

PROPOSED AMENDMENTS TO SUPPLEMENTARY MATERIALS

Section 1. The Preface of the Manual for Courts-Martial, United States, is amended as follows:

“The Manual for Courts-Martial (MCM), United States (2019 2023 Edition) updates the MCM (20169 Edition). It is a complete reprinting and incorporates the MCM (20169 Edition), including all amendments to the Preamble, Rules for Courts-Martial (R.C.M.), Military Rules of Evidence (Mil. R. Evid.), Punitive Articles, and Nonjudicial Punishment Procedures made by the President in Executive Orders (EO) from 1984 to present, and specifically including EO XXXXX. See Appendix 19. This edition also contains amendments to the Uniform Code of Military Justice (UCMJ) made by ~~Military Justice Act of 2016 (Division E of Subtitle D of the National Defense Authorization Act (NDAA) for Fiscal Year 2017) 2022~~, and the NDAA for Fiscal Years ~~2018 and 2019~~ 2020 and 2021. Finally, this edition incorporates amendments to the Supplementary Materials accompanying the MCM as published in the Federal Register on XX XXX XXXXX. The aforementioned Statutes, NDAA, EOs, and Supplementary Materials are available at the Joint Service Committee on Military Justice website at <http://jsc.defense.gov>. Because this ~~m~~Manual includes numerous changes, practitioners should consider the MCM completely revised.”

Section 2. The Discussion Sections in Part II of the Manual for Courts-Martial, United States, are amended as follows:

1. The discussion immediately following Rule for Courts-Martial (R.C.M.) 104(c)(1)(B) is revised as follows:

Discussion

This rule applies when the counsel in question has been detailed, assigned, or authorized to represent the client as a defense or special victims’ counsel. Nothing in this rule prohibits supervisors from taking appropriate action for violations of ethical, procedural, or other rules, or for conduct outside the scope of representation.

~~“Special Victims’ Counsel,” as used in this rule, includes Victims’ Legal Counsel within the Navy and Marine Corps. As used in this rule, “special victims’ counsel” are judge advocates and civilian counsel, who, in accordance with 10 U.S.C. § 1044e, are designated as Special Victims’ Counsel.~~

2. The discussion immediately following R.C.M. 201(a)(3) is revised as follows:

Discussion

In addition to the power to try persons for offenses under the UCMJ, general courts-martial have power to try certain persons for violations of the law of war and for crimes or offenses against 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. See R.C.M. 201(f)(1)(B). In cases where a person is tried by general court-martial for offenses against the law of an occupied territory, the court-martial normally sits in the country where the offense is committed, and must do so under certain circumstances. See Articles 4, 64, and 66, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, arts. 4, 64, and 66, 6 U.S.T. 3516, 3559-60 T.I.A.S. No. 3365.

3. The discussion immediately following R.C.M. 201(b)(3) is revised as follows:

Discussion

See R.C.M. 601; *see also* R.C.M. 307. A commanding officer shall not be considered an accuser under Article 1(9) solely due to the role of the commanding officer in convening a general court-martial or a

special court-martial to which charges and specifications were referred by a special trial counsel pursuant to Article 22(b) for general courts-martial or Article 23(b) for special courts-martial, as amended by Section 534 of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, Stat. (2021).

4. The discussion immediately following R.C.M. 201(d)(3) is revised as follows:

Discussion

In the case of an act or omission which violates the UCMJ and a criminal law of a State, the United States, or both, the determination which agency shall exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military officials (~~ordinarily the staff judge advocate~~) and appropriate civilian authorities (United States Attorney, or equivalent). *See also* Memorandum of Understanding (MOU) Between the Departments of Justice (DOJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes ~~Over Which the Two Departments Have Concurrent Jurisdiction~~ at Appendix 3; Memorandum of Understanding Between the Departments Of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction at Appendix 4.

Under the Constitution, a person generally may not be tried for the same misconduct by both a court-martial and another federal court. *See* R.C.M. 907(b)(2)(C). Although it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy, a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act. Overseas, international agreements might preclude trial by one state of a person acquitted or finally convicted of a given act by the other state.

Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty. *See, e.g.*, NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846. As a matter of policy, efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the UCMJ to the extent possible under applicable agreements.

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

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

5. The discussion immediately following R.C.M. 201(f)(1)(B)(i)(b) is revised as follows:

Discussion

R.C.M. 201(f)(1)(B)(i)(b) is an exercise of the power of military government.

6. The discussion immediately following R.C.M. 201(f)(1)(D) is revised as follows:

Discussion

Only a general court-martial has jurisdiction over penetrative sex offenses under subsections (a) and (b) of Article 120, subsections (a) and (b) of Article 120b, and attempts to commit such penetrative sex offenses under Article 80. *See* ~~UCMJ, Article~~ 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further amended by

Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

7. The discussion immediately following R.C.M. 301(c) is revised as follows:

Discussion

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

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

Upon receipt of a report, the immediate commander of a suspect, or a special trial counsel, as appropriate, should refer to R.C.M. 306 (Initial disposition) or R.C.M. 306A (Initial determination by special trial counsel to exercise authority). See also R.C.M. 302 (Apprehension); R.C.M. 303 (Preliminary inquiry into reported offenses); R.C.M. 304, 305 (Pretrial restraint, confinement). Any doubt whether a report alleges a covered offense should be resolved in favor of forwarding the reported offense to a special trial counsel.

8. The discussion immediately following R.C.M. 302(b)(1) is revised as follows:

Discussion

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

The phrase “persons designated by proper authority to perform military criminal investigative, guard or police duties” includes special agents of the Defense Criminal Investigative Service, security forces, military police, master at arms personnel, and members of the shore patrol.

9. The discussion immediately following R.C.M. 302(b)(3) is revised as follows:

Discussion

The UCMJ specifically provides that any civil officer with the authority to apprehend offenders under the laws of the United States or of a State, Commonwealth, ~~passion~~ possession, or the District of Columbia may summarily apprehend a deserter. Article 8. However, this authority does not permit state and local law enforcement officers to apprehend persons for other violations of the UCMJ.

10. The discussion immediately following R.C.M. 302(c) is revised as follows:

Discussion

~~“Reasonable grounds” means that there must be the kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true.~~ A mere suspicion

is not enough but proof which would support a conviction is not necessary. A person who determines probable cause may rely on the reports of others.

11. The discussion immediately following R.C.M. 302(d) is revised as follows:

Discussion

In addition to any other action required by law or regulation or proper military officials, any person making an apprehension under these rules should maintain custody of the person apprehended and inform as promptly as possible the immediate commander of the person apprehended, or any official higher in the chain of command of the person apprehended if it is ~~impractical~~ impracticable to inform the immediate commander.

12. The discussion immediately following R.C.M. 303 is revised as follows:

Discussion

~~The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases, including sexual offenses and sexual harassment, the commander should, and in some cases must, consider whether to seek the assistance of law enforcement personnel or appropriate investigative assistance in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation. Investigations, including those performed by a law enforcement agency, fulfill the requirement for a preliminary inquiry under this rule. A commander who receives a report of a sex-related offense involving a member of the Armed Forces in the chain of command of such officer shall refer the report to the military criminal investigative organization with responsibility for investigating that offense of the military department concerned or such other investigative service of the military department concerned as the Secretary concerned may specify.~~

The Military Rules of Evidence should be consulted when conducting interrogations (*see* Mil. R. Evid. 301-306), searches (*see* Mil. R. Evid. 311-317), and eyewitness identifications (*see* Mil. R. Evid. 321).

If the offense is one for which the Department of Justice has investigative responsibilities, appropriate coordination should be made under the Memorandum of Understanding, *see* Appendix 3, and any implementing regulations.

If it appears that any witness may not be available for later proceedings in the case, this should be brought to the attention of appropriate authorities. *See also* R.C.M. 702 (depositions).

A person who is an accuser (*see* Article 1(9)) is disqualified from convening a general or special court-martial in that case. *See* R.C.M. 504(c)(1). Therefore, when the immediate commander is a general or special court-martial convening authority, the preliminary inquiry should be conducted by another officer of the command. That officer may be informed that charges may be preferred if the officer determines that preferral is warranted.

13. The discussion immediately following R.C.M. 305(i)(1) is revised as follows:

Discussion

This report may be made by any means. Ordinarily, the immediate commander of the confinee should be notified. In unusual cases any commander to whose authority the confinee is subject, such as the commander of the confinement facility, may be notified. In the latter case, the commander so notified must ensure compliance with R.C.M. 305 ~~(h)~~(i)(2).

14. The discussion immediately following R.C.M. 305(l)(2)(A)(iv) is revised as follows:

Discussion

Personal appearance by the victim is not required. A victim's right to be reasonably heard at a 7-day review may also be accomplished telephonically, by video conference, or by written statement. The right to be heard under this rule includes the right to be heard through counsel, in those instances in which a victim is represented by counsel.

15. The discussion immediately following R.C.M. 305(n)(2) is revised as follows:

Discussion

Under this paragraph, the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of those standards). Also, pretrial confinement remains subject to judicial review. The confinee's commander still must determine whether confinement will continue under R.C.M. 305 ~~(h)~~(i)(2)(B). The suspension of R.C.M. 305 ~~(h)~~(i)(2)(A) removes the 72-hour requirement because, in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under paragraph (2) since the commander of a vessel is always available.)

Operational exceptions to the requirements under R.C.M. 305 (e)(3) and (4) do not constitute exceptions to the notice requirements under Article 31(b).

16. The discussion immediately following R.C.M. 306(a) is revised as follows:

Discussion

Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer's authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. See R.C.M. 401(c); 601(f). Once charges are referred to a court-martial by a convening authority competent to do so, they may be withdrawn from that court-martial only in accordance with R.C.M. 604 and R.C.M. 604A.

~~The initial disposition authority for certain sex-related offenses is withheld from all commanders who do not possess at least special court-martial convening authority and who are not in the grade of O-6 or higher. See DoD Instruction 6495.02, "Sexual Assault Prevention and Response (SAPR) Program Procedures," March 28, 2013, as amended. Military Justice Manual, COMDTINST M5810.1 (series) as amended; COMDTNOTE 5811 "Higher Level Review of Cases Involving Certain Sex-Related Offenses," Sept 4, 2014.~~

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

17. The discussion immediately following the introductory paragraph of R.C.M. 306(c) is revised as follows:

Discussion

Prompt disposition of charges is essential. See R.C.M. 707 (speedy trial requirements).

~~Before determining an appropriate disposition, a commander should ensure that a preliminary inquiry under R.C.M. 303 has been conducted.~~ If charges have not already been preferred, the commander may, if appropriate, prefer them and dispose of them under this rule. But see R.C.M. 601(c) regarding disqualification of an accuser.

If charges have been preferred, the commander should ensure that the accused has been notified in accordance with R.C.M. 308, and that charges are in proper form. See R.C.M. 307. Each commander who forwards or disposes of charges may make minor changes therein. See R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. See R.C.M. 603(d).

When charges are brought against two or more accused with a view to a joint or common trial, see R.C.M. 307(c)(5); 601(e)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, see R.C.M. 706; 909; 916(k).

18. The discussion immediately following R.C.M. 306(c)(4) is revised as follows:

Discussion

If charges have not been preferred, they may be preferred. See R.C.M. 307 concerning preferral of charges. But see R.C.M. 601(c) concerning disqualification of an accuser.

Charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to a summary, special, or general court-martial. Before charges may be referred to a general court-martial, compliance with R.C.M. 405 and 406 is necessary. Therefore, if appropriate, a preliminary hearing under R.C.M. 405 may be directed. Additional guidance on these matters is found in R.C.M. 401-407.

Pursuant to Article 24a and R.C.M. 306A, a convening authority may not dispose of a covered offense at a general or special court-martial.

19. A new discussion is inserted immediately following R.C.M. 306A(b) and reads as follows:

Discussion

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

20. The discussion immediately following R.C.M. 308(a) is revised as follows:

Discussion

When notice is given, a certificate to that effect on the Charge Sheet should be completed. See Appendix 5.

However, in cases where charges are immediately referred after preferral, service of referred charges under R.C.M. 602 fulfills the notice requirement of this rule. In those cases, the notice certificate on the Charge Sheet need not be completed and should be lined out.

Following notification of preferred charges, the Government shall comply with the requirements of R.C.M. 403(c).

21. A new discussion is inserted immediately following R.C.M. 308(d)(5) and reads as follows:

Discussion

This rule is not intended to limit or discourage counsel for the Government from providing additional materials to the defense. The purpose of this rule is to provide the accused with the documents used to make the determination to prefer charges.

22. The discussion immediately following R.C.M. 401(a) is revised as follows:

Discussion

R.C.M. 401 applies only to offenses over which a special trial counsel does not exercise authority. When a special trial counsel has exercised authority, a commander may not dispose of charges in accordance with this rule unless the special trial counsel defers. See R.C.M. 401A.

When a commander receives charges containing a covered offense that has not been reviewed by a special trial counsel, the commander shall forward the charges to a special trial counsel for an initial determination under R.C.M. 303A.

See R.C.M. 504 as to who may convene courts-martial and paragraph 2 of Part V as to who may administer nonjudicial punishment. If the power to convene courts-martial and to administer nonjudicial punishment has been withheld, a commander may not dispose of charges under this rule.

Ordinarily charges should be forwarded to the accused's immediate commander for initial consideration as to disposition. Each commander has independent discretion to determine how charges will be disposed of, except to the extent that the commander's authority has been withheld by superior competent authority. See also R.C.M. 104.

See R.C.M. 603 if major or minor changes to the charges are necessary after preferral. If a commander is an accuser (see Article 1(9); R.C.M. 307(a)) that commander is ineligible to refer such charges to a general or special court-martial. See R.C.M. 601(c). But see R.C.M. 1302(b) (accuser may refer charges to a summary court-martial).

23. The discussion immediately following the introductory paragraph of R.C.M. 401(c) is revised as follows:

Discussion

A commander may dispose of charges individually or collectively. ~~If charges are referred to a court-martial, ordinarily all known charges should be referred to a single court-martial. But see R.C.M. 902A.~~

See Appendix 3 when the charges may involve matters in which the Department of Justice has an interest.

See the Discussion to R.C.M. 306(b) and Appendix 2.1 (Non-binding disposition guidance).

24. The discussion immediately following R.C.M. 401(c)(1) is revised as follows:

Discussion

Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed. When all charges and specifications are dismissed, the accuser and the accused ordinarily should be informed.

A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate. Before dismissing charges because trial would be detrimental to the prosecution of a war or harmful to national security, see R.C.M. 401(d); [and](#) 407(b).

If the accused has already refused nonjudicial punishment, charges should not be dismissed with a view to offering nonjudicial punishment unless the accused has indicated willingness to accept nonjudicial punishment if again offered. The decision whether to dismiss charges in such circumstances is within the sole discretion of the commander concerned.

Charges may be amended in accordance with R.C.M. 603. It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required ([see](#) R.C.M. 603(d)), or did not adequately reflect the nature or seriousness of the offense.

[See](#) R.C.M. 907(b)(2)(C) concerning the effect of dismissing charges after the court-martial has begun.

25. A new discussion is inserted immediately following the first full sentence in R.C.M. 401A(b) and reads as follows:

Discussion

[In determining what level of disposition is appropriate, see R.C.M. 306\(b\) and \(c\) and Appendix 2.1 \(Non-binding disposition guidance\).](#)

26. A new discussion is inserted immediately following R.C.M. 405(d)(1)(D) and reads as follows:

Discussion

[This rule is not intended to limit or discourage counsel for the Government from providing additional materials to the defense.](#)

27. A new discussion is inserted immediately following R.C.M. 405(d)(4) and reads as follows:

Discussion

[The purpose of this rule is to provide the accused with the documents used to make the determination to direct a preliminary hearing and to allow the accused to prepare for the preliminary hearing. This rule is not intended to be a tool for discovery and does not impose the same discovery obligations found in R.C.M. 405 prior to amendments required by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980 \(2013\), as amended by Section 531 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3371 \(2014\), or R.C.M. 701. Additional rules for disclosure of witnesses and other evidence in the preliminary hearing are provided in R.C.M. 405\(h\).](#)

28. The discussion immediately following R.C.M. 405(f)(3) is revised as follows:

Discussion

Except as set forth in R.C.M. 405~~(h)(i)~~(j), the Military Rules of Evidence do not apply at a preliminary hearing. Except as prohibited elsewhere in this rule, a preliminary hearing officer may consider evidence, including hearsay, which would not be admissible at trial.

29. The discussion immediately following R.C.M. 405(i)(3)(B)(iii) is revised as follows:

Discussion

A pre-referral investigative subpoena to produce books, papers, documents, data, electronically stored information, or other objects for a preliminary hearing may be issued by counsel for the Government when authorized by the general court-martial convening authority or by a military judge under R.C.M. 309. The preliminary hearing officer has no authority to issue a pre-referral investigative subpoena.

