of this rule were found by the members.

(c) Aggravating circumstances. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating circumstances:

(1) That the offense was committed before or in the presence of the enemy, except that this circumstance shall not apply in the case of a violation of Article 118 or 120;

(2) That in committing the offense the accused intended to:

(A) Cause substantial damage to the national security of the United States; or

(B) Cause substantial damage to a mission, system, or function of the United States, provided that this subsection shall apply only if substantial damage to the national security of the United States would have resulted had the intended

damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this circumstance shall not apply in the case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this circumstance shall not apply to a violation of Article 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress or Member-of-Congress elect, or any judge of the United States;

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim; or

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) Spying. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) Other penalties. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

#### Rule 1005. Instructions on sentence

(a) In general. The military judge shall give the members appropriate instructions on sentence.

(b) When given. Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(c) Requests for instructions. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

(d) How given. Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) Required instructions. Instructions on sentence shall include:

(1) a statement of the maximum authorized punishment which may be adjudged and of the mandatory minimum punishment, if any;

(2) a statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

(3) a statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

(4) a statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5).

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to

deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 1006. Deliberations and voting on sentence

(a) In general. The members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

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

(c) Proposal of sentences. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president.

(d) Voting.

(1) Duty of members. Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused.

(2) Secret ballot. Proposed sentences shall be voted on by secret written ballot.

(3) Procedure.

(A) Order. All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

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

(4) Number of votes required.

(A) Death. A sentence which includes death may be adjudged only if all members present vote for that sentence.

(B) Confinement for life or more than 10 years. A sentence which includes confinement for life or more than 10 years may be adjudged only if at least three-fourths of the members present vote for that sentence.

(C) Other. A sentence other than those described in subsection (d)(4)(A) or (B) of this rule may be adjudged only if at least two-thirds of the members present vote for that sentence.

(5) Mandatory sentence. When a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule.

(6) Effect of failure to agree. If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.



(e) Action after a sentence is reached. After the members have agreed upon a sentence, the court-martial shall be opened and the president shall inform the military judge that a sentence has been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the sentence in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

Rule 1007. Announcement of sentence

(a) In general. The sentence shall be announced by the president or, in a court-martial composed of a military judge alone, by the military judge, in the presence of all parties promptly after it has been determined.

(b) Erroneous announcement. If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. This action shall not constitute reconsideration of the sentence. If the court-martial has been adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

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

Rule 1008. Impeachment of sentence

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

Rule 1009. Reconsideration of sentence

(a) Time for reconsideration. Subject to this rule, a sentence may be reconsidered by the members or the military judge who reached it at any time before the record of trial is authenticated.

(b) Limitations. After a sentence has been announced, it may not be increased upon reconsideration unless the sentence announced was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty.

(c) Initiation of reconsideration.

(1) By members. Any member may propose that a sentence reached by the members be reconsidered.

(2) By military judge.

(A) Adjudged by military judge. The military judge may initiate reconsideration of a sentence adjudged by that military judge.

(B) Reached by members. When a sentence reached by members is ambiguous or apparently illegal, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for reconsideration and proceed in accordance with subsection (d) of this rule, or may bring the matter to the attention of the convening authority.

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

## (d) Procedure with members.

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

(2) Voting. The members shall vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

## (3) Number of votes required.

(A) With a view to increasing. Subject to subsection (b) of this rule, members may reconsider a sentence with a view to increasing it only if at least a majority vote for reconsideration.

(B) With a view to decreasing. Members may reconsider a sentence with a view to decreasing it only if:

(i) in the case of a sentence which includes death, at least one member votes to reconsider;

(ii) in the case of a sentence which includes confinement for life or more than 10 years, more than one-fourth of the members vote to reconsider; or

(iii) in the case of any other sentence, more than one-third of the members vote to reconsider.

(4) Successful vote. If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply.

## Rule 1010. Advice concerning post-trial and appellate rights

(a) Advice. In each general and special court-martial, after the sentence is announced and before the court-martial is adjourned, the military judge shall inform the accused of:

(1) The right to submit matters to the convening authority to consider before taking action;

(2) The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights;

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

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

(b) Inquiry. After compliance with subsection (a) of this rule, the military judge shall inquire of the accused to ensure that the accused understands the advice.