~~(iv) The preliminary hearing officer may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.~~

30. The discussion immediately following R.C.M. 405(i)(3)(B)(iv) is deleted.

(iv) The preliminary hearing officer may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

31. The discussion immediately following R.C.M. 405(m)(1) is revised as follows:

Discussion

As soon as practicable after receipt of supplementary information under R.C.M. 405(k), the charges and the report of preliminary hearing should be forwarded to the ~~general~~ court-martial convening authority. *See* Article 10.

32. The discussion immediately following R.C.M. 405(m)(2)(L) is revised as follows:

Discussion

The preliminary hearing officer may include any additional matters useful to the convening authority or special trial counsel in determining disposition. For guidance concerning disposition of offenses, see Appendix 2.1 (Non-binding disposition guidance). The preliminary hearing officer may recommend that the charges and specifications be amended or that additional charges be preferred. See R.C.M. 306 and 401 concerning other possible dispositions.

33. The discussion immediately following R.C.M. 405(n) is revised as follows:

Discussion

See also R.C.M. 905(b)(1); 906(b)(3).

~~The convening authority who receives an objection may direct that the preliminary hearing be reopened or take other action, as appropriate.~~

34. The discussion immediately following R.C.M. 406(a)(1)(iv) is revised as follows:

Discussion

A written pretrial advice need not be prepared in cases referred to special or summary courts-martial. A convening authority is required to consult with a judge advocate before referring charges to a special court-martial (*see* R.C.M. 406A(a)(2)) and may seek the advice of a lawyer before referring charges to a summary court-martial. When charges have been withdrawn from a general court-martial (*see* R.C.M. 604) or when a mistrial has been declared in a general court-martial (*see* R.C.M. 915), supplementary advice is necessary before the charges may be referred to another general court-martial.

The staff judge advocate may make changes in the charges and specifications in accordance with R.C.M. 603.

For guidance concerning the disposition of charges and specifications, see Appendix 2.1 (Non-binding disposition guidance).

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. While the staff judge advocate may use a preliminary hearing officer's report in preparing pretrial advice, and another person may prepare the advice, the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in the case as preliminary hearing officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of preliminary hearing are forwarded with the pretrial advice. In addition, the pretrial advice should include, when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and any recommendations of the Article 32 preliminary hearing officer. However, there is no legal requirement to include such information, and failure to do so is not error.

Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. *See* R.C.M. 905(b)(1); 906(b)(3).

Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. *See* R.C.M. 905(b)(1) and its Discussion..

35. The discussion immediately following R.C.M. 406(a)(2) is deleted.

Discussion

~~For guidance concerning disposition of charges and specifications, see Appendix 2.1 (Non-binding disposition guidance).~~

36. The discussion immediately following R.C.M. 502(d)(4) is revised as follows:

Discussion

(A) *General duties before trial.* Immediately upon receipt of referred charges, the trial counsel should cause a copy of the charges to be served upon accused. *See* R.C.M. 602.

The Trial counsel should: examine the charge sheet and allied papers for completeness and correctness; correct (and initial) minor errors or obvious mistakes in the charges but may not without authority make any substantial changes (*see* R.C.M. 603); and assure that the information about the accused on the charge sheet and any evidence of previous convictions are accurate.

(B) *Relationship with convening authority.* The Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, ~~charges~~, or allied papers; and report an actual or anticipated reduction of the number of members required under R.C.M. 501(a) to the convening authority. Except for offenses over which a special trial counsel has exercised authority and has not deferred, the trial counsel should report any substantial irregularity in the charges and bring to the attention of the convening authority any case in which the trial counsel finds trial inadvisable for lack of evidence or other reasons. For cases over which a special trial counsel has exercised authority and has not deferred, the special trial counsel is responsible for addressing irregularities in the charges.

(C) *Relationship with the accused and defense counsel.* The Trial counsel must communicate with a represented accused only through the accused's defense counsel. *But see* R.C.M. 602. The Trial counsel may not attempt to induce an accused to plead guilty or surrender other important rights.

(D) *Victim rights.* The trial counsel should ensure that the Government's responsibilities under Article 6b are fulfilled.

(E) *Preparation for trial.* The Trial counsel should: ensure that a suitable room, a reporter (if authorized), and necessary equipment and supplies are provided for the court-martial; obtain copies of the charges and specifications and convening orders for each member and all personnel of the court-martial; give timely notice to the members, other parties, other personnel of the court-martial, and witnesses for the prosecution and (if known) defense of the date, time, place, and uniform of the meetings of the court-martial; ensure that any person having custody of the accused is also informed; comply with applicable disclosure and discovery rules (*see* R.C.M. ~~404A~~ 308, 405, and 701); prepare to make a prompt, full, and orderly presentation of the evidence at trial; consider the elements of proof of each offense charged, the burden of proof of guilt and the burdens of proof on motions which may be anticipated, and the Military Rules of Evidence; secure for use at trial such legal texts as may be available and necessary to sustain the prosecution's contentions; arrange for the presence of witnesses and evidence in accordance with R.C.M. 703; prepare to make an opening statement of the prosecution's case (*see* R.C.M. 913); prepare to conduct the examination and cross-examination of witnesses; and prepare to make final argument on the findings and, if necessary, on sentencing (*see* R.C.M. 919; 1001(h)).

(F) *Trial.* The Trial counsel should bring to the attention of the military judge any substantial irregularity in the proceedings. The Trial counsel should not allude to or disclose to the members any evidence not yet admitted or reasonably expected to be admitted in evidence or intimate, transmit, or purport to transmit to the military judge or members the views of the convening authority or others as to the guilt or innocence of the accused, an appropriate sentence, or any other matter within the discretion of the court-martial.

(G) *Post-trial duties.* The Trial counsel should promptly provide written notice of the Statement of Trial Results to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility (*see* R.C.M. 1101(e)), and supervise the preparation, and distribution of copies of the record as required by these rules and regulations of the Secretary concerned (*see* R.C.M. 1112).

(H) *Assistant trial counsel.* An assistant trial counsel may act in that capacity only under the supervision of the detailed trial counsel. Responsibility for trial of a case may not devolve to an assistant not qualified to serve as trial counsel. Unless the contrary appears, all acts of an assistant trial counsel are presumed to have been done by the direction of the trial counsel. An assistant trial counsel may not act in the absence of the trial counsel at trial in a general court-martial unless the assistant has the qualifications required of a trial counsel. *See* R.C.M. 805(c).

37. The discussion immediately following R.C.M. 503(a)(1)(C) is revised as follows:

Discussion

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

The convening authority should detail a sufficient number of qualified persons to allow for the randomization process in R.C.M. 911.

A military judge may not impanel alternate members unless expressly authorized by the convening authority. *See* Article 29. The procedure to be used by the military judge to impanel members and alternate members is specified in R.C.M. 912A.

38. The discussion immediately following R.C.M. 503(a)(2) is revised as follows:

Discussion

When an enlisted accused makes a request for either all-officer members or at least one-third enlisted members, the convening authority may need to:

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

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

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

When the accused elects one-third enlisted members, the military judge must ensure there are at least two enlisted members for a special court-martial and at least three enlisted members for a noncapital general court-martial. There must be at least two enlisted members in a general court-martial where the number of members falls to six as a result of excusals after impanelment. *See* Article 29.

~~If an accused elects for the membership of the court martial to which that accused's case has been referred be comprised of a military judge and members and the members return a finding of guilty to at least one charge and specification, the accused may, after announcement of findings, elect to have an appropriate sentence determined by either the members or the military judge alone. *See* R.C.M. 1002.~~

39. The discussion immediately following R.C.M. 503(a)(3) is revised as follows:

Discussion

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

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

40. The discussion immediately following R.C.M. 601(a) is revised as follows:

Discussion

~~Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (see R.C.M. 601(b) and (c)); preferred charges which have been received by~~

~~the convening authority for disposition (see R.C.M. 307 as to preferral of charges and Chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (see R.C.M. 504).~~

If a court-martial trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, see R.C.M. 401(d) and 407(b).

41. The discussion immediately following R.C.M. 601(d)(2)(B) is deleted.

42. A new discussion is inserted immediately following R.C.M. 601(e)(1)(B) and reads as follows:

Discussion

A special trial counsel may not refer a charge to a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

43. The discussion immediately following R.C.M. 601(e)(1)(C) is revised as follows:

Discussion

Referral is ordinarily evidenced by an indorsement on the charge sheet. Although the indorsement should be completed on all copies of the charge sheet, only the original must be signed. The signature may be that of a person acting by the order or direction of the convening authority or a special trial counsel. In such a case the signature element must reflect the signer's authority.

If, for any reason, charges are referred to a court-martial different from that to which they were originally referred, the new referral is ordinarily made by a new indorsement attached to the original charge sheet. The previous indorsement should be lined out and initialed by the person signing the new referral. The original indorsement should not be obliterated. *See also* R.C.M. 604.

The failure to include a special instruction that a case is to be tried as a capital case at the time of the referral does not bar the convening authority or special trial counsel from later adding the required special instruction, provided that the convening authority or special trial counsel has otherwise complied with the applicable notice requirements. If the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy. *See* R.C.M. 1004(b)(1).

For limitations regarding offenses that may be referred to a special court-martial consisting of a military judge alone, see R.C.M. 201(f)(2)(E).

If the only officer present in a command refers the charges to a summary court-martial and serves as the summary court-martial under R.C.M. 1302, the indorsement should be completed with the additional comments, "only officer present in the command."

~~The convening authority may instruct that the charges against the accused be tried with certain other charges against the accused. *See* R.C.M. 601(d)(2).~~

~~The convening authority may instruct that charges against one accused be referred for joint or common trial with another accused. *See* R.C.M. 601(e)(3).~~

Any special instructions must be stated in the referral indorsement.

When the charges have been referred to a court-martial, the indorsed charge sheet and allied papers should be promptly transmitted to the trial counsel.

44. The discussion immediately following R.C.M. 601(e)(2) is deleted.

45. The discussion immediately following R.C.M. 601(g)(2) is revised as follows:

Discussion

Parallel convening authorities are those convening authorities that possess the same court-martial jurisdiction authority. Examples of permissible transmittal of charges under this rule include the transmittal from a general court-martial convening authority to another general court-martial convening authority, or from one special court-martial convening authority to another special court-martial convening authority. It would be impracticable for an original convening authority to continue exercising authority over the charges, for example, when a command is being decommissioned or inactivated, or when deploying or redeploying and the accused is remaining behind. If charges have been referred, there is no requirement that the charges be withdrawn or dismissed prior to transfer. *See* R.C.M. 604. In the event that the case has been referred, the receiving convening authority may adopt the original court-martial convening order, including the court-martial panel selected to hear the case as indicated in that convening order. When charges are transmitted under this rule, no recommendation as to disposition may be made.

The transfer process is subject to the limitations contained in these rules, including the requirement that only a special trial counsel may withdraw, dismiss, or refer charges over which special trial counsel has exercised authority and has not deferred.

46. The discussion immediately following R.C.M. 603(e) is revised as follows:

Discussion

Charges and specifications forwarded or referred for trial should be free from defects of form and substance. Scriveners' errors may be corrected without the charge being sworn anew by the accuser. Other changes should be signed and sworn to by an accuser. All changes in the charges should be initialed by the person who makes the changes. Except for charges over which a special trial counsel has exercised authority and has not deferred, a ~~A~~ trial counsel acting under this provision ordinarily should consult with the convening authority before making any changes which, even though minor, change the nature or seriousness of the offense.

47. The discussion immediately following R.C.M. 604(a)(2) is revised as follows:

Discussion

Charges that are withdrawn from a court-martial should be dismissed (*see* R.C.M. 401(c)(1)) unless it is intended to refer them anew promptly or to forward them to another authority for disposition.

Charges should not be withdrawn from a court-martial arbitrarily or unfairly to an accused. *See also* R.C.M. 604 (b).

Some or all charges and specifications may be withdrawn. In a joint or common trial the withdrawal may be limited to charges against one or some of the accused.

Except for charges over which a special trial counsel has exercised authority and has not deferred, charges that have been properly referred to a court-martial may be withdrawn only by the direction of the convening authority or a superior competent authority in the exercise of that officer's independent judgment. ~~When directed to do so by the convening authority or a superior competent authority, The T~~ trial counsel may withdraw charges or specifications by lining out the affected charges or specifications, renumbering remaining charges or specifications as necessary, and initialing the changes. Charges and specifications withdrawn before commencement of trial will not be brought to the attention of the members. When charges or specifications are withdrawn after they have come to the attention of the members, the

military judge must instruct them that the withdrawn charges or specifications may not be considered for any reason.

48. The discussion immediately following R.C.M. 604(b) is revised as follows:

Discussion

See also R.C.M. 915 (Mistrial).

When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding.

Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ, or with the impartiality of a court-martial. A withdrawal is improper if it was not directed personally and independently by the convening authority, [a special trial counsel](#), or ~~by~~ a superior competent authority.

Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. Before arraignment, there are many reasons for a withdrawal that will not preclude another referral. These include receipt of additional charges, absence of the accused, reconsideration by the convening authority, [a special trial counsel](#), or ~~by~~ a superior competent authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of the personnel constituting the court-martial. Charges withdrawn after arraignment may be referred to another court-martial under some circumstances. For example, it is permissible to refer charges that were withdrawn pursuant to a pretrial agreement if the accused fails to fulfill the terms of the agreement. *See* R.C.M. 705. Charges withdrawn after some evidence on the general issue of guilt is introduced may be re-referred only under the narrow circumstances described in the rule.

49. The discussion immediately following R.C.M. 702(e)(9) is revised as follows:

Discussion

When any unusual problem, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.

The authority who ordered the deposition should forward copies [of the transcript of the deposition](#) to the parties.

50. A new discussion is inserted immediately following R.C.M. 703(d)(3)(C)(v) and reads as follows:

Discussion

[See R.C.M. 701\(g\)\(3\) Discussion.](#)

[Notice will include the name and contact information for the expert consultant or expert witness.](#)

51. A new discussion is inserted immediately following R.C.M. 703(g)(3)(E)(vi) and reads as follows:

Discussion

When detailed to a general or special court-martial, a special trial counsel may issue a subpoena pursuant to R.C.M. 703(g)(3)(E)(iii). See R.C.M. 103(25).

52. The discussion immediately following R.C.M. 704(c)(2) is revised as follows:

Discussion

Only the lead special trial counsel or general court-martial convening authorities, or their designees, are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. Under some circumstances a promise of immunity by someone other than a general court-martial convening authority, lead special trial counsel, or their designee may bar prosecution altogether. Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred.

When the victim of an alleged offense requests an expedited response to a request for immunity for misconduct that is collateral to the underlying offense, the convening authority, lead special trial counsel, or their designees, should respond to the request as soon as practicable.

A convening authority who grants immunity to a prosecution witness in a court-martial may be disqualified from taking post-trial action in the case under some circumstances.

53. The discussion immediately following R.C.M. 704(c)(5)(B) is revised as follows:

Discussion

A general court-martial convening authority has wide latitude under this section to exercise his or her discretion in delegating immunity authority. For example, a general court-martial convening authority may decide to delegate only the authority for a designee to grant immunity for certain offenses, such as a list of specific offenses or any offense not warranting a punitive discharge, while withholding authority to grant immunity for all others. A general court-martial convening authority may also delegate only authority for certain categories of grantees, such as victims of alleged sex-related offenses.

Department of Defense Instruction 5525.07 (~~18 June 2007~~ 5 March 2020) provides: “A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States, ~~will~~ shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the [Department of Justice]. The General Counsel of the Department of Defense will obtain the views of other appropriate elements of DoD that should be considered during consultation with DOJ.” ~~shall obtain the view of other appropriate elements of the Department of Defense in furtherance of such consultation.”~~

54. The discussion immediately following R.C.M. 704(d)(2) is revised as follows:

Discussion

~~A person who has received a valid grant of immunity from a proper authority may be ordered to testify. In addition, a Servicemember who has received a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant. Cf. Mil. R. Evid. 301(d).~~ A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the UCMJ may be charged under Article 131d. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privileges against disclosure of information. See Mil. R. Evid., Section V.

An immunity order or grant must not specify the contents of the testimony it is expected the witness will give.

When immunity is granted to a prosecution witness, the accused must be notified in accordance with Mil. R. Evid. 301(d)(2).

55. The discussion immediately following R.C.M. 705(a) is revised as follows:

Discussion

The authority of convening authorities or special trial counsel to refer cases to trial and approve plea agreements extends only to trials by court-martial. To ensure that such actions do not preclude appropriate action by federal civilian authorities in cases likely to be prosecuted in the ~~Unites~~ United States District Courts, convening authorities or special trial counsel, when applicable, shall ensure that appropriate consultation under the “Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction” has taken place prior to trial by court-martial or approval of a plea agreement in cases where such consultation is required. *See* Appendix 3. Convening authorities should also review and consider Appendix 2.1 (Non-binding disposition guidance) for guidance concerning the disposition of charges and specifications through plea agreements.