## Rule 1011. Adjournment

The military judge may adjourn the court-martial at the end of the trial of an accused or proceed to trial of other cases referred to that court-martial. Such an adjournment may be for a definite or indefinite period.

## CHAPTER XI. POST-TRIAL PROCEDURE

## Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement

(a) Report of the result of trial. After final adjournment of the court-martial in a case, the trial counsel shall promptly notify the accused's immediate commander, the convening authority or the convening authority's designee, and, if appropriate, the officer in charge of the confinement facility of the findings and sentence.

(b) Post-trial confinement.

(1) In general. An accused may be placed in post-trial confinement if the sentence adjudged by the court-martial includes death or confinement.

(2) Who may order confinement. Unless limited by superior authority, a commander of the accused may order the accused into post-trial confinement when post-trial confinement is authorized under subsection (b)(1) of this rule. A commander authorized to order post-trial confinement under this subsection may delegate this authority to the trial counsel.

(3) Confinement on other grounds. Nothing in this rule shall prohibit confinement of a person after a court-martial on proper grounds other than the offenses for which the accused was tried at that court-martial.

(c) Deferment of confinement.

(1) In general. Deferment of a sentence to confinement is a postponement of the service and of the running of the sentence.

(2) Who may defer. The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused, at any time after the adjournment of the court-martial, defer the accused's service of a sentence to confinement which has not been ordered executed.

(3) Action on deferment request. The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement. The accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interests in confinement. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation or witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; and the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment shall be subject to judicial review only for abuse of discretion. The action of the convening authority shall be written and a copy shall be provided to the accused.

(4) Orders. The action granting deferment shall be reported in the convening authority's action under R.C.M. 1107(f)(4)(E) and shall include the date of the action on the request when it occurs prior to or concurrently with the action. Action granting deferment after the convening authority's action under R.C.M. 1107 shall be reported in orders under R.C.M. 1114 and included in the record of trial.

(5) Restraint when deferment is granted. When deferment of confinement is granted, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused's liberty during the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(6) End of deferment. Deferment of a sentence to confinement ends when:

(A) The convening authority takes action under R.C.M. 1107, unless the convening authority specifies in the action that service of confinement after the action is deferred;

(B) The confinement is suspended;

(C) The deferment expires by its own terms; or

(D) The deferment is otherwise rescinded in accordance with subsection (c)(7) of this rule.

Deferment of confinement may not continue after the conviction is final under R.C.M. 1209.

(7) Rescission of deferment.

(A) Who may rescind. The authority who granted the deferment, or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(B) Action. Deferment of confinement may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under subsection (c)(3) of this rule. The accused shall promptly be informed of the basis for the rescission and of the right to submit written matters in the accused's behalf and to request that the rescission be reconsidered. However, the accused may be required to serve the sentence to confinement pending this action.

(C) Execution. When deferment is rescinded after the convening authority's action under R.C.M. 1107, the confinement may be ordered executed. However, no such order may be issued within 7 days of notice of the rescission to the accused under subsection (c)(7)(B) of this rule, to afford the accused an opportunity to respond. The authority rescinding the deferment may extend this period for good cause shown. The accused shall be credited with any confinement actually served during this period.

(D) Orders. Rescission of a deferment before or concurrently with the initial action in the case shall be reported on the action under R.C.M. 1107(f)(4)(E), which action shall include the dates of the granting of the deferment and the rescission. Rescission of a deferment after the convening authority's action shall be reported in supplementary orders in accordance with R.C.M. 1114 and shall state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended.

#### 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.

(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.

(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 that which may be adjudged by a special court-martial; or

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

(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.

(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 deterrent 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; termination prior to findings. Notwithstanding subsections (b), (c), and (d) of this rule, if the proceedings resulted in an acquittal of all charges and specification or 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).

(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.

(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.

(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.

(B) Examination by defense counsel. Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication.

(2) Summary courts-martial. The summary court-martial shall examine and correct the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(j) Videotape and similar records.