56. The discussion immediately following R.C.M. 705(b)(2)(C) is revised as follows:

Discussion

A convening authority or special trial counsel may withdraw certain specifications and/or charges from a court-martial and dismiss them if the accused fulfills the accused’s promises in the agreement. Except when jeopardy has attached (*see* R.C.M. 907(b)(2)(C)), such withdrawal and dismissal does not bar later reinstatement of the charges by ~~the~~ a special trial counsel or the same or ~~a~~ different convening authority. A judicial determination that the accused breached the plea agreement is not required prior to reinstatement of withdrawn or dismissed specifications and/or charges. If the defense moves to dismiss the reinstated specifications and/or charges on the grounds that the government remains bound by the terms of the plea agreement, the government will be required to prove, by a preponderance of the evidence, that the accused has breached the terms of the plea agreement. If the agreement is intended to grant immunity to an accused, see R.C.M. 704.

57. The discussion immediately following R.C.M. 705(e)(2) is revised as follows:

Discussion

The plea agreement ordinarily contains an offer to plead guilty and a description of the offenses to which the offer extends. It must also contain a complete and accurate statement of any other agreed terms or conditions. For example, if the convening authority or special trial counsel agrees to withdraw certain specifications, or if the accused agrees to waive the right to an Article 32 preliminary hearing or the right to elect sentencing by members, this should be stated. The written agreement should contain a statement by the accused that the accused enters it freely and voluntarily and may contain a statement that the accused has been advised of certain rights in connection with the agreement.

58. The discussion immediately following R.C.M. 706(c)(3)(C) is revised as follows:

Discussion

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

59. The discussion immediately following R.C.M. 707(c)(1) is revised as follows:

Discussion

The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. ~~This decision should be based on the facts and circumstances then and there existing.~~ Reasons to grant a delay might include, for example, the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause. Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

~~Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 preliminary hearing officer.~~

60. The discussion immediately following R.C.M. 707(e) is deleted.

61. The discussion immediately following R.C.M. 801(d) is revised as follows:

Discussion

A report of the matter may be made to the convening authority or the special trial counsel, as applicable, after trial. If charges are preferred for an offense indicated by the evidence referred to in this subsection, no member of the court-martial who participated in the first trial should sit in any later trial. Such a member would ordinarily be subject to a challenge for cause. *See* R.C.M. 912. *See also* Mil. R. Evid. 105 concerning instructing the members on evidence of uncharged misconduct.

62. The discussion immediately following R.C.M. 801(c)(2) is revised as follows:

Discussion

Express waiver. The accused may expressly waive the right to be present at trial proceedings. There is no right to be absent, however, and the accused may be required to be present over objection. Thus, an accused cannot frustrate efforts to identify the accused at trial by waiving the right to be present. The right to be present is so fundamental, and the Government's interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present only for good cause, and only after the military judge explains to the accused the right, and the consequences of forgoing it, and secures the accused's personal consent to proceeding without the accused.

Voluntary absence. In any case the accused may forfeit the right to be present by being voluntarily absent after arraignment.

“Voluntary absence” means voluntary absence from trial. For an absence from court-martial proceedings to be voluntary, the accused must have known of the scheduled proceedings and intentionally missed them. For example, although an accused service member might voluntarily be absent without authority, this would not justify proceeding with a court-martial in the accused’s absence unless the accused was aware that the court-martial would be held during the period of the absence.

An accused who is in military custody or otherwise subject to military control at the time of trial or other proceeding may not properly be absent from the trial or proceeding without securing the permission of the military judge on the record.

The prosecution has the burden to establish by a preponderance of the evidence that the accused’s absence from trial is voluntary. Voluntariness may not be presumed, but it may be inferred, depending on the circumstances. For example, it may be inferred, in the absence of evidence to the contrary, that an accused who was present when the trial recessed and who knew when the proceedings were scheduled to resume, but who nonetheless is not present when court reconvenes at the designated time, is absent voluntarily.

Where there is some evidence that an accused who is absent for a hearing or trial may lack mental capacity to stand trial, capacity to voluntarily waive the right to be present for trial must be shown. *See* R.C.M. 909.

Subsection (1) authorizes but does not require trial to proceed in the absence of the accused upon the accused’s voluntary absence. When an accused is absent from trial after arraignment, a continuance or a recess may be appropriate, depending on all the circumstances.

~~Presence of the accused by remote means does not require the consent of the accused.~~

Removal for disruption. Trial may proceed without the presence of an accused who has disrupted the proceedings, but only after at least one warning by the military judge that such behavior may result in removal from the courtroom. In order to justify removal from the proceedings, the accused’s behavior should be of such a nature as to materially interfere with the conduct of the proceedings.

The military judge should consider alternatives to removal of a disruptive accused. Such alternatives include physical restraint (such as binding, shackling, and gagging) of the accused, or physically segregating the accused in the courtroom. Such alternatives need not be tried before removing a disruptive accused under subsection (2). Removal may be preferable to such an alternative as binding and gagging, which can be an affront to the dignity and decorum of the proceedings.

Disruptive behavior of the accused may also constitute contempt. *See* R.C.M. 809. When the accused is removed from the courtroom for disruptive behavior, the military judge should—

(A) Afford the accused and defense counsel ample opportunity to consult throughout the proceedings. To this end, the accused should be held or otherwise required to remain in the vicinity of the trial, and frequent recesses permitted to allow counsel to confer with the accused.

(B) Take such additional steps as may be reasonably practicable to enable the accused to be informed about the proceedings. Although not required, technological aids, such as closed-circuit television or audio transmissions, may be used for this purpose.

(C) Afford the accused a continuing opportunity to return to the courtroom upon assurance of good behavior. To this end, the accused should be brought to the courtroom at appropriate intervals, and offered the opportunity to remain upon good behavior.

(D) Ensure that the reasons for removal appear in the record.

63. The discussion immediately following R.C.M. 805(b) is revised as follows:

Discussion

See R.C.M. 501 and R.C.M. 505 concerning the minimum number of members and the procedures to follow when members are dismissed.

~~See R.C.M. 1002 concerning the accused's right to elect sentencing by members, except where the court-martial is composed of a military judge alone.~~

64. The discussion immediately following R.C.M. 812) is revised as follows:

Discussion

A “joint trial” is one in which two or more accused are charged with a joint offense, that is, one in which they acted together with a common purpose. The offense is stated in a single specification and the accused are joined by the pleading. A “common trial” is one in which two or more accused are tried for an offense or offenses which, although not jointly committed, were committed at the same time and place and are provable by the same evidence. The common trial is ordered in the discretion of the convening authority or a special trial counsel by endorsement on the charge sheet. See R.C.M. 307(c)(5) concerning preparing charges and specifications for joint trials. See R.C.M. 601(e)(3) concerning referral of charges for joint or common trials, and the distinction between the two. See R.C.M. 906(b)(9) concerning motions to sever and other appropriate motions in joint or common trials.

In a joint or common trial, each accused may be represented by separate counsel; make challenges for cause; make peremptory challenges (*see* R.C.M. 912); cross-examine witnesses; elect whether to testify; introduce evidence; request that the membership of the court include enlisted persons or be limited to officer members, if an enlisted accused; and request trial by military judge alone.

In a joint or common trial, evidence which is admissible against only one or some of the joint or several accused may be considered only against the accused concerned. For example, when a stipulation is accepted which was made by only one or some of the accused, the stipulation does not apply to those accused who did not join it. *See also* Mil. R. Evid. 306. In such instances the members must be instructed that the stipulation or evidence may be considered only with respect to the accused with respect to whom it is accepted.

65. The discussion immediately following R.C.M. 905(g) is revised as follows:

Discussion

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

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

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

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

Examples:

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

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

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

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

66. The discussion immediately following R.C.M. 906(b)(10)(B) is revised as follows:

Discussion

~~Ordinarily, all known charges should be tried at a single court-martial. *But see* R.C.M. 902A.~~ Joinder of minor and major offenses, or of unrelated offenses, is not alone a sufficient ground to sever offenses. For example, when an essential witness as to one offense is unavailable, it might be appropriate to sever that offense to prevent violation of the accused's right to a speedy trial.

67. The discussion immediately following R.C.M. 906(b)(12)(B) is deleted.

68. The discussion immediately following R.C.M. 908(c)(3) is revised as follows:

Discussion

A special trial counsel may request that the applicable Judge Advocate General certify a case to the Court of Appeals for the Armed Forces. The United States may appeal a sentence in accordance with Article 56(d) and the procedures set forth in R.C.M. 1117.

69. The discussion immediately following R.C.M. 910(f)(5) is deleted.

70. The discussion immediately following R.C.M. 910(g) is deleted.

71. The discussion immediately following R.C.M. 910(j) is revised as follows:

Discussion

Other errors with respect to the plea inquiry or acceptance of a plea under this rule are subject to forfeiture waiver if not brought to the attention of the military judge, ~~and will be reviewed for harmless error under Article 45.~~

72. The discussion immediately following R.C.M. 911(d) is revised as follows:

Discussion

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

When an accused's request to be tried by military judge alone is approved, the court-martial is ordinarily assembled immediately following approval of the request.

In a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), the court-martial is assembled prior to beginning of the trial on the merits.

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

73. The discussion immediately following R.C.M. 915(c)(1) is revised as follows:

Discussion

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

74. The discussion immediately following R.C.M. 922(a) is deleted.

75. A new discussion is inserted immediately after R.C.M. 925(e) and reads as follows:

Discussion

R.C.M. 925(d) is applicable only to sentencing proceedings in which death may not be adjudged. See R.C.M. 1004 for capital sentencing procedures.

76. The discussion immediately following R.C.M. 1001(c)(5)(B) is revised as follows:

Discussion

A victim's statement should not exceed what is permitted under R.C.M. 1001(c)(3). A crime victim may also testify as a witness during presentencing proceedings in order to present evidence admissible under a rule other than R.C.M. 1001(c)(3). ~~Upon objection by either party or sua sponte, a military judge may stop~~

~~or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(e)(3).~~ A victim, victim's counsel, or designee has no separate right to present argument under R.C.M. 1001(h).

When the military judge waives the notice requirement under this rule, the military judge may conduct a session under Article 39(a) to ascertain the content of the victim's anticipated unsworn statement.

If the victim intends to submit a written statement, a copy of the statement satisfies the requirement for a written proffer.

77. The discussion immediately following R.C.M. 1002(a)(2)(B) is revised as follows:

Discussion

See Article 56(a) and R.C.M. 1003.

78. The discussion immediately following R.C.M. 1002(b)(2) is deleted.

79. The discussion immediately following R.C.M. 1004(b)(3) is deleted.

80. The discussion immediately following R.C.M. 1004(c)(110)(B) is revised as follows:

Discussion

Examples of substantial damage to the national security of the United States include: impeding the performance of a combat mission or operation; impeding the performance of an important mission in a hostile fire or imminent danger pay area (*see* 37 U.S.C. § 310(a)); and disclosing military plans, capabilities, or intelligence such as to jeopardize any combat mission or operation of the armed services of the United States or its allies or to materially aid an enemy of the United States.

See also R.C.M. 1004(b)(5).

81. The discussion immediately following R.C.M. 1004(d) is revised as follows:

Discussion

~~A sentence of death may not be ordered executed until approved by the President. See R.C.M. 1207. A sentence of death which has been finally ordered executed will be carried out in the manner prescribed by the Secretary concerned. See R.C.M. 1102(b)(5).~~

See R.C.M. 1001(d).

82. A new discussion is inserted immediately following R.C.M. 1004(f)(1) and reads as follows:

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. See R.C.M. 801(e)(1)(C), 803.

The military judge is not required to give the specific instruction requested by counsel if the matter is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

83. A new discussion is inserted immediately following R.C.M. 1004(f)(2) and reads as follows:

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

84. A new discussion is inserted immediately following R.C.M. 1004(f)(3)(E) and reads as follows:

Discussion

For example, tailored instructions should reflect the considerations set forth in Article 56(c), including the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character, and any pretrial restraint imposed on the accused.

85. A new discussion is inserted immediately following R.C.M. 1004(f)(4)(D) and reads as follows:

Discussion

A determination by the members may be reconsidered only in accordance with R.C.M. 1009.

86. A new discussion is inserted immediately following R.C.M. 1004(h) and reads as follows:

Discussion

Ordinarily a worksheet should be provided to the members as an aid to putting the determination in proper form. If a worksheet has been provided, the military judge should examine it before announcing the determination. If the military judge intends to instruct the members after such examination, counsel should be permitted to examine the worksheet and to be heard on any instructions the military judge may give.

The president should not disclose any specific number of votes for or against any sentence.

If the sentence is ambiguous or apparently illegal, see R.C.M. 1009.

If the members voted unanimously for a sentence of death, the sentence worksheet shall indicate which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt. See R.C.M. 1004(b)(8).

87. A new discussion is inserted immediately following R.C.M. 1004(i)(3)(D)(ii)(II) and reads as follows:

Discussion

After a determination has been adopted by secret ballot in closed session, no other vote may be taken on the sentence unless a vote to reconsider succeeds.

88. A new discussion is inserted immediately following R.C.M. 1004(j)(2)(C) and reads as follows:

Discussion

A sentence of death may not be ordered executed until approved by the President. See R.C.M. 1207. A sentence of death which has been finally ordered executed will be carried out in the manner prescribed by the Secretary concerned. See R.C.M. 1102(b)(5).

89. The discussion immediately following R.C.M. 1005(c) is deleted.
90. The discussion immediately following R.C.M. 1005(e)(1) is deleted.
91. The discussion immediately following R.C.M. 1005(e)(3) is deleted.
92. The discussion immediately following R.C.M. 1005(e)(4) is deleted.
93. The discussion immediately following R.C.M. 1005(e)(5) is deleted.
94. A new discussion is inserted immediately following R.C.M. 1005(e) and reads as follows:

Discussion

See R.C.M. 1111(c) for correcting errors after entry of judgment.

95. The discussion immediately following R.C.M. 1303 is deleted.

Section 3. In Part III of the Manual for Courts-Martial, United States, a discussion section is added immediately after Mil. R. Evid. 311(c)(4) and reads as follows:

Discussion

See *U.S. v. Perkins*, 78 M.J. 381 (C.A.A.F. 2019).

Section 4. Appendix 2.1, Non-Binding Disposition Guidance, of the Manual for Courts-Martial, United States, is revised as follows:

SECTION 1: IN GENERAL

1.1. Policy.

a. This Appendix provides non-binding guidance regarding factors that convening authorities or special trial counsel, as applicable; commanders; staff judge advocates; and judge advocates should consider when exercising their duties with respect to the disposition of charges and specifications under the UCMJ, and to further promote the purpose of military law.

b. This Appendix supplements the Manual for Courts-Martial. The guidance in this Appendix does not require a particular disposition decision or other action in any given case. Accordingly, the disposition factors set forth in this Appendix are cast in general terms, with a view to providing guidance rather than mandating results. The intent is to promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to apply these factors in the manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

1.2. Purpose. This non-binding guidance is intended to:

a. Set forth factors for consideration by those assigned responsibility under the UCMJ for disposing of alleged violations of the UCMJ on how best to exercise their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law;

b. Serve as a training tool for convening authorities or special trial counsel, as applicable; commanders; staff judge advocates; and judge advocates in the proper discharge of their duties;

c. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources; and

d. Enhance the relationship between military commanders, judge advocates, and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions.

1.3. Scope. This Appendix is designed to support the exercise of discretion with respect to the following disposition decisions:

- a. Initiating and declining action (to include deferral) under the UCMJ;
- b. Selecting appropriate charges and specifications;
- c. Selecting the appropriate type of court-martial or alternative mode of disposition, if any; and
- d. Considering the appropriateness of a plea agreement.

1.4. Non-Litigability. This non-binding guidance was developed solely as a matter of internal Departmental policy in accordance with Article 33. This Appendix is not intended to, does not, and may not be relied upon to create a right, benefit, or defense, substantive or procedural, enforceable at law or in equity by any person.

SECTION 2: CONSIDERATIONS IN ALL CASES

2.1. Interests of Justice and Good Order and Discipline. The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members. ~~It is a commander's duty to use it appropriately.~~ In determining whether the interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, ~~the commander or convening authority should consider, in consultation with a judge advocate,~~ the following should be considered:

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;
- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

2.2. Consultation with a Judge Advocate. If a member of a command is accused or suspected of committing an offense punishable under the UCMJ, the commander should seek advice from a judge

advocate regarding all possible dispositions of the allegation. The judge advocate's advice should include a discussion of the advantages and disadvantages of each of the available dispositions. The cognizant commander should consider all available options.

2.3. Referral. Probable cause must exist for each charge and specification referred to a court-martial. However, when making a referral decision, the convening authority should also consider the matters described in paragraph 2.1 of this appendix.

2.4. Determining the Charges and Specifications to Refer. ~~Ordinarily, the convening authority should refer charges and specifications for all known offenses to a single court-martial. However, t~~The convening authority or special trial counsel, as applicable, should avoid referring multiple charges when they would:

- a. Unnecessarily complicate the prosecution of the most serious, readily provable offense or offenses;
- b. Unnecessarily exaggerate the nature and extent of the accused's criminal conduct or add unnecessary confusion to the issues at court-martial;
- c. Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or
- d. Be disposed of more appropriately through an alternative disposition.

2.5. Determining the Appropriate Type of Court-Martial. In determining the appropriate type of court-martial, a convening authority should consider the advice of a judge advocate. Additionally, a convening authority or special trial counsel, as applicable, should consider:

- ~~a. The advice of a judge advocate;~~
 - ~~ba.~~ The interests of justice and good order and discipline (*see* paragraph 2.1);
 - ~~eb.~~ The authorized maximum and minimum punishments for the offenses charged;
 - ~~ec.~~ Any unique circumstances in the case requiring immediate disposition of the charges;
 - ~~ed.~~ Whether the type of court-martial would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and
 - ~~fe.~~ Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

2.6. Alternatives to Referral.

2.6.1. In determining whether a case should not be referred to court-martial for trial because there exists an adequate alternative, a judge advocate should advise the convening authority on, and the convening authority should consider, in addition to the considerations in paragraph 2.1:

- a. The effect of alternative disposition on the interests of justice and good order and discipline;
- b. The options available under the alternative means of disposition;
- c. The views of the victim, if any, concerning the alternative disposition of the case; and
- d. The likelihood of an effective outcome.

2.6.2. In determining whether a case should be deferred because there exists an adequate alternative, special trial counsel should consider, in addition to the considerations in paragraph 2.1:

- a. The effect of alternative disposition on the interests of justice and good order and discipline;
- b. The options available under the alternative means of disposition;
- c. The views of the victim, if any, concerning the alternative disposition of the case; and
- d. The likelihood of an effective outcome.

2.7. Inappropriate Considerations. The disposition determination must not be influenced by:

- a. The accused's race, ethnicity, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;

- b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;
- c. The time and resources already expended in the investigation of the case;
- d. The possible effect of the disposition determination on the commander's, ~~or~~ convening authority's, or special trial counsel's military career or other professional or personal circumstances; or
- e. Political pressure to take or not to take specific actions in the case.

SECTION 3: SPECIAL CONSIDERATIONS

3.1. Prosecution in Another Jurisdiction. When the accused is subject to effective prosecution in another jurisdiction, a ~~judge advocate should advise on and the~~ convening authority should consider the advice of a judge advocate. Additionally, a convening authority or special trial counsel, as applicable, should consider the following additional factors when determining disposition:

- a. The strength of the other jurisdiction's interest in prosecution;
- b. The other jurisdiction's ability and willingness to prosecute the case effectively;
- c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;
- d. The views of the victim, if any, as to the desirability of prosecution in the other jurisdiction;
- e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and
- f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.

3.2. Plea Agreements. In accordance with Article 53a, the convening authority or special trial counsel, as applicable, may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. A ~~judge advocate should advise on and the~~ convening authority should consider the advice of a judge advocate. Additionally, a convening authority or special trial counsel, as applicable, should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:

- a. The accused's willingness to cooperate in the investigation or prosecution of others;
- b. The nature and seriousness of the offense or offenses charged;
- c. The accused's remorse or contrition and his or her willingness to assume responsibility for his or her conduct;
- d. Restitution, if any;
- e. The accused's criminal history or history of misconduct, whether military or civilian;
- f. The desirability of prompt and certain disposition of the case and of related cases;
- g. The likelihood of obtaining a conviction at court-martial;
- h. The probable effect on victims and witnesses;
- i. The probable sentence or other consequences if the accused is convicted;
- j. The public and military interest in having the case tried rather than disposed of by a plea agreement;
- k. The time and expense associated with trial and appeal;
- l. The views of the victim with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and
- m. The potential of the accused for rehabilitation and continued service.

3.3. Agreements Concerning Disposition of Charges and Specifications. With respect to ~~the convening authority's~~ plea agreements regarding the disposition of charges and specifications, the plea agreement should require the accused to plead guilty to charges and specifications that:

- a. Appropriately reflect the nature and extent of the criminal conduct;
- b. Are supported by an adequate factual basis;
- c. Would support the imposition of an appropriate sentence under all the circumstances of the case;
- d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and
- e. Appropriately serve the interests of justice and good order and discipline.

3.4 Agreements Concerning Sentence Limitations. A ~~convening authority, in consultation with a judge advocate,~~ plea agreement should ensure that any sentence limitation ~~of a plea agreement~~ takes into consideration the sentencing guidance set forth in Article 56(c).

Analysis:

This appendix implements Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and section 12 of Executive Order 13825 of March 1, 2018. The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association (~~ABA~~), Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association (~~NDAA~~), National Prosecution Standards. Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as these related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of military justice and the need for commanders, ~~and~~ convening authorities, and special trial counsel to exercise wide discretion to meet their responsibilities to maintain good order and discipline.

Section 5. Appendix 8, Guide for Summary Courts-Martial, of the Manual for Courts-Martial, United States, is amended as follows:

1. Note 25 is revised as follows:

Note 25. The summary court-martial should review the evidence and applicable law. It must acquit the accused unless it is convinced beyond a reasonable doubt by the evidence it has received in court in the presence of the accused that each element of the alleged offense(s) has been proved beyond a reasonable doubt. *See* R.C.M. 918. It may not consider any facts which were not admitted into evidence, such as a confession or admission of the accused which was excluded because it was taken in violation of Mil. R. Evid. 304. In accordance with R.C.M. 1304(b)(2)(F), the summary court-martial shall apply the principles of R.C.M. 918 in determining the findings. ~~may find the accused guilty of only the offense(s) charged, a lesser included offense, or of an offense which does not subchange the identity of an offense charged or a lesser included offense thereof.~~

2. Note 34 is revised as follows:

Note 34. The crime victim may make a sworn statement, and be subject to cross-examination. The crime victim can elect to submit an unsworn statement, and may not be subjected to cross-examination. The content of statements may only include victim impact and matters in mitigation. ~~The statement may not include a recommendation of a specific sentence.~~

Section 6. Appendix 15, Analysis of [the Introduction, Preamble, and Rules for Courts-Martial](#), of the Manual for Courts-Martial, United States, is amended as follows:

1. The Introduction is revised as follows:

Introduction

The Manual for Courts-Martial, United States, ~~2019~~2023 implements the [military justice reforms enacted by the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 \(2022\)](#). It includes [Executive Orders signed by President Biden, Executive Order No. 14062 \(Jan. 26, 2022\)](#); ~~Executive Order No. 13825 (1 March 2018)~~; ~~Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081 of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017)~~. It includes ~~one Executive Order signed by President Donald Trump; Executive Order No. 13825 (1 March 2018)~~. This publication also contains various supplementary materials for the convenience of the user.

History of the Manual for Courts-Martial. The President traditionally has exercised the power to make rules for the government of the military establishment, including rules governing courts-martial. See ~~William~~ Winthrop, *Military Law and Precedents* 27–28 (2d ed. 1920 reprint). Such rules have been promulgated under the President’s authority as commander-in-chief, see U.S. Const., Art. II, sec. 2, cl.1., and, at least since 1813, such power also has been provided for in statutes. See ~~W.~~ Winthrop, *supra*, at 26–27. Article 36 of the Uniform Code of Military Justice provides such authority. See also Articles 18 and 56. See generally *Hearings on H.R. 3804 Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 96th Cong., 1st Sess. 5–6, 14, 17–18, 20–21, 52, 106 (1979). In 1979, Article 36 was amended to clarify the broad scope of the President’s rulemaking authority for courts-martial. Act of November 9, 1979, Pub. L. No. 96–107, Section 801(b), 93 Stat. 810,811. See generally *Hearings on H.R. 3804, supra*.

In the nineteenth century the President promulgated, from time to time, regulations for the Army. Those regulations were published in various forms, including “Manuals.” ~~W.~~ Winthrop, *supra*, at 28. Such publications were not limited to court-martial procedures and related matters; however, they were more in the nature of compendiums of military law and regulations. The early manuals for courts-martial were informal guides and were not promulgated by the President. See MCM, 1895 at 1, 2; MCM, 1905 at 3; MCM, 1910 at 3; MCM, 1917 at III. See also MCM, 1921 at XIX.

The forerunner of the modern *Manual for Courts-Martial* was promulgated by the Secretary of War in 1895. See MCM, 1895 at 2. See also *Hearings on H.R. 3805, supra*, at 5. (Earlier Manuals were prepared by individual authors. See e.g., ~~Arthur~~ Murray, *A Manual for Courts-Martial* (3d ed. 1893); ~~Henry~~ Coppée, *Field Manual for Courts-Martial* (1863)). Subsequent Manuals through MCM, 1969 (Rev.) ~~have~~ had the same basic format, organization, and subject matter as MCM, 1895, although the contents ~~were~~~~have been~~ modified and considerably expanded. See, e.g., MCM, 1921 at XIX–XX. The format was ~~been~~ a paragraph format, numbered consecutively and divided into chapters. The subject matter included pretrial, trial, and post-trial procedure. In MCM, 1917, rules of evidence and explanatory materials on the punitive articles were included. See MCM, 1917 at XIV. The 1921 Manual for Courts-Martial was the first to be promulgated by the President. See MCM, 1921 at XXVI.

Background of this Manual. During the drafting of the Military Rules of Evidence (see Analysis, Part III, introduction, *infra*), the drafters identified several portions of MCM, 1969 (Rev.) in which they considered revisions appropriate. Consideration was given to amending MCM, 1969 (Rev.) in specific areas. However, the project to draft the Military Rules of Evidence had demonstrated the value of a more comprehensive examination of existing law. In addition, changing the format of the Manual for Courts-Martial was considered desirable. In this regard it should be noted that, as indicated above, the basic format and organization of the Manual for Courts-Martial had remained the same for over 80 years, although court-martial practice and procedure had changed substantially.

Upon completion of the Military Rules of Evidence in early 1980, the General Counsel, Department of Defense, with the concurrence of the Judge Advocates General, directed that the Manual for Courts-Martial

be revised. There were four basic goals for the revision. First, the new Manual was to conform to federal practice to the extent possible, except where the Uniform Code of Military Justice requires otherwise or where specific military requirements render such conformity impracticable. *See* Article 36. Second, current court-martial practice and applicable judicial precedent was to be thoroughly examined and the Manual was to be brought up to date, by modifying such practice and precedent or conforming to it as appropriate. Third, the format of the Manual was to be modified to make it more useful to lawyers (both military and civilian) and nonlawyers. Specifically, a rule as opposed to paragraph format was to be used and prescriptive rules would be separated from nonbinding discussion. Fourth, the procedures in the new Manual had to be workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions.

These goals were intended to ensure that the Manual for Courts-Martial continues to fulfill its fundamental purpose as a comprehensive body of law governing the trial of courts-martial and as a guide for lawyers and nonlawyers in the operation and application of such law. It was recognized that no single source could resolve all issues or answer all questions in the criminal process. However, it was determined that the Manual for Courts-Martial should be sufficiently comprehensive, accessible, and understandable so it could be reliably used to dispose of matters in the military justice system properly, without the necessity to consult other sources, as much as reasonably possible.

The Joint Service Committee on Military Justice was tasked with the project. In the summer of 1980, the Navy and Army prepared an initial outline of the new Manual. Drafting was done by the Working Group of the Joint Service Committee on Military Justice.

The Working Group drafted the Manual in fourteen increments. Each increment was circulated by each service to various field offices for comment. Following such comment, each increment was reviewed in the respective offices of the Judge Advocates General, the Director, Judge Advocate Division, Headquarters, USMC, and the Chief Counsel, USCG, and in the Court of Military Appeals. Following ~~that~~^{such} review, the Joint Service Committee met and took action on each increment. After all increments had been reviewed and approved, the Code Committee approved the draft.

Following approval by the Code Committee, the draft was made available for comment by the public. 48 Fed. Reg. 23688 (May 26, 1983). In September and October 1983, the comments were reviewed. The Working Group prepared numerous modifications in the draft based on comments from the public and from within the Department of Defense, and on judicial decisions and other developments since completion of the draft. In October 1983, the Joint Service Committee approved the draft for forwarding to the General Counsel, Department of Defense, for submission to the President after coordination by the Office of Management and Budget.

On November 18, 1983, Congress passed the Military Justice Act of 1983. This act was signed into law by the President on December 6, 1983, Pub. L. No. 98–209, 97 Stat. 1393 (1983). The Working Group had previously drafted proposed modifications to the May 1983 draft which would be necessary to implement the act. These proposed modifications were approved by the Joint Service Committee in November 1983 and were made available to the public for comment in December 1983. 48 Fed. Reg. 54263 (December 1, 1983). These comments were reviewed and modifications made in the draft by the Working Group, and the Joint Service Committee approved these changes in January 1984. The draft of the complete Manual and the proposed executive order were forwarded to the General Counsel, Department of Defense in January 1984. These were reviewed and forwarded to the Office of Management and Budget in January 1984. They were reviewed in the Departments of Justice and Transportation. The Executive Order was finally prepared for submission to the President, and the President signed it on 13 April 1984.

A note on citation form. The drafters generally have followed the *The Bluebook, A Uniform System of Citation* (~~20th~~^{21st} ed. ~~2020~~²⁰¹⁶), subject to the following.

This edition of the Manual for Courts-Martial is referred to generally as “this Manual.” The Rules for Courts-Martial are cited, *e.g.*, as R.C.M. 101. The Military Rules of Evidence are cited, *e.g.*, as Mil. R. Evid. 101. Other provisions of this Manual are cited to the applicable part and paragraph, *e.g.*, MCM, Part V, paragraph 1a(1) (~~2023~~²⁰¹⁹).

Previous editions of the Manual for Courts-Martial will be referred to as “MCM, (XXXX).”

The Uniform Code of Military Justice, 10 U.S.C. Sections 801–946a, ~~is will be~~ cited as follows:

Each individual section is denominated in the statute as an “Article” and ~~is will be~~ cited to the corresponding Article. *E.g.*, 10 U.S.C. Section 801 ~~is will be~~ cited as “Article 1”; 10 U.S.C. Section 802 ~~is will be~~ cited as “Article 2”; 10 U.S.C. Section 940 ~~is will be~~ cited as “Article 140.” The entire legislation, Articles 1 through 146a, ~~is will be~~ referred to as “the Code” or “the UCMJ” without citation to the United States Code. When a change from MCM, 2016 is based on the Military Justice Act of 2016 or subsequent legislation, this will be noted in the analysis, with citation to the appropriate section of the act.

Composition of the Manual for Courts-Martial

Executive Order

The Executive Order includes the Manual for Courts-Martial, which consists of the Preamble; Rules for Courts-Martial; Military Rules of Evidence; the Punitive Articles; Nonjudicial Punishment Procedure; and Appendix 12A, Presidentially-Prescribed Lesser Included Offenses [Pursuant to Article 79\(b\)\(2\), Uniform Code of Military Justice](#). Each rule states binding requirements except when the text of the rule expressly provides otherwise. Normally, failure to comply with a rule constitutes error. *See* Article 59 concerning the effect of errors.

a. Supplementary Materials

As a supplement to the Manual, the Department of Defense, in conjunction with the Department of Homeland Security, has published a Discussion (accompanying the Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles), this Analysis, and various Appendices.

(1) The Discussion

The Discussion is intended by the drafters to serve as a treatise. To the extent that the Discussion uses terms such as “must” or “will,” it is solely for the purpose of alerting the user to important legal consequences that may result from binding requirements in the Executive Order, judicial decisions, or other sources of binding law. The Discussion itself, however, does not have the force of law, even though it may describe legal requirements derived from other sources. It is in the nature of treatise, and may be used as secondary authority. The inclusion of both the President’s rules and the drafters’ informal discussion in the basic text of the Manual provides flexibility not available in pre-1984 editions of the Manual, and should eliminate questions as to whether an item is a requirement or only guidance. *See, e.g., United States v. Baker*, 14 M.J. 361, 373 (C.M.A. 1973). In this Manual, if matter is included in a rule or paragraph, it is intended that the matter be binding, unless it is clearly expressed as precatory. A rule is binding even if the source of the requirement is a judicial decision or a statute not directly applicable to courts-martial. If the President ~~had~~ adopted a rule based on a judicial decision or a statute, subsequent repeal of the statute or reversal of the judicial decision does not repeal the rule. On the other hand, if the President did not choose to “codify” a principle or requirement derived from a judicial decision or other source of law but the drafters considered it sufficiently significant that the Manual’s users should be aware of it, such matter is addressed in the Discussion. The Discussion is revised from time to time as warranted by changes in applicable law.

(2) The Analysis

The Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation. Users are reminded, however, that primary reliance should be placed on the plain words of the rules. In addition, it is important to remember that the Analysis solely represents the views of staff personnel who worked on the project, and does not necessarily reflect the views of the President in approving it, or of the officials who formally recommended approval to the President.