(1) Recording proceedings. If authorized by regulations of the Secretary concerned, general and special courts-martial may be recorded by videotape, audiotape, or similar material from which sound or sound and visual images may be reproduced to accurately depict the entire court-martial. Such means of recording may be used in lieu of recording by a qualified court reporter, when one is required, subject to this rule.

(2) Preparation of written record. When the court-martial, or any part of it, is recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, a written transcript or summary as required in subsection (b)(2)(A), (b)(2)(B), (b)(2)(C), or (c) of this rule, as appropriate, shall be prepared in accordance with this rule and R.C.M. 1104 before the record is forwarded under R.C.M. 1104(e), unless military exigencies prevent transcription.

(3) Military exigency. If military exigency prevents preparation of a written transcript or summary, as required, and when the court-martial has been recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, the videotape, audiotape, or similar material, together with the matters in subsections (b)(2)(D) and (b)(3) of this rule shall be authenticated and forwarded in accordance with R.C.M. 1104, provided that in such case the convening authority shall cause to be attached not be prepared, and provided further that in such case the defense counsel shall be given reasonable opportunity to listen to or to view and listen to the recording whenever defense counsel is otherwise entitled to examine the record under these rules. Subsection (g) of this rule shall not apply in case of military exigency under this subsection.

(4) Further review.

(A) Cases reviewed by the Court. of Military Review. Before review, if any, by a Court of Military Review of a case in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a complete written transcript shall be prepared and certified as accurate in accordance with regulations of the Secretary concerned. The authenticated recording shall be retained for examination by appellate authorities.

(B) Cases not reviewed by the Court of Military Review. In cases in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a written record shall be prepared under such circumstances as the Secretary concerned may prescribe.

(5) Accused's copy. When a record includes an authenticated recording under subsection (j)(3) of this rule, the Government shall, in order to comply with R.C.M. 1104(b):

(A) Provide the accused with a duplicate copy of the videotape, audiotape, or similar matter and copies of any written contents of and attachments to the record, and give the accused reasonable opportunity to use such viewing equipment as is necessary to listen to or view and listen to the recording; or

(B) With the written consent of the accused, defer service of the record until a written record is prepared under



subsection (4) of this rule.

Rule 1104. Records of trial: authentication; service; loss; correction; forwarding

(a) Authentication.

(1) In general. A record is authenticated by the signature of a person specified in this rule who thereby declares that the record accurately reports the proceedings. No person may be required to authenticate a record of trial if that person is not satisfied that it accurately reports the proceedings.

(2) General and special courts-martial.

(A) Authentication by the military judge. In special courts-martial in which a bad-conduct discharge has been adjudged and in general courts-martial, except as provided in subsection (a)(2)(B) of this rule, the military judge present at the end of the proceedings shall authenticate the record of trial, or that portion over which the military judge presided. If more than one military judge presided over the proceedings, each military judge shall authenticate the record of the proceedings over which that military judge presided, except as provided in subsection (a)(2)(B) of this rule. The record of trial of special courts-martial in which no bad-conduct discharge was adjudged shall be authenticated in accordance with regulations of the Secretary concerned.

(B) Substitute authentication. If the military judge cannot authenticate the record of trial because of the military judge's death, disability, or absence, the trial counsel present at the end of the proceedings shall authenticate the record of trial. If the trial counsel cannot authenticate the record of trial because of the trial counsel's death, disability, or absence, a member shall authenticate the record of trial. In a court-martial composed of a military judge alone, or as to sessions without members, the court reporter shall authenticate the record of trial when this duty would fall upon a member under this subsection. A person authorized to authenticate a record under this subsection may authenticate the record only as to those proceedings at which that person was present.

(3) Summary courts-martial. The summary court-martial shall authenticate the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(b) Service.

(1) General and special courts-martial.

(A) Service of record of trial on accused. In each general and special court-martial, except as provided in subsection (b)(1)(C) or (D) of this rule, the trial counsel shall cause a copy of the record of trial to be served on the accused as soon as the record of trial is authenticated.