The Analysis frequently refers to judicial decisions and statutes from the civilian sector that are not applicable directly to courts-martial. Subsequent modification of such sources of law may provide useful guidance in interpreting rules, and the drafters do not intend that citation of a source in this Analysis should preclude reference to subsequent developments for purposes of interpretation. At the same time, the user is reminded that the amendment of the Manual is the province of the President. Developments in the civilian

sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law. The same is true with respect to rules derived from the decisions of military tribunals. Once incorporated into the Executive Order, such matters have an independent source of authority and are not dependent upon continued support from the judiciary. Conversely, to the extent that judicial precedent is set forth only in the Discussion or is otherwise omitted from the Rules or the Discussion, the continuing validity of the precedent will depend on the force of its rationale, the doctrine of *stare decisis*, and similar jurisprudential considerations. Nothing in this Introduction should be interpreted to suggest that the placement of matter in the Discussion (or the Analysis), rather than the rule, is to be taken as disapproval of the precedent or as an invitation for a court to take a different approach; rather, the difficult drafting problem of choosing between a codification and common law approach to the law frequently resulted in noncodification of decisions which had the unanimous support of the drafters. To the extent that future changes are made in the Rules or Discussion, corresponding materials will be included in the Analysis.

The Appendices contain various nonbinding materials to assist users of this Manual. The Appendices also contain excerpts from pertinent statutes. These excerpts are appropriate for judicial notice of law, *see* Mil. R. Evid. 201, but nothing herein precludes a party from proving a change in law through production of an official codification or other appropriate evidence.

2. Paragraph 3 of the Preamble is revised as follows:

3. Purpose of military law

See generally Chappell v. Wallace, 462 U.S. 296 (1983); *Parker v. Levy*, 417 U.S. 733 (1974); S.Rep. No. 53, 98th Cong., 1st Sess. 2–3 (1983). For a discussion of the nature and purpose of military law, see R. Everett, *Military Justice in the Armed Forces of the United States* (1956); J. Bishop, *Justice Under Fire* (1974); Hodson, *Military Justice: Abolish or Change?*, 22 Kan. L. Rev. 31 (1975), *reprinted in* Mil. L. Rev. Bicent. Issue 579 (1976); Hansen, *Judicial Functions for the Commander*, 41 Mil.L.Rev. 1 (1968); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 606, 778–86 (1949); H. Moyer, *Justice and the Military* 5–23 (1972).

2023 Amendment:

Paragraph 3 was revised to note that the purposes of military law include deterring misconduct and facilitating appropriate accountability.

3. A new paragraph 4 of the Preamble is inserted immediately after paragraph 3 and reads as follows:

4. The Evolving Military Justice System

2023 Amendment:

A new paragraph 4 was added to discuss the evolution of the military justice system, including the reforms enacted by the National Defense Authorization Act for Fiscal Year 2022, Pub. Law. No. 117-81, 135 Stat. 1546 (2021).

4. Paragraph 4 of the Preamble is renumbered as paragraph 5 and is revised as follows:

45. Structure and application of the Manual for Courts-Martial

Self-explanatory. *See also* the *Introduction* of the Analysis.

2023 Amendment:

Paragraph 4 was renumbered as paragraph 5. Citations to the Department of Defense issuance governing the Joint Service Committee on Military Justice were updated.

5. Rule 101 is revised as follows:

Rule 101 Scope, title

This rule is taken from Rule 101 of the MCM (2016⁹ edition) without substantive amendment.

6. Rule 102 is revised as follows:

Rule 102 Purpose and construction

This rule is taken from Rule 102 of the MCM (2016⁹ edition) without substantive amendment.

7. Rule 103 is revised as follows:

Rule 103 Definitions and rule of construction

This rule is taken from Rule 103 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 103(1), (2), and (3) are renumbered as R.C.M. 103(2), (3), and (4); R.C.M. 103(16) through (18) are renumbered as R.C.M. 103(17) through (19); R.C.M. 103(19) through (21) are renumbered R.C.M. 103(21) through (23). The definition of “UCMJ” is moved from R.C.M. 103(4) to R.C.M. 103(20).

R.C.M. 103(1) is amended and clarifies the reference to “appellate military judge” means a judge of a Court of Criminal Appeals.

R.C.M. 103(8)(D) is amended and implements Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes a convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

R.C.M. 103(11) is amended and updates a description of the federal law definition of “explosive.”

R.C.M. 103(15) is amended and implements Article 1, as amended by Section 5101 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 1081(a)(21) and 1081(c)(1)(A) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which amends the definition of “military judge.”

R.C.M. 103(16) is amended and implements Articles 19, 26a, and 30a, as amended by Sections 5163, 5185, and 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which authorizes the use of military magistrates; Article 30a was amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 103(17) is amended and clarifies the definition of “party” to include acting on behalf of a party in pre-referral and post-referral proceedings under these rules.

R.C.M. 103(22) is amended and aligns the definitions of “writings” and “recordings” with Mil. R. Evid. 1001.

2023 Amendment:

R.C.M. 103(10), (12), and (22) are added to implement definitions relevant to the establishment of the special trial counsel role created by Subtitle D of the National Defense Authorization Act for Fiscal Year 2022, Pub. Law. No. 117-81, 135 Stat. 1546 (2021) [hereinafter FY22 NDAA]. Other definitions are renumbered as appropriate without further amendment.

R.C.M. 103(23) Discussion is amended to reflect current statutory provisions.

8. Rule 104 is revised as follows:

Rule 104 Unlawful eCommand influence

This rule is taken from Rule 104 of the MCM (2016⁹ edition) ~~13825, 83 Fed. Reg. 9889 (March 1, 2018)~~, with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 104(b)(2)(B) is amended to reflect the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2022 Amendment:

The title of the rule is amended to reflect the change to Article 37. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. Law. No. 116-92, 133 Stat. 1359. The text of the rule is amended to implement changes to Article 37 as well as to clarify the role and responsibilities of special trial counsel.

2023 Amendment:

R.C.M. 104(a)(2)(B)(ix) is added to include “taking action on the findings or sentence.” and all subsequent paragraphs are redesignated.

9. Rule 105 is revised as follows:

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

This rule is taken from Rule 105 of the MCM (2016⁹ edition) without substantive the following amendment:

2023 Amendment:

R.C.M. 105 is updated to enable communication with special trial counsel.

10. Rule 106 is revised as follows:

Rule 106 Delivery of military offenders to civilian authorities

This rule is taken from Rule 106 of the MCM (2016⁹ edition) without substantive ~~the following amendment:~~ the Discussion accompanying R.C.M. 106 is amended to correct a cross-reference.

11. Rule 107 is revised as follows:

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

This rule is taken from Rule 107 of the MCM (2016⁹ edition) without substantive amendment.

12. Rule 108 is revised as follows:

Rule 108 Rule of court

This rule is taken from Rule 108 of the MCM (2016⁹ edition) without substantive amendment.

13. Rule 109 is revised as follows:

Rule 109 Professional supervision of military judges and counsel

This rule is taken from Rule 109 of the MCM (2016⁹ edition) without substantive ~~the following amendment:~~

2018 Amendment:

The title of R.C.M. 109 and its accompanying Discussions are amended and reflect Articles 6a and 26a, as added by Sections 5104 and 5185 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which adds military

magistrates to those judicial personnel included in procedures relating to the investigation and disposition of matters pertaining to the fitness of military judges, and authorizes the Judge Advocate General to certify the qualifications of military magistrates, respectively.

14. Rule 201 is revised as follows:

Rule 201 Jurisdiction in general

This rule is taken from Rule 201 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 201(b)(5) is amended and deletes a reference to R.C.M. 810(d).

R.C.M. 201(c), which addressed contempt, is deleted. See R.C.M. 809 for procedures and standards for contempt proceedings and the exercise of contempt authority by judicial officers under Article 98.

R.C.M. 201(f)(1)(A)(i), R.C.M. 201(f)(1)(D), and the Discussion accompanying R.C.M. 201(g) are amended to reflect the reorganization of the punitive articles in the Military Justice Act of 2016. See Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 201(f)(1)(D) and (f)(2)(D) are amended and eliminate redundancies and reflect the dates of applicability set forth in Section 1705(c) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 960 (2013).

The Discussion accompanying R.C.M. 201(f)(2)(D) is amended to update a citation.

R.C.M. 201(f)(2)(B)(ii) is amended and implements Articles 16 and 19, as amended by Sections 5161 and 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which eliminate special courts-martial without a military judge and authorize a convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

R.C.M. 201(f)(2)(E) and the accompanying Discussion are new and reflect Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes a convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

2022 Amendment:

R.C.M. 201(e) is amended to clarify the procedure for reciprocal jurisdiction among the services.

2023 Amendment:

The Discussion accompanying R.C.M. 201(b)(3) is amended to reflect a referral to a general court-martial or special court-martial, when done at the direction of a special trial counsel for covered offenses, does not make the convening authority an accuser for purposes of R.C.M. 307. See FY22 NDAA.

The Discussion accompanying R.C.M. 201(d)(3) is amended to reflect the document title of the memorandum of understanding (MOU) between the Department of Justice (DOJ) and Department of Defense at Appendix 3 and to note a similar MOU between the DOJ and the Department of Transportation for the U.S. Coast Guard at Appendix 4.

R.C.M. 201(f)(2)(C) is amended to account for referral of capital offenses by special trial counsel to special court-martial.

15. Rule 202 is revised as follows:

Rule 202 Persons subject to jurisdiction of courts-martial

This rule is taken from Rule 202 of the MCM (2016⁹ edition) without substantive ~~no~~ substantive ~~the following~~ amendments.

2018 Amendment:

Paragraph (1) of the Discussion accompanying R.C.M. 202(a) and the Discussion accompanying R.C.M. 202(c) are amended to reflect the reorganization of the punitive articles in the Military Justice Act of 2016. See Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

Paragraph (5) of the Discussion accompanying R.C.M. 202(a) is amended and reflects Article 2(a)(3), as amended by Section 5102 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which revises UCMJ jurisdiction over reservists to cover periods incident to inactive-duty training.

16. Rule 203 is revised as follows:

Rule 203 Jurisdiction over the offense

This rule is taken from Rule 203 of the MCM (2016⁹ edition) without ~~no~~ substantive ~~the following~~ amendments.

2018 Amendment:

The Discussion accompanying R.C.M. 203 is amended and adds a reference to R.C.M. 201(f) with respect to the punishment limitations applicable to specific types of courts-martial.

17. Rule 204 is revised as follows:

Rule 204 Jurisdiction over certain reserve component personnel

This rule is taken from Rule 204 of the MCM (2016⁹ edition) without ~~no~~ substantive ~~the following~~ amendments.

2018 Amendment:

R.C.M. 204(d) is amended and implements Article 2(a)(3), as amended by Section 5102 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which revises UCMJ jurisdiction over reservists to cover periods incident to inactive-duty training.

18. Rule 301 is revised as follows:

Rule 301 Report of offense

This rule is taken from Rule 301 of the MCM (2016⁹ edition) without ~~the following~~ substantive amendments.

2023 Amendment:

Subparagraph (c) is added to ensure special trial counsel are made aware of all allegations of covered offenses. Special trial counsel must exercise authority over a covered offense and has exclusive authority to determine whether a reported offense is a covered offense.

19. Rule 302 is revised as follows:

Rule 302 Apprehension

This rule is taken from Rule 302 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 302(a)(1) is amended and updates cross-references.

R.C.M. 302(e)(2)(A) is amended and updates cross-references to the Military Rules of Evidence.
R.C.M. 302(e)(2)(B) is amended and reflects exigent circumstances under which an apprehension may be made in a private dwelling.

2023 Amendment:

The Discussion accompanying R.C.M. 302(b)(3) is amended to replace “passion” with “possession.”

The Discussion accompanying R.C.M. 302(c) is amended to remove the proposition that “reasonable grounds” is equivalent to “probable cause.”

20. Rule 303 is revised as follows:

Rule 303 Preliminary inquiry into reported offenses

This rule is taken from Rule 303 of the MCM (2016⁹ edition) with the following amendment:

2018 Amendment:

The Discussion accompanying R.C.M. 303 is amended and reflects Section 1742 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980 (2013), which mandated that commanders refer reports of sex-related offenses involving members of the armed forces in their chain of command to the appropriate military criminal investigative organization.

2023 Amendment:

The rule is amended to ensure special trial counsel are made aware of all allegations of covered offenses. The Discussion accompanying the rule is amended to direct commanders to seek investigative assistance when appropriate.

21. A new Rule 303A is inserted immediately after Rule 303 and reads as follows:

Rule 303A Determination by special trial counsel to exercise authority

This rule is new and describes the initial determinations special trial counsel shall make prior to exercising authority over an offense.

22. Rule 304 is revised as follows:

Rule 304 Pretrial restraint

This rule is taken from Rule 304 of the MCM (2016⁹ edition) with the following amendment:

2018 Amendment:

The Discussion accompanying R.C.M. 304(a)(4) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 304(f) is added to ensure timely notice is given to special trial counsel when an accused suspected of a covered offense is placed under pretrial restraint. All other paragraphs are redesignated, without further amendment, to accommodate the addition of the new R.C.M. 304(f).

23. Rule 305 is revised as follows:

Rule 305 Pretrial confinement

This rule is taken from Rule 305 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 305 is amended throughout the rule and replaces the term “prisoner” with the term “confinee.”

The Discussion accompanying R.C.M. 305(a) is amended and reflects Article 12, as amended by Section 5122 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal

Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with respect to confinement of members of the armed forces in immediate association with enemy prisoners and other specified individuals.

R.C.M. 305(k) is amended and updates cross-references applicable to administrative credit against the sentenced adjudged for confinement served as a result of noncompliance with R.C.M. 305(f), (h), (i), or (j).

R.C.M. 305(m)(1) and (2) are amended and update cross-references.

The Discussion accompanying R.C.M. 305(m) is amended and clarifies that operational exceptions permitted to the requirements of certain provisions of R.C.M. 305 do not constitute exceptions to the requirements of Article 31(b).

The Discussion accompanying R.C.M. 305(n) is amended and clarifies the meaning of the term “victim of an alleged offense” as it pertains to this rule.

2022 Amendment:

R.C.M. 305(j), now R.C.M. 305(k), is amended to provide procedures for pre-referral review of a pretrial confinement determination.

2023 Amendment:

R.C.M. 305(f) is added to ensure timely notice is given to special trial counsel when an accused suspected of a covered offense is placed in pretrial confinement. All other paragraphs are redesignated, without further amendment, to accommodate the addition of the new R.C.M. 305(f).

24. Rule 306 is revised as follows:

Rule 306 Initial disposition for offenses over which special trial counsel does not exercise authority

This rule is taken from Rule 306 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 306(a) is amended and reflects that the Initial Disposition Authority for certain sex-related offenses is a commander in the grade of O-6 or above possessing at least special court-martial convening authority.

The Discussion accompanying R.C.M. 306(b) is amended and refers to the non-binding disposition guidance required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

The Discussion accompanying R.C.M. 306(c)(2) is relocated and accompanies R.C.M. 306(c)(1).

R.C.M. 306(e)(1) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 306(e)(3) is amended and clarifies that, under such regulations as the Secretary may prescribe, if no charges are preferred for an alleged sex-related offense, if the commander learns of any decision by civilian authorities to prosecute or not prosecute the offense in civilian court, the commander shall ensure the victim is notified.

2023 Amendment:

R.C.M. 306 is amended to articulate command authority to make an initial disposition determination on reported offenses when a special trial counsel is not exercising authority or has deferred.

25. A new Rule 306A is inserted immediately after Rule 306 and reads as follows:

Rule 306A Initial disposition for offenses over which special trial counsel exercises authority

2023 Amendment:

This rule is new and describes the manner in which special trial counsel disposes of offenses over which special trial counsel has exercised authority. Under R.C.M. 307(a), any person subject to the UCMJ may

prefer charges. If someone other than special trial counsel prefers charges for a covered offense, special trial counsel must exercise authority over that offense as soon as special trial counsel becomes aware of the preferral of charges. Special trial counsel has exclusive authority to dispose of preferred charges for covered offenses, and any other offenses over which special trial counsel has exercised authority, regardless of who preferred the charges.

26. Rule 307 is revised as follows:

Rule 307 Preferral of charges

This rule is taken from Rule 307 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 307(b) is amended and implements Article 30, as amended by Section 5201 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 307(c)(3) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016 and the addition of Appendix 12A with respect to lesser included offenses. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 307(c)(4) is amended and deletes the last sentence.

The Discussion accompanying R.C.M. 307(c)(4) is amended to address the differences between multiplicity and unreasonable multiplication of charges, and to alert practitioners that use of the phrase “multiplicity in sentencing,” is confusing and should be avoided. *See United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012).

2023 Amendment:

R.C.M. 307(b)(3) is added to clarify that preferral of charges by remote means is authorized.

27. Rule 308 is revised as follows:

Rule 308 Notification to accused of charges and required disclosures

This rule is taken from Rule 308 of the MCM (2016⁹ edition) with ~~out~~ the following amendments:

2023 Amendment:

R.C.M. 308(c) and (d) incorporate language regarding disclosures that were previously located in R.C.M. 404A(a)(1), (b), (c), and (d) in the MCM (2019 edition). Additionally, R.C.M. 308(c) specifically identifies the items accompanying the charges that are required for initial disclosure, and R.C.M. 308(d)(2) clarifies work product not subject to disclosure.

28. Rule 309 is revised as follows:

Rule 309 Pre-referral judicial proceedings

This rule is taken from Rule 309 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 309 is new and implements Article 30a, as added by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017), which establishes the matters that may be addressed by a military judge or military magistrate in a pre-referral proceeding.

2022 Amendment:

R.C.M. 309(a) is amended to limit the authority of the military judge in the pre-referral context.

R.C.M. 309(b)(3) clarifies the ability of a victim named in a specification to request relief from a

subpoena for personal and confidential information. Previously this ability was solely contained in R.C.M. 703(g)(3)(G).

R.C.M. 309(b)(4)-(10), now R.C.M. 309(5)-(11), are added to include matters which may be adjudicated at a pre-referral hearing under Article 30a.

2023 Amendment:

R.C.M. 309(b)(3) is added to allow a party to ask a military judge to consider whether to order a pre-referral deposition. R.C.M. 309(b)(3), now R.C.M. 309(b)(4), is amended to allow a request for relief from an order of a pre-referral deposition. All other paragraphs are redesignated, without further amendment, to accommodate the addition of the new R.C.M. 309(b)(3).

R.C.M. 309(e) is amended to ensure the record from any pre-referral hearing in a case involving special trial counsel is forwarded to special trial counsel.

29. Rule 401 is revised as follows:

Rule 401 Forwarding and disposition of charges in general

This rule is taken from Rule 401 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussions accompanying R.C.M. 401(b) and (c) are amended and refer to the non-binding disposition guidance required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

2023 Amendment:

R.C.M. 401 and the Discussions are amended to articulate command authority over the forwarding and disposition of charges when a special trial counsel has not exercised authority or has deferred.

30. A new Rule 401A is inserted immediately after Rule 401 and reads as follows:

Rule 401A. Disposition of charges over which a special trial counsel exercises authority and has not deferred

2023 Amendment:

R.C.M. 401A is new and describes the process special trial counsel must employ to dispose of preferred charges. A superior competent authority in this instance may include the Secretary concerned, the Lead Special Trial Counsel, or other supervisory special trial counsel.

31. Rule 402 is revised as follows:

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

This rule is taken from Rule 402 of the MCM (2016⁹ edition) ~~without amendment.~~ the following amendments:

2023 Amendment:

R.C.M. 402 is amended to clarify the role of special trial counsel.

32. Rule 403 is revised as follows:

Rule 403 Action by commander exercising summary court-martial jurisdiction

This rule is taken from Rule 403 of the MCM (2016⁹ edition) ~~without amendment.~~ the following amendments:

2018 Amendment:

The Discussions accompanying R.C.M. 403 are amended and update cross-references.

R.C.M. 403(b)(4) is amended and implements Article 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further

amended by Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which limits jurisdiction for certain sex-related offenses to general courts-martial.

2023 Amendment:

R.C.M. 402 is amended is amended to clarify the role of special trial counsel.

33. Rule 404 is revised as follows:

Rule 404 Action by Commander exercising special court-martial jurisdiction

This rule is taken from Rule 404 of the MCM (2016⁹ edition) without ~~amendment~~—the following amendments:

2018 Amendment:

R.C.M. 404(4) and the accompanying Discussion are amended and reflect Article 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further amended by Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which limits jurisdiction for certain sex-related offenses to general courts-martial.

2023 Amendment:

R.C.M. 402 is amended is amended to clarify the role of special trial counsel.

34. Rule 404A is revised as follows:

Rule 404A Initial Disclosures [Removed]

This rule is taken from Rule 404A of the MCM (2016 edition) with the following amendments:

2018 Amendment:

The rule is renamed “Initial disclosures.”

R.C.M. 404A(a) is amended and establishes the Government’s disclosure requirements at preferral of charges and at the direction of a preliminary hearing.

The Discussion accompanying R.C.M. 404A(c) is amended and updates a cross-reference.

The Discussion accompanying R.C.M. 404A(d) is amended and updates a reference.

2023 Amendment:

R.C.M. 404A is removed. The substance of the rule is incorporated into R.C.M. 308 and R.C.M. 405.

35. Rule 405 is revised as follows:

Rule 405 Preliminary hearing

This rule is taken from Rule 405 of the MCM (2016⁹ edition) without ~~amendment~~—the following amendments:

2018 Amendment:

R.C.M. 405 and the accompanying Discussions are amended and reflect Articles 6b, 30a, 32, 33, 46, and 47, as amended or added by Sections 5105, 5202, 5203, 5204, and 5229 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 6b is further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017). Article 30a is amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017).

The Discussions following R.C.M. 405(i)(2)(D), R.C.M. 405(j)(8), and R.C.M. 405(k)(3) are new and reflect that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside of the procedures set forth in R.C.M. 1113(b).

2022 Amendment:

R.C.M. 405(f), now R.C.M. 405(g), is amended to clarify the rights of the accused at a preliminary

hearing.

R.C.M. 405(h)(3)(B)(iii), now R.C.M. 405(i)(3)(B)(iii), is amended to clarify the use of an investigative subpoena for evidence not under the control of the Government during a preliminary hearing.

R.C.M. 405(i)(2)(A), now R.C.M. 405(j)(2)(A), is amended to change “any alleged victim’s sexual predisposition” to “the alleged victim’s sexual predisposition.” Additionally, subparagraph (i) is amended to replace “Mil. R. Evid. 412(b)(1)(A) or (B)” with “Mil. R. Evid. 412(b)(1) or (2),” and subparagraph (ii) is amended to remove “relevant” from the determination.

R.C.M. 405(j)(3), now R.C.M. 405(k)(3), is amended to clarify preliminary hearings should remain open to the public whenever possible, whether conducted in person or via remote means. R.C.M. 405(j)(4), now R.C.M. 405(k)(4), is amended to clarify the requirements for an accused to appear via remote means at a preliminary hearing.

2023 Amendment:

R.C.M. 405(c) is amended to clarify special trial counsel’s role in determining whether a preliminary hearing is required.

R.C.M. 405(d) is added to incorporate disclosures previously contained in R.C.M. 404A. Other paragraphs are renumbered to accommodate this addition.

R.C.M. 405(d), now R.C.M. 405(e), is amended to add that for preliminary hearings, special trial counsel shall detail counsel for the Government consistent with regulations prescribed by the Secretary concerned.

R.C.M. 405(e), now R.C.M. 405(f), is amended to require the preliminary hearing officer to provide notice to the convening authority and submit a copy of the preliminary hearing report to a special trial counsel if an uncharged covered offense is adduced during the preliminary hearing.

R.C.M. 405(k)(4) is amended to clarify that remote presence of the accused for a preliminary hearing is authorized.

36. Rule 406 is revised as follows:

Rule 406 Pretrial advice and special trial counsel determinations

This rule is taken from Rule 406 of the MCM (2016⁹ edition) ~~without amendment.~~ the following amendments:

2018 Amendment:

R.C.M. 406(a) and (b) and the accompanying Discussions are amended and reflect Article 34, as amended by Section 5205 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a convening authority to consult a judge advocate on relevant legal issues before referring charge(s) and specification(s) to a special court-martial and also prohibits a convening authority from referring charge(s) and specification(s) to a general court-martial unless a staff judge advocate provides written advice stating that the specification alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charges, and a court-martial would have jurisdiction over the accused and the offense. Prior to referring charge(s) and specification(s) to a general court-martial, the staff judge advocate is also required to provide a recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline. *See also* R.C.M. 601(d).

The Discussion accompanying R.C.M. 406(a) is amended and refers to the non-binding disposition guidance required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

2022 Amendment:

R.C.M. 406(c) is added to address distribution of written advice from the staff judge advocate if charges are referred to a general court-martial.

2023 Amendment:

R.C.M. 406(a)(2) is amended to incorporate R.C.M. 406A.

R.C.M. 406(c) is amended to account for the written determination made by special trial counsel if charges are referred to a general or special court-martial.

37. Rule 406A is revised as follows:

Rule 406A Pretrial advice before referral special court-martial [REMOVED]

2018 Amendment:

R.C.M. 406A is new and implements Article 34(b), as amended by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a convening authority to consult a judge advocate on relevant legal issues before referring charge(s) and specification(s) to a special court-martial.

The Discussion accompanying R.C.M. 406A(a) is amended and refers to guidance concerning disposition of charges and specifications required by Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). *See* Appendix 2.1.

2023 Amendment:

R.C.M. 406A is removed. The substance of the rule is incorporated into R.C.M. 406.

38. Rule 407 is revised as follows:

Rule 407 Action by commander exercising general court-martial jurisdiction

This rule is taken from Rule 407 of the MCM (2016⁹ edition) ~~without amendment—the following amendments:~~

2018 Amendment:

R.C.M. 407(a)(4) and the accompanying Discussion are amended and reflect Article 18, as amended by Section 1705(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), as further amended by Section 5162 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which limits jurisdiction over certain sex-related offenses to general courts-martial.

The Discussion accompanying R.C.M. 407(a)(6) is amended and refers to Sections 1744(b)-(d) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980 (2013), as amended by the Section 541 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3371 (2014), which require higher level review with respect to the referral of certain sex-related offenses to courts-martial.

2023 Amendment:

R.C.M. 407 is amended to clarify the role of special trial counsel.

39. Rule 501 is revised as follows:

Rule 501 Composition and personnel of courts-marital

This rule is taken from Rule 501 of the MCM (2016⁹ edition) ~~without substantive the following amendments:~~

2018 Amendment:

R.C.M. 501(a) and the accompanying Discussion are amended and reflect Articles 16, 25a, and 29, as amended by Sections 5161, 5183, and 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which require a set number of members for capital and non-capital general courts-martial and special courts-martial, eliminate special courts-martial without a military judge, establish a special court-martial consisting of a military judge alone with certain limitations on offenses and punishments, and authorize the convening authority to detail alternate members to general

and special courts-martial.

The Discussion accompanying R.C.M. 501(c) in the MCM (2016 edition), which addressed court reporters, is deleted.

40. Rule 502 is revised as follows:

Rule 502 Qualifications and duties of personnel of court-martial

This rule is taken from Rule 502 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 502(a)(1) is amended and implements Article 25, as amended by Section 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which permits a convening authority to detail enlisted members to general and special courts-martial without requiring a request for such members from an enlisted accused.

R.C.M. 502(a)(2) and the accompanying Discussion are amended and reflect Articles 29 and 53, as amended by Sections 5187 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes the convening authority to detail alternate members to general and special courts-martial and addresses sentencing for capital offenses.

R.C.M. 502(c) and the accompanying Discussion are amended and reflect Articles 26 and 26a, as amended and added, respectively, by Sections 5184 and 5185 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which establish qualifications and minimum tour lengths for trial judges and authorizes the Secretary concerned to establish a military magistrate program.

R.C.M. 502(d)(1) and (2) and the accompanying Discussion are amended and reflect Article 27, as amended by Section 5186 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with respect to the qualifications of trial counsel, assistant trial counsel, defense counsel, assistant and associate defense counsel, individual military counsel, civilian defense counsel, and counsel learned in the law applicable to capital cases.

R.C.M. 502(d)(3) and the accompanying Discussion are amended and address disqualification of appellate military judges and counsel for witnesses and victims.

The Discussion accompanying R.C.M. 502(d)(4) is amended and updates cross-references, reflects trial counsel's duties with regard to victims' rights, and reflects the elimination of special courts-martial without a military judge. *See* Articles 6b and 16, as amended by Sections 5105 and 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 6b is further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). Article 16 is further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 502(d)(5) is amended and clarifies defense counsel's duties in light of substantial changes to post trial and appellate practice in the Military Justice Act of 2016.

2023 Amendment:

R.C.M. 502(a)(2) is amended to account for changes in the sentencing procedures.

R.C.M. 502(d)(1)(C) is amended to require special trial counsel be detailed to all cases referred by a special trial counsel.

R.C.M. 502(d)(3)(A) is amended to clarify that a special trial is not disqualified as an accuser if special trial counsel has made a determination to prefer or refer charges in a case.

The Discussion accompanying R.C.M. 502(d)(4) is amended to clarify the convening authority is responsible for addressing irregularities in the convening orders and allied papers in all cases. For cases over which special trial counsel has exercised authority and has not deferred, special trial counsel is

responsible for addressing irregularities in the charges. For cases in which the convening authority has referred the charges, the convening authority is responsible for addressing irregularities in the charges.

41. Rule 503 is revised as follows:

Rule 503 Detailing members, military judge, and counsel, and designating military magistrates

This rule is taken from Rule 503 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 503(a)(1) and (2) and the accompanying Discussions are amended and reflect Articles 25, 25a, and 29, as amended by Sections 5182, 5183, and 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding detailing of members, excusal of members, and impanelment of alternate members.

R.C.M. 503(a)(4) is new and implements Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which permits a convening authority to refer charge(s) and specification(s) to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation.

R.C.M. 503(b)(4) is new and implements Articles 19 and 30a, as amended by Sections 5163 and 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and Article 30a is further amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017), which authorizes military judges to detail military magistrates, if authorized under regulations of the Secretary concerned, to preside over certain pre-referral proceedings and special courts-martial consisting of a military judge alone in specified circumstances.

R.C.M. 503(c)(1) is amended and implements Article 27, as amended by Section 5186 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), with respect to counsel learned in the law applicable to capital cases.

2023 Amendment:

R.C.M. 503(a)(1) is amended to reference Article 25, UCMJ, and to require the convening authority to provide a list of detailed members to the military judge to randomize in accordance with R.C.M. 911.

The Discussion accompanying R.C.M. 503(a)(1) is amended to require the convening authority to detail a sufficient number of qualified persons. In order to determine a sufficient number of qualified persons to detail to a court-martial, the convening authority, as advised by the staff judge advocate, should consider the following non-exclusive list of factors to ensure an adequate number of members remain after challenges: operational necessity; forum of the court-martial; availability of Article 25, UCMJ, qualified servicemembers available to the convening authority; anticipated awareness of, and knowledge regarding, the parties or facts of the case; and the capability to detail additional members to the convening order.

The Discussion accompanying R.C.M. 503(a)(2) is amended to remove the reference to member sentencing.

42. Rule 504 is revised as follows:

Rule 504 Convening courts-martial

This rule is taken from Rule 504 of the MCM (2016⁹ edition) with the following amendment:

2018 Amendment:

R.C.M. 504(d) is amended and aligns with the 2018 Amendments to R.C.M. 503(a).

2023 Amendment:

R.C.M. 504(c)(1) is amended to clarify a commanding officer shall not be considered an accuser solely due to the role of the commanding officer in convening a special or general court-martial to which charges and specifications were referred by a special trial counsel.

43. Rule 505 is revised as follows:

Rule 505 Changes of members, military judge, and counsel

This rule is taken from Rule 505 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 505(a) is amended and aligns with the 2018 Amendments to R.C.M. 503(b)(4) regarding military magistrates.

R.C.M. 505(b) is amended and aligns with the 2018 Amendments to R.C.M. 1202 regarding the certification of the record of trial.

R.C.M. 505(c)(2) is amended and aligns with the 2018 Amendments to R.C.M. 501 and 912A regarding fixed panel sizes in general and special courts-martial and the procedure for excusing excess members at impanelment. The Discussion accompanying R.C.M.505(c)(2) is new.

R.C.M. 505(e) is amended and describes the circumstances in which the military magistrate can be changed before and after assembly of the court-martial. The Discussion accompanying R.C.M. 505(e) is new.

R.C.M. 505(f) is amended and describes the circumstances in which good cause would exist to change the military magistrate.

2023 Amendment:

R.C.M. 505(c) is amended to specify the convening authority must follow the procedures in R.C.M 503(a) when detailing additional members to a court-martial.

44. Rule 506 is revised as follows:

Rule 506 Accused's rights to counsel

This rule is taken from Rule 506 of the MCM (2016⁹ edition) ~~without substantive the following amendment:~~

2018 Amendment:

R.C.M. 506(a) and the accompanying Discussion are amended and align with the 2018 Amendments to R.C.M. 502(d)(2)(C) regarding the detailing of defense counsel in capital cases.

45. Rule 601 is revised as follows:

Rule 601 Referral

This rule is taken from Rule 601 of the MCM (2016⁹ edition) ~~as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018)~~ with the following amendments:

2018 Amendment:

R.C.M. 601(a) is amended and clarifies that referral is the order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial.

R.C.M. 601(d) is amended and implements Article 34(b), as amended by Section 5205 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a convening authority to consult a judge advocate on relevant legal issues before referring charge(s) and specification(s) to a special court-martial and also prohibits a convening authority from referring charge(s) and specification(s) to a general court-martial unless a staff judge advocate provides written advice stating that the specification alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charges, and a court-martial would have jurisdiction over the accused and the offense. Prior to referring charge(s) and specification(s) to a general court-martial, the staff judge advocate is also required to provide a recommendation to the convening authority as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline. *See also* R.C.M. 406.