(B) Proof of service of record of trial on accused. The trial counsel shall cause the accused's receipt for the copy of the record of trial to be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record of trial is forwarded to the convening authority, the trial counsel shall prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused, including the means of transmission and the address, and cause the certificate to be attached to the original record of trial. In such a case the accused's receipt shall be forwarded to the convening authority as soon as it is obtained.

(C) Substitute service. If it is impracticable to serve the record of trial on the accused because of 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 of the record shall be forwarded to the accused's defense counsel, if any. Trial counsel shall attach a statement to the record explaining why the accused was not served personally. If the accused has more than one counsel, R.C.M. 1106(f)(2) shall apply. If the accused has no counsel and if the accused is absent without authority, the trial counsel shall prepare an explanation for the failure to serve the

record. The explanation and the accused's copy of the record shall be forwarded with the original record. The accused shall be provided with a copy of the record as soon as practicable.

(D) Classified information.

(i) Forwarding to convening authority. If the copy of the record of trial prepared for the accused contains classified information, the trial counsel, unless directed otherwise by the convening authority, shall forward the accused's copy to the convening authority, before it is served on the accused.

(ii) Responsibility of the convening authority. The convening authority shall:

(a) cause any classified information to be deleted or withdrawn from the accused's copy of the record of trial;

(b) cause a certificate indicating that classified information has been deleted or withdrawn to be attached to the record of trial; and

(c) cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be served on the accused as provided in subsections (b)(1)(A) and (B) of this rule except that the accused's receipt shall show that the accused has received an expurgated copy of the record of trial.

(iii) Contents of certificate. The certificate regarding deleted or withdrawn classified information shall indicate:

(a) that the original record of trial may be inspected in the Office of the Judge Advocate General concerned under such regulations as the Secretary concerned may prescribe;

(b) the pages of the record of trial from which matter has been deleted;

(c) the pages of the record of trial which have been entirely deleted; and

(d) the exhibits which have been withdrawn.

(2) Summary courts-martial. The summary court-martial record of trial shall be disposed of as provided in R.C.M. 1305(e). Subsection (b)(1)(D) of this rule shall apply if classified information is included in the record of trial of a summary court-martial.

(c) Loss of record. If the authenticated record of trial is lost or destroyed, the trial counsel shall, if practicable, cause another record of trial to be prepared for authentication. The new record of trial shall become the record of trial in the case if the requirements of R.C.M. 1103 and this rule are met.

(d) Correction of record after authentication; certificate of correction.

(1) In general. A record of trial found to be incomplete or defective after authentication may be corrected to make it accurate. A record of trial may be returned to the convening authority by superior competent authority for correction under this rule.

(2) Procedure. An authenticated record of trial believed to be incomplete or defective may be returned to the military judge or summary court-martial for a certificate of correction. The military judge or summary court-martial shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties shall be given reasonable access to any original reporter's notes or tapes of the proceedings.

(3) Authentication of certificate of correction; service on the accused. The certificate of correction shall be authenticated as provided in subsection (a) of this rule and a copy served on the accused as provided in subsection (b) of

this rule. The certificate of correction and the accused's receipt for the certificate of correction shall be attached to each copy of the record of trial required to be prepared under R.C.M. 1103(g).

(e) Forwarding. After every court-martial, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action, provided that in case of a special court-martial in which a bad-conduct discharge was adjudged or a general court-martial, the convening authority shall refer the record to the staff judge advocate or legal officer for a recommendation under R.C.M. 1106 before the convening authority takes action.

#### Rule 1105. Matters submitted by the accused

(a) In general. After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule.

(b) Matters which may be submitted. The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Such matters are not subject to the Military Rules of Evidence and may include:

(1) Allegations of errors affecting the legality of the findings or sentence;

(2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(3) Matters in mitigation which were not available for consideration at the court-martial; and

(4) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

(c) Time periods.

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

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

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

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

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

(d) Waiver.

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

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

(3) Written waiver. The accused may expressly waive, in writing, the right to submit matters under this rule. Once filed, such waiver may not be revoked.

(4) Absence of accused. If, as a result of the unauthorized absence of the accused, the record cannot be served on the accused in accordance with R.C.M. 1104(b)(1) and if the accused has no counsel to receive the record, the accused shall be deemed to have waived the right to submit matters under this rule within the time limit which begins upon service on the accused of the record of trial.