The Discussion accompanying R.C.M. 601(d)(1) is amended and references Appendix 2.1 (Non-binding disposition guidance), and reflects Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 601(d)(2) is new and reflects the opportunity of the accused to waive the preliminary hearing and the rules regarding waiver or forfeiture for failure to object to a defect under R.C.M. 601.

The Discussion accompanying R.C.M. 601(d)(3) is new and references limitations on referral of charges and specifications to special courts-martial.

R.C.M. 601(e)(1) is amended and implements Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), concerning referring charges and specifications in a capital case or in a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

2023 Amendment:

R.C.M. 601(a) is amended to allow for referral by special trial counsel.

The Discussion accompanying R.C.M. 601(a) deletes the reference to elements of referral of charges because it is no longer applicable to cases referred by a special trial counsel.

R.C.M. 601(b) is amended to allow for referral by special trial counsel.

R.C.M. 601(c) is amended to clarify special trial counsel is not disqualified from referring charges as a result of having preferred charges or having directed charges to be preferred.

R.C.M. 601(d) is amended to describe the process for referral of charges by special trial counsel.

R.C.M. 601(e) is amended to allow for referral by special trial counsel.

The Discussion accompanying R.C.M. 601(e) clarifies that special trial counsel is not authorized to refer a charge to a special court-martial consisting of military judge alone under Article 16(c)(2)(A). Additionally, the Discussion is amended to remove the language directing the convening authority to join charges or multiple accused and to refer all known charges to a single court-martial, as this guidance may interfere with special trial counsel's exclusive authority.

R.C.M. 601(g)(2) is added, and its Discussion is amended, to allow for a convening authority to transfer charges to a parallel convening authority within the limitations prescribed by the Secretary concerned to avoid interfering with special trial counsel's exclusive authority.

46. Rule 602 is revised as follows:

Rule 602 Service of charges

This rule is taken from Rule 602 of the MCM (2016⁹ edition) without substantive ~~the following~~ amendment:

2018 Amendment:

R.C.M. 602 is amended and implements Article 35, as amended by Section 5206 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) regarding the time periods applicable to service of charges and commencement of trial, and sets forth the consequences for defense failure to object to proceeding during the applicable period

47. Rule 603 is revised as follows:

Rule 603 Changes to charges and specifications

This rule is taken from Rule 603 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 603 and the accompanying Discussions are revised and clarify the definition of major and minor

changes that may be made to charges and specifications that have been referred to trial by court-martial, and the timing requirements for making such changes to the charges and specifications.

2023 Amendment:

R.C.M. 603(a) is amended to clarify the role of special trial counsel.

48. Rule 604 is revised as follows:

Rule 604 Withdrawal of charges

This rule is taken from Rule 604 of the MCM (2016⁹ edition) ~~without substantive amendment.~~ the following amendments:

2023 Amendment:

R.C.M. 604(a) and its Discussion are amended to clarify the role of special trial counsel.

49. Rule 701 is revised as follows:

Rule 701 Discovery

This rule is taken from Rule 701 of the MCM (2016⁹ edition) ~~as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018),~~ with the following amendments:

2018 Amendment:

The amendments to R.C.M. 701 clarify discovery practice in the military justice system. The amendments enhance efficiency and ensure the prompt disposition of offenses, while at the same time ensuring fairness to the accused and the equal opportunity of both the prosecution and defense to obtain witnesses and evidence guaranteed by Article 46.

R.C.M. 701(a) is amended and aligns with the 2018 Amendments to the disclosure provisions of R.C.M. 404A.

The Discussion accompanying R.C.M. 701(a) is new and addresses the purposes of discovery in the military justice system.

R.C.M. 701(a)(2)(A)(i) and (a)(2)(B)(i) are amended and specify the scope of trial counsel discovery obligations. The provisions broaden the scope of discovery, requiring disclosure of items that are “relevant” rather than “material” to defense preparation of a case, and adding a requirement to disclose items the government anticipates using in rebuttal.

R.C.M. 701(a)(3) and (5), and R.C.M. 701(b)(1)(A) and (C)(i) are amended and require the trial counsel and defense counsel to provide contact information, rather than addresses, of witnesses.

R.C.M. 701(a)(6)(D) is added and clarifies that trial counsel must disclose to defense counsel information adverse to the credibility of prosecution witnesses or evidence. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999) (duty to disclose evidence favorable to the defense applies even in the absence of a request by the defense and encompasses impeachment evidence as well as exculpatory evidence).

The Discussion accompanying R.C.M. 701(a)(6) is amended and reflects that trial counsel may disclose information earlier than required by R.C.M. 701 or in addition to that required by the rule; that trial counsel have a continuing duty to disclose information favorable to the defense and should exercise due diligence and good faith in learning about such evidence; and should not avoid pursuit of information that may be harmful to the prosecution’s case; and to update cross-references.

R.C.M. 701(b)(2) and the accompanying Discussion are amended and require that the defense provide notice of certain defenses in writing.

R.C.M. 701(b)(3) is amended and permits the trial counsel to copy or photograph the items listed for disclosure by the defense.

The Discussion accompanying R.C.M. 701(b)(5) is amended and updates cross-references.

The Discussion accompanying R.C.M. 701(d) is new and reflects that trial counsel should advise authorities involved in the case of their duty to identify, preserve, and disclose to trial counsel the information required to be disclosed under R.C.M. 701.

R.C.M. 701(e)(1) is amended and conforms to Article 6b, as amended by Section 5105 of the Military

Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 701(g)(2) is amended and clarifies the applicability of Part III of the Manual for Courts-Martial to the examination of materials by the military judge *in camera*. R.C.M. 701(g)(2) is further amended and clarifies the responsibilities of the military judge with respect to sealing materials and attaching materials examined to the record of trial.

The Discussion accompanying R.C.M. 701(g)(2) is new and addresses considerations relevant to the military judge's authority to regulate discovery in order to achieve the purposes of the Rule and reflects that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside the procedures set forth in R.C.M. 1113(b).

2023 Amendment:

R.C.M. 701(a)(1) is amended to clarify which papers accompanying the charges must be provided to defense as soon as practicable after service of charges.

50. Rule 702 is revised as follows:

Rule 702 Depositions

This rule is taken from Rule 702 of the MCM (2019 edition) with the following amendments:

This rule is taken from Rule 702 of the MCM (2016⁹ edition) with substantial amendments, clarifies the circumstances in which depositions may be ordered and their uses at trial, and reflects Article 49, as amended by Section 5231 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and the consequence for failure to object prior to or during a deposition, or to written interrogatories.

2023 Amendment:

R.C.M. 702(b) is amended to clarify who can order a deposition.

51. Rule 703 is revised as follows:

Rule 703 Production of witnesses and evidence

This rule is taken from Rule 703 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

This rule is taken from Rule 703 of the MCM (2016 edition) with substantial amendments and clarifies the procedures for requesting the production of witnesses and evidence at trial. The amendments are as follows:

R.C.M. 703(d) is amended and clarifies the distinction between expert witnesses and expert consultants. *See, e.g., United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005); *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989); *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991).

R.C.M. 703(g)(3)(C) and (D) and the Discussion accompanying R.C.M. 703(g)(3)(C) are new and reflect Article 46, as amended by Section 5228 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which authorizes the issuance of a pre-referral investigative subpoena under specified circumstances.

R.C.M. 703(g)(3)(C)(i) and (ii) and the accompanying Discussions are new. R.C.M. 703(g)(3)(C)(i) describes requirements for investigative subpoenas; R.C.M. 703(g)(3)(C)(ii) establishes a category of investigative subpoenas with respect to personal or confidential information of a victim consistent with the Fed. R. Crim. P. 17. This category of investigative subpoenas has special notice requirements, with appropriate exceptions for exceptional circumstances. The Discussion accompanying R.C.M. 703(g)(3)(C)(ii) also clarifies the meaning of the term "victim" for purposes of this provision.

R.C.M. 703(g)(3)(G) and (H) and the Discussion accompanying R.C.M. 703(g)(3)(H)(i) are amended and reflect Articles 30a and 46, as added and amended, respectively, by Sections 5202 and 5228 of the

Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which authorizes a military judge to review requests for relief from subpoenas prior to referral. Article 30a was amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 703(g)(4) is new and reflects that a request for subpoena may be accompanied by a request that the custodian of the evidence take all necessary step to preserve records and other evidence until such time as the items may be produced or inspected. *Cf. United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015).

2022 Amendment:

R.C.M. 703(d) is amended to require the Services to promulgate regulations for government and defense funding of expert witnesses and consultants.

R.C.M. 703(g)(3)(G), now R.C.M. 703(g)(3)(I), is amended to allow a named victim in a specification to request relief.

2023 Amendment:

R.C.M. 703(d)(2) is amended to change “shall” to “may” which recognizes defense may continue to request funding of expert witnesses and consultants by the Government. R.C.M. 703(d)(2)(A) is amended to expand the types of defense requests that may be raised before the military judge (previously the defense could only raise a “denied defense request” before the military judge). R.C.M. 703(d)(3) is added to require notice by both parties for expert witnesses.

R.C.M. 703(g)(3)(D) is added to allow defense to request a subpoena, after referral, for witnesses *ex parte* to the military judge and require the military judge to issue such subpoena if the witness’s testimony is determined to be relevant and necessary.

R.C.M. 703(g)(3)(E) is amended to account for the addition of R.C.M. 703(g)(3)(D).

R.C.M. 703(g)(3)(F) is added to account for the addition of R.C.M. 703(g)(3)(D) by requiring notice to all parties for any subpoena issued for a witness post-referral, unless the military judge issues a protective order.

All other paragraphs are shifted to accommodate the additions in R.C.M. 703(g)(3) without further amendment.

52. Rule 703A is revised as follows:

Rule 703A Warrant or order for wire or electronic communication

This rule is taken from Rule 703A of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 703A is new and implements Article 46, as amended by Section 5228 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which provides authority for a military judge to issue a warrant or order for the disclosure of the contents of electronic communications by a provider of an electronic communication service or a remote computing service. *See also* 18 U.S.C. §§ 2703 and 2711, as amended by Section 5228 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2022 Amendment:

R.C.M. 703A(a) is amended to remove time limits on storage in an electronic communications system and to clarify the warrants or orders a military judge can issue.

R.C.M. 703A(b)(5) is added to allow a military judge to quash or modify the warrant.

R.C.M. 703A(c) & (d) are modified to clarify the procedures for non-disclosure orders.

53. Rule 704 is revised as follows:

Rule 704 Immunity

This rule is taken from Rule 704 of the MCM (2016~~9~~ edition) with the following amendments:

2018 Amendment:

R.C.M. 704, as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), with the following amendments: The Discussion accompanying R.C.M. 704(d) is amended and updates cross-references and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. See Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 704(c) and its Discussion are amended to allow the lead special trial counsel (or designee) to grant immunity for offenses over which special trial counsel has exercised authority and not deferred.

R.C.M. 704(d)(1) is amended to allow the lead special trial counsel (or designee) to grant immunity.

R.C.M. 704(d)(2) is amended to move language from the Discussion into the rule and clarify that the convening authority, not the lead special trial counsel (or designee), shall order a person subject to the UCMJ who receives a grant of immunity, to answer questions pursuant to that grant of immunity.

R.C.M. 704(e) is amended to allow the lead special trial counsel (or designee) to grant immunity.

54. Rule 705 is revised as follows:

Rule 705 Plea agreements

This rule is taken from Rule 705 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 705 and the accompanying Discussions are substantially amended and reflect Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), and Articles 33, 56 and 60, as amended by Sections 5204, 5301 and 5321 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion following R.C.M. 705(d)(1)(C) is new and reflects the role of the military judge and the members in adjudging a sentence as part of a plea agreement.

R.C.M. 705(e) of the MCM (2016 edition) is renumbered as R.C.M. 705(f) and is amended and allows a military judge to notify a court-martial of the existence of a plea agreement upon either the request of an accused or to prevent a manifest injustice.

2022 Amendment:

R.C.M. 705(d)(1) is amended to allow the Secretary concerned to prescribe limitations pursuant to R.C.M. 705(a), and R.C.M. 705(d)(1)(D) is added to allow a plea agreement to include a specified sentence or portion of a sentence that shall be imposed by the court-martial.

2023 Amendment:

R.C.M. 705(a) and its Discussion are amended to account for plea agreements in cases over which special trial counsel has exercised authority and not deferred. Under Article 53a, UCMJ, such plea agreements may only be entered into between a special trial counsel and the accused. Such plea agreements shall be subject to the same limitations and conditions applicable to other plea agreements under Article 53a, UCMJ. However, upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties (including the convening authority and special trial counsel in the case of a plea agreement entered into under Article 53a(a)(3)) and the court-martial. R.C.M 705(a) requires plea agreements to be subject to limitations as prescribed by the Secretary concerned in order to provide clarity regarding the binding authority of a plea agreement.

R.C.M. 705(b) and its Discussion are amended to account for plea agreements in cases over which special trial counsel has exercised authority and not deferred. R.C.M. 705(b)(3) is added to allow a promise

by either the convening authority or special trial counsel to take other action within their authority to be included in the plea agreement.

R.C.M. 705(c) is amended to account for plea agreements in cases over which special trial counsel has exercised authority and not deferred.

R.C.M. 705(e) and its Discussion are amended to account for plea agreements in cases over which special trial counsel has exercised authority and not deferred.

55. Rule 706 is revised as follows:

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

This rule is taken from Rule 706 of the MCM (2016⁹ edition) ~~without substantive amendment.~~ with the following amendments:

2022 Amendment:

R.C.M. 706(b)(1) is amended to add authority for a military judge or magistrate to order an inquiry into the mental capacity or mental responsibility of an accused before referral, in accordance with R.C.M. 309.

R.C.M. 706(c)(3)(A) is amended to clarify the only counsel entitled to the board's ultimate conclusions are government and defense counsel.

2023 Amendment:

R.C.M. 706(b) is amended to allow any applicable convening authority to order an inquiry into the into the mental capacity or mental responsibility of an accused. An "applicable convening authority" means a convening authority with authority over the accused.

56. Rule 707 is revised as follows:

Rule 707 Speedy trial

This rule is taken from Rule 707 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 707(b)(3)(A) is amended and clarifies the effect of dismissal of charges or mistrial on the 120-day time period in which to bring a case to trial. The rule addresses both the circumstance where the accused, on the date of dismissal or mistrial, is under pretrial restraint and the circumstance where the accused, on the date of dismissal or retrial, is not under pretrial restraint. *See United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1997).

R.C.M. 707(e) is amended and clarifies the consequences of a plea of guilty on speedy trial issues as to the offense to which a plea of guilty is entered.

R.C.M. 707(f) is new and mandates that the trial of an accused held in pretrial restraint under R.C.M. 304(a)(3)-(4) be given priority, consistent with the Speedy Trial Act, *see* 18 U.S.C. § 3164 and Article 10, as amended by Section 5121 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2022 Amendment:

R.C.M. 707(c)(1) is amended to remove the language authorizing the Secretary concerned to prescribe regulations allowing for a military judge to resolve requests for pretrial delay.

R.C.M. 707(e) is amended to clarify the accused is waiving, not forfeiting, speedy trial issues by pleading guilty.

2023 Amendment:

R.C.M. 707(b)(3)(D) is amended to clarify when the 120-day time period for a rehearing begins for charges and specifications referred by special trial counsel.

R.C.M. 707(c)(1) and its Discussion are amended to require notification to the defense regarding pretrial delay requests. The rule is further amended by removing language from the Discussion and adding it to the rule to authorize the convening authority to delegate approval of pretrial delay requests to the preliminary hearing officer.

The Discussion accompanying R.C.M. 707(e) is removed.

57. Rule 801 is revised as follows:

Rule 801 Military judge’s responsibility; other matters

This rule is taken from Rule 801 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

The Discussion accompanying R.C.M. 801(a) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 801(a)(3) is amended and updates a cross-reference.

R.C.M. 801(a)(6) and the Discussion accompanying R.C.M. 801(a)(6)(E) are amended and reflect Article 6b, as amended by Section 5105 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(a), 1081(a)(22), and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). The Discussion accompanying R.C.M. 801(a)(6)(E) also clarifies the meaning of the term “victim of an offense under the UCMJ” as it pertains to this rule.

R.C.M. 801(e) and (f) are amended and reflect the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 801(e)(4) is amended and updates cross-references, and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 801(e)(5) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

58. Rule 802 is revised as follows:

Rule 802 Conferences

This rule is taken from Rule 802 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 802(a) is amended and reflects Article 30a, as added by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017), which provides the authority for military judges to preside over specified proceedings prior to referral.