#### Rule 1106. Recommendation of the staff judge advocate or legal officer

(a) In general. Before the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial or a record of trial by special court-martial which includes a sentence to a bad-conduct discharge, that convening authority's staff judge advocate or legal officer shall, except as provided in subsection (c) of this rule, forward to the convening authority a recommendation under this rule.

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

(c) When the convening authority has no staff judge advocate.

(1) When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified. If the convening authority does not have a staff judge advocate or legal officer, or if the person serving in that capacity is disqualified under subsection (b) of this rule or otherwise, the convening authority shall:

(A) request the assignment of another staff judge advocate or legal officer to prepare a recommendation under this rule; or

(B) forward the record for action to any officer exercising general court-martial jurisdiction as provided in R.C.M. 1107(a).

(2) When the convening authority has a legal officer but wants the recommendation of a staff judge advocate. If the convening authority has a legal officer but no staff judge advocate, the convening authority may, as a matter of discretion, request designation of a staff judge advocate to prepare the recommendation.

(d) Form and content of recommendation.

(1) In general. The purpose of the recommendation of the staff judge advocate or legal officer is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The staff judge advocate or legal officer shall use the record of trial in the preparation of the recommendation.

(2) Form. The recommendation of the staff judge advocate or legal officer shall be a concise written communication.

(3) Required contents. Except as provided in subsection (e) of this rule, the recommendation of the staff judge advocate or legal officer shall include concise information as to:

(A) The findings and sentence adjudged by the court-martial;

(B) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;

(C) A statement of the nature and duration of any pretrial restraint;

(D) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and

(E) A specific recommendation as to the action to be taken by the convening authority on the sentence.

(4) Legal errors. The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required.

(5) Optional matters. The recommendation of the staff judge advocate or legal officer may include, in addition to matters included under subsections (d)(3) and (4) of this rule, any additional matters deemed appropriate by the staff judge advocate or legal officer. Such matters may include matters outside the record.

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

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

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

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

(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.

(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.

(5) Time period. Counsel for the accused shall be given 5 days from receipt 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.

(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.

#### 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.

#### (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 commend prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.

(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;

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

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

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

(i) The record of trial;

(ii) The personnel records of the accused; and

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

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

(5) Action when accused lacks mental capacity. The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If a question is raised as to the requisite mental capacity of the accused, the convening authority must be satisfied by a preponderance of evidence -- including matters outside the record of trial -- that the accused has the requisite mental capacity before approving the sentence. 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. 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.

(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.

(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.

(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.

(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.

(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.

(C) Limitations.

(i) Sentence approved. A rehearing shall not be ordered if, in the same action, a sentence is approved.

(ii) Lack of sufficient evidence. A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(iii) Rehearing on sentence only. A rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings.

(D) Additional charges. Additional charges may be referred for trial together with charges as to which a rehearing has been directed.

(E) Lesser included offenses. If at a previous trial the accused was convicted of a lesser included offense, a rehearing may be ordered only as to that included offense or as to an offense included in that found. If, however, a rehearing is ordered improperly on the original offense charged and the accused is convicted of that offense at the rehearing, the finding as to the lesser included offense of which the accused was convicted at the original trial may nevertheless be approved.

(2) "Other" trial. The convening or higher authority may order an "other" trial if the original proceedings were invalid because of lack of jurisdiction or failure of a specification to state an offense. The authority ordering an "other" trial shall state in the action the basis for declaring the proceedings invalid.

(f) Contents of action and related matters.

(1) In general. The convening authority shall state in writing the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action shall be signed personally by the convening authority. The convening authority's authority to sign shall appear below the signature.

(2) Modification of initial action. The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. In addition, in any special court-martial not involving a bad-conduct discharge or any summary court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Article 64, 66, or 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action.

(3) Findings of guilty. If any findings of guilty are disapproved, the action shall so state. If a rehearing is not ordered, the affected charges and specifications shall be dismissed by the convening authority in the action. If a rehearing or other trial is directed, the reasons for the disapproval shall be set forth in the action.



(4) Action on sentence.

(A) In general. The action shall state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

(B) Execution; suspension. The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(C) Place of confinement. If the convening authority orders a sentence of confinement into execution, the convening authority shall designate the place of confinement in the action, unless otherwise prescribed by the Secretary concerned. If a sentence of confinement is ordered into execution after the initial action of the convening authority, the authority ordering the execution shall designate the place of confinement unless otherwise prescribed by the Secretary concerned.

(D) Custody or confinement pending appellate review; capital cases. When a record of trial involves an approved sentence to death, the convening authority shall, unless any approved sentence of confinement has been ordered into execution and a place of confinement designated, provide in the action for the temporary custody or confinement of the accused pending final disposition of the case on appellate review.

(E) Deferment of service of sentence to confinement. Whenever the service of the sentence to confinement is deferred by the convening authority under R.C.M. 1101(c) before or concurrently with the initial action in the case, the action shall include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

(f) Credit for illegal pretrial confinement. When the military judge has directed that the accused receive credit under R.C.M. 305(k), the convening authority shall so direct in the action.

(G) Reprimand. The convening authority shall include in the action any reprimand which the convening authority has ordered executed.

(5) Action on rehearing or new or other trial.

(A) Rehearing or other trial. In acting on a rehearing or other trial the convening authority shall be subject to the sentence limitations prescribed in R.C.M. 810(d). Except when a rehearing or other 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 include 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 if 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.

(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.

#### 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 the action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or officer exercising general court-martial jurisdiction over the command to which the accused is assigned may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President. The commander of the accused who has the authority to convene a court-martial of the kind which adjudged the sentence may suspend or remit any part or amount of the unexecuted part of any sentence by summary court-martial or any sentence by special court-martial which does not include a bad-conduct discharge regardless whether the person acting has previously approved the sentence.

(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.

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.

(4) Interruptions to the period of suspension. Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts the running of the period of suspension.

(c) Confinement of probationer pending vacation proceedings.

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

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

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

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

(A) Rights of accused. Before the preliminary hearing the accused shall be notified of:

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

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

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

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

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

(C) Decision. The hearing officer shall determine whether there is probable cause to believe that the probationer

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

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

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

(A) In general. Before vacation of the suspension of any general court-martial sentence, or of a special court-martial sentence which, as approved, includes a bad-conduct discharge, the officer having special court-martial jurisdiction over the probationer shall personally hold a hearing on the alleged violation of the conditions of probation. If there is no officer having special court-martial jurisdiction over the accused who is subordinate to the officer having general court-martial jurisdiction over the accused, the officer exercising general court-martial jurisdiction over the accused shall personally hold the hearing under subsection (d)(1) of this rule. In such cases subsection (d)(1)(D) of this rule shall not apply.

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

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

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

(iii) the alleged violations of the conditions of probation and the evidence expected to be relied on;

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

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

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

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

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

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

(A) In general. The officer exercising general court-martial jurisdiction over the probationer shall, based upon the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether the probationer violated a condition of suspension, and, if so, whether to vacate the

suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating.

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

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

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

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

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

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

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

#### Rule 1110. Waiver or withdrawal of appellate review

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

(b) Right to counsel.

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

(2) Waiver.

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

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

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

(3) Withdrawal.

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

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

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

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

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

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

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

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

(1) Be written;

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

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

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

(e) To whom submitted.

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

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

(f) Time limit.

(1) Waiver. The accused may file a waiver of appellate review only within 10 days after the accused or defense

counsel is served with a copy of the action under R.C.M. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days.

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

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

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

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

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

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

Rule 1111. Disposition of the record of trial after action

(a) General courts-martial.

(1) Cases forwarded to the Judge Advocate General. A record of trial by general court-martial and the convening authority's action shall be sent directly to the Judge Advocate General concerned if the approved sentence includes death or if the accused has not waived review under R.C.M. 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 in R.C.M. 1306.

Rule 1112. Review by a judge advocate

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

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

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

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

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

(1) Conclusions as to whether --

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

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

(C) The sentence was legal;

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

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

(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.

If the judge advocate's review is not forwarded under this subsection, it shall be attached to the original record of trial and a copy forwarded to the accused.

(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 --