Subsection (f) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further

amended by Section 1081(c)(1)(C) of the National Defense Authorization Act of 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

59. Rule 803 is revised as follows:

Rule 803 Court-martial sessions with members under Article 39(a)

This rule is taken from Rule 803 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 803 is amended and reflects the requirement for an entry of judgment in special and general courts-martial. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The last line of R.C.M. 803 is deleted and reflects the elimination of special courts-martial without a military judge. *See* Articles 16, 25, and 53, as amended by Sections 5161, 5182, and 5236, respectively, of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 1081(c)(1)(C) and 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 803 is amended and reflects changes to court-martial forums, the establishment of military judge alone sentencing as the default rule, and the elimination of special courts-martial without a military judge. *See* Articles 16, 25, and 53, as amended by Sections 5161, 5182, and 5236, respectively, of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 1081(c)(1)(C) and 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

60. Rule 804 is revised as follows:

Rule 804 Presence of the accused at trial proceedings

This rule is taken from Rule 804 of the MCM (2016⁹ edition) with the following amendment:

2018 Amendment:

The Discussion accompanying R.C.M. 804(a) is new and reflects the accused's entitlement to travel allowances for official travel to attend military justice proceedings.

R.C.M. 804(b) is amended and reflects the requirements of Article 39(b) with respect to remote proceedings and the physical presence of defense counsel with the accused, and prohibits the use of remote sessions for presentencing proceedings.

2022 Amendment:

R.C.M. 804(b) is amended to allow the use of remote sessions for presentencing proceedings under certain specified circumstances.

2023 Amendment:

The Discussion accompanying R.C.M. 804(c) is amended to remove the language not requiring the accused to consent to presence by remote means.

61. Rule 805 is revised as follows:

Rule 805 Presence of military judge, members, and counsel

This rule is taken from Rule 805 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 805(a) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5121 of the Military Justice Act of 2016, Division E of the National

Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 805(b) and the accompanying Discussion are amended and reflect Articles 16 and 25, as amended by Sections 5161 and 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which requires the use of fixed panel sizes, permits the accused the ability to request specified officer or enlisted composition, and permits the accused to elect sentencing by members, except where the court-martial is composed of a military judge alone.

R.C.M. 805(c) is amended and reflects the requirements of Article 39(b), with respect to remote proceedings and the physical presence of defense counsel with the accused, and prohibits the use of remote means to conduct presentencing proceedings.

The Discussion accompanying R.C.M. 805(c) is amended and updates cross-references.

R.C.M. 805(d) is amended and reflects Article 29(f), as amended by Section 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which provides the option of playing an audio recording of the trial to newly detailed panel members and judges.

2023 Amendment:

R.C.M. 805(a) is amended by deleting the option in Article 39(a) sessions for the military judge to satisfy the presence requirement through the use of audiovisual technology. This language is now incorporated in the amendments to R.C.M. 804(b).

The Discussion in R.C.M. 805(b) is amended to remove the reference to member sentencing.

R.C.M. 805(c) is amended to account for special trial counsel presence in cases where special trial counsel is detailed. A special trial counsel may determine his or her presence is not required, so long as another trial counsel, who is qualified according to R.C.M. 502(d), is present. The rule is also amended by deleting the option in Article 39(a) sessions for counsel to satisfy the presence requirement through the use of audiovisual technology. This language is now incorporated in the amendments to R.C.M. 804(b).

62. Rule 806 is revised as follows:

Rule 806 Public trial

This rule is taken from Rule 806 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 806(b)(1) is amended and deletes a provision addressing exclusion of spectators, which is now addressed in R.C.M. 806(b)(2).

R.C.M. 806(b)(2) is amended and addresses exclusion of spectators.

R.C.M. 806(b)(3) is amended and addresses the right of the victim not to be excluded. The Discussion accompanying R.C.M. 806(b)(3) is amended and addresses additional matters pertaining to victims, and clarifies the meaning of the term “victim of an alleged offense” as it pertains to this rule.

R.C.M. 806(b)(4) and (6) are deleted and the subject matter of those provisions is now addressed in a new R.C.M. 806(b)(3) and the accompanying Discussion.

R.C.M. 806(b)(5) is redesignated as R.C.M. 806(b)(4), and the accompanying Discussion is amended and updates cross-references.

R.C.M. 806(d) is amended and reflects the elimination of special courts-martial without a military judge. See Article 16, as amended by Section 5121 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

63. Rule 807 is revised as follows:

Rule 807 Oaths

This rule is taken from Rule 807 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

64. Rule 808 is revised as follows:

Rules 808 Record of trial

This rule is taken from Rule 808 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 808 is amended and updates a cross-reference.

The Discussion accompanying R.C.M. 808 is deleted in its entirety and the subject matter is covered by the 2018 Amendments to R.C.M. 1112.

65. Rule 809 is revised as follows:

Rule 809 Contempt proceedings

This rule is taken from Rule 809 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 809(a) and (b) and the Discussion accompanying R.C.M. 809(a) are amended and reflect Article 48(a), as amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which uses the term “judicial officer.” The use of the term reflects that judges are not detailed to courts of inquiry, and that judges serving on the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals are not “detailed” to those courts in the sense that military judges are “detailed” to courts-martial.

The Discussion following R.C.M. 809(a) is further amended and reflects that, since 2011, the contempt power includes “indirect” contempts in addition to “direct” contempts. *See* Article 48, as amended by Section 542 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4218 (2011), as further amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 809(d) is amended and reflects Article 48, as amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which provides for appellate review of contempt punishments when imposed by military judges and military magistrates.

R.C.M. 809(e) is amended and addresses when execution of a sentence of contempt begins to run or becomes effective and the permissible maximum punishments that may be imposed for contempt *See* Article 48, as amended by Section 542 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4218 (2011), as further amended by Section 5230 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 809(f) is amended and reflects that judicial officers may exercise contempt authority and requires that a person held in contempt be informed of the procedures for review of a finding of contempt. *See* Article 48, as amended by Section 5230 of the Military Justice Act of 2016, Division E of the National

Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(F) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

66. Rule 810 is revised as follows:

Rule 810 Procedures for rehearings, new trials, other trials, and remands

This rule is taken from Rule 810 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 810(a)-(d) and the accompanying Discussions are amended and reflect Article 63, as added by Section 5327 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(i) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which addressed the limitations on sentences at rehearing's.

R.C.M. 810(f) is new and reflects Article 66(f)(3), as amended by Section 5330 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(j) and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), and reflects, but does not expand, current practice regarding *DuBay* hearings. *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

2023 Amendment:

R.C.M. 810 is amended to account for rehearings in cases over which special trial counsel has exercised authority. Specifically, R.C.M. 810(f) adds a requirement to notify special trial counsel because special trial counsel exercises exclusive authority to determine whether an ordered rehearing is impracticable.

67. Rule 811 is revised as follows:

Rule 811 Stipulations

This rule is taken from Rule 811 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

68. Rule 812 is revised as follows:

Rule 812 Joint and common trials

This rule is taken from Rule 812 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

The Discussion accompanying R.C.M. 812 is amended and addresses the differences between a joint and a common trial. *See Major Robert S. Stubbs II, USMC, Joint and Common Trials*, 1956 JAG Journal 16 (September-October).

69. Rule 813 is revised as follows:

Rule 813 Announcing personnel of the courts-martial and the accused

This rule is taken from Rule 813 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 813(a)(3) is amended and reflects the elimination of special courts-martial without a military judge. *See Article 16*, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 813 is amended to omit from announcement during the opening session of the court-martial, the name, rank, or position of the convening authority, with the exception of the Secretary concerned, the Secretary of Defense, or the President.

70. Rule 901 is revised as follows:

Rule 901 Opening session

This rule is taken from Rule 901 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

The Discussion following R.C.M. 901(a) is amended and provides a cross-reference reflecting applicable waiting periods between service of charges and commencement of trial by special and general courts-martial. *See* Article 35, as amended by Section 5206 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 901(d)(2) and the Discussion accompanying R.C.M. 901(d)(3) are amended and reflect Article 27, as amended by Section 5186 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) which requires, to the greatest extent practicable, that at least one defense counsel in a capital case be learned in the law applicable to capital cases.

R.C.M. 901(e) is amended and provides for the conduct of designated procedures without the members present, and to reflect the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

71. Rule 902 is revised as follows:

Rule 902 Disqualification of military judge

This rule is taken from Rule 902 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 902(c)(1) is amended and reflects Article 30a, as added by Section 5202 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(b) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 155-91, 131 Stat. 1283 (2017), which provides limited pre-referral authority to the military judge.

R.C.M. 902(c)(3) is deleted and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 902(b)(3) is amended to clarify that a military judge is disqualified if the military judge has previously referred any charges as the special trial counsel in that case.

72. Rule 902A is revised as follows:

Rule 902A Application of sentencing rules [Removed]

2018 Amendment:

R.C.M. 902A is new and implements Section 5542 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which establishes effective dates for the amendments made by the Military Justice Act of 2016 and authorizes the President to prescribe regulations regarding applicable sentencing rules. R.C.M. 902A applies in cases where charges were referred to trial by court-martial after the effective date designated by the President for offenses allegedly committed both before and on or after the effective date. (Note, see text of Section 531(o), NDAA 2018)

2023 Amendment:

R.C.M. 902A is removed. The substance of the rule is incorporated into the new R.C.M. 925.

73. Rule 903 is revised as follows:

Rule 903 Accused’s elections on composition of court-martial

This rule is taken from Rule 903 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 903 and its accompanying Discussion are amended and reflect Article 25, as amended by Section 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which permits an accused to elect trial by military judge alone or by members, and, if the accused is enlisted, trial by a panel with at least one-third enlisted members or by an all-officer panel, and the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

74. Rule 904 is revised as follows:

Rule 904 Arraignment

This rule is taken from Rule 904 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

The Discussion accompanying R.C.M. 904 is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

75. Rule 905 is revised as follows:

Rule 905 Motions generally

This rule is taken from Rule 905 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 905(b)(3) and (4) and R.C.M. 905(d) is amended and cross-references are updated.

R.C.M. 905(e) is amended and clarifies the applicability throughout the Manual of the concepts of waiver and forfeiture.

R.C.M. 905(f) and the Discussion accompanying R.C.M. 905(d) are amended to reflect the requirement for an entry of judgment in special and general courts-martial and the elimination of authentication of the record of trial. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E

of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 905(h) is amended and authorizes the military judge to exercise his or her discretion to determine whether an Article 39(a) session is necessary for the resolution of a motion.

2023 Amendment:

R.C.M. 905(e)(2) is amended to now require a motion for failure of a charge to allege an offense to be raised before adjournment.

The Discussion to R.C.M. 905(g) is amended to account for special trial counsel.

76. Rule 906 is revised as follows:

Rule 906 Motions for appropriate relief

This rule is taken from Rule 906 of the MCM (2016⁹ edition) with the following amendments.

2018 Amendment:

R.C.M. 906(b)(4) is amended and clarifies the provisions governing amendment of charges after referral.

The Discussion accompanying R.C.M. 905(b)(5) is amended and updates a cross-reference and reflects the addition of Appendix 12A with respect to lesser included offenses. *See* Article 79, as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 906(b)(7) is amended and updates a cross-reference.

R.C.M. 906(b)(10) is amended and addresses the standards applicable to severance of charges in capital and non-capital cases.

R.C.M. 906(b)(12) and the accompanying Discussion are amended and clarify the remedies available to address findings of unreasonable multiplication of charges in light of the requirement for segmented sentencing by military judges. *See* Article 56, as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 906(b)(3) is amended to account for written determinations made by special trial counsel.

The Discussion accompanying R.C.M. 906(b)(10) is amended to delete the statement that all known charges should ordinarily be tried at a single court-martial.

R.C.M. 906(b)(12) is amended to delete references to member sentencing and move language from the Discussion to the rule stating the ruling ordinarily should be deferred until after findings are entered.

77. Rule 907 is revised as follows:

Rule 907 Motions to dismiss

This rule is taken from Rule 907 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 907(b)(2)(C) and the accompanying Discussion are amended and reflect Article 44, as amended by Section 5226 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the point when jeopardy attaches in a court-martial.

R.C.M. 907(b)(2)(D)(iii) is deleted and R.C.M. 907(b)(2)(D)(iv) is redesignated as R.C.M. 907(b)(2)(D)(iii).

78. Rule 908 is revised as follows:

Rule 908 Appeal by the United States

This rule is taken from Rule 908 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 908(a) is amended and implements Article 62, as amended by Section 5326 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(h) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which authorizes a Government appeal when a military judge sets aside a panel's guilty verdict. The Discussion accompanying R.C.M. 908(a) is new.

R.C.M. 908(b)(5) is amended and implements Article 54, as amended by Section 5238 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires the certification of the record of trial.

The Discussion accompanying R.C.M. 908(b)(7) is new and reflects changes to the jurisdiction of the Courts of Criminal Appeals. See Article 66(b), as amended by Section 5330 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(j) and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which provides that the Courts of Criminal Appeals maintain jurisdiction to review a case under Article 66(b) regardless of the sentence imposed when the government has filed an appeal under Article 62 or Article 56.

The Discussion accompanying R.C.M. 908(c) is new and reflects that the Government may appeal a sentence under certain circumstances and utilizing certain procedures. See Article 56, as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 908(d) of the MCM (2016 edition) is deleted and reflects the elimination of special courts-martial without a military judge. See Article 16, as amended by Section 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 908(b)(6) is amended to move the requirement that The Judge Advocate General decides whether to file the appeal with the Court of Criminal Appeals to R.C.M. 908(b)(7).

R.C.M. 907(b)(7) is amended to clarify who is responsible for determining whether to file an appeal on behalf of the United States.

The Discussion accompanying R.C.M. 908(c) is amended to allow the lead special trial counsel to request The Judge Advocate General certify a case to the Court of Appeals for the Armed Forces.

79. Rule 909 is revised as follows:

Rule 909 Capacity of the accused to stand trial by court-martial

This rule is taken from Rule 909 of MCM (2016⁹ edition) ~~without amendment.~~ with the following amendments:

2022 Amendment:

R.C.M. 909(c)(2), now R.C.M. 909(c)(3), is added to permit the government or the accused to request the military judge conduct a hearing to determine the mental capacity of the accused any time prior to referral.

2023 Amendment:

R.C.M. 909(c)(2) is added to clarify that the convening authority, not the special trial counsel, takes action on the results of an inquiry under R.C.M. 706.

R.C.M. 909(g) is amended to account for cases in which special trial counsel has exercised authority and not deferred.

80. Rule 910 is revised as follows:

Rule 910 Pleas

This rule is taken from Rule 910 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 910(a)(1) is amended and implements Article 45, as amended by Section 5227 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which permits a military judge to accept a guilty plea in a capital case except where death is the mandatory punishment. Although the 2016 Amendments eliminated the sentence of death as a mandatory punishment for any offense, the prohibition against accepting a guilty plea in a capital case where death is the mandatory punishment is retained.

The Discussion accompanying R.C.M. 910(a)(1) is amended and reflects the addition of Appendix 12A with respect to lesser included offenses and reflects that no offenses carry a mandatory penalty of death. *See* Article 79, as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 910(c)(1) and the accompanying Discussion are amended and reflect changes to plea agreements and the sentencing proceeding in courts-martial. *See* Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017); and Article 56, as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 910(c)(6) and the accompanying Discussion are new and reflect forum options for sentencing under the Military Justice Act of 2016. *See* Articles 53 and 56, as amended by Sections 5236 and 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 910(f) and the accompanying Discussions are amended and reflect changes to plea agreement practice in the military as a result of the Military Justice Act of 2016. *See* Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 910(g) is amended and implements Articles 45 and 19, as amended by Sections 5227 and 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which removed the requirement for the Services to maintain separate rules authorizing entry of a finding of guilty without a vote when a guilty plea has been accepted and eliminated special courts-martial without a military judge.

R.C.M. 910(h) is amended by deleting paragraph (3) and reflects the manner in which the military judge addresses the plea agreement under R.C.M. 910(f).

R.C.M. 910(i) is deleted. The requirement for a certified record of guilty plea proceedings is governed by R.C.M. 1112, 1114 and 1305.

R.C.M. 910(j) is redesignated as 910(i) and reflects the application of plain-error review to errors concerning guilty pleas raised for the first time on appeal. *See* Article 45, as amended by Section 5227 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2022 Amendment:

R.C.M. 910(f)(8) is added to establish the criteria a military judge shall use to reject a plea agreement.

R.C.M. 910(j) is amended to add that an accused waives any objections for non-jurisdictional defects in a plea of guilty.

2023 Amendment:

R.C.M. 910(a) and its Discussion are amended to remove references to guilty pleas in cases in which death is the mandatory punishment.

The Discussions accompanying R.C.M. 910(f)(5) and (g) are amended to delete the reference to member sentencing.

The Discussion accompanying R.C.M. 910(j) is amended to change “forfeiture” to “waiver” and remove the “harmless error” standard.

81. Rule 911 is revised as follows:

Rule 911 ~~Assembly of the court-martial~~ Randomization and assembly of the court-martial panel

This rule is taken from Rule 911 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 911 is amended and authorizes the convening authority to refer charges to a special court-martial consisting of a military judge alone under such limitations as the President may prescribe by regulation, and updates a cross-reference. *See* Articles 16 and 19, as amended by Sections 5161 and 5163 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2023 Amendment:

R.C.M. 911 is amended to require randomization of court-martial members prior to assembly. Additionally, the amended rule describes the role of the military judge in the randomization process, to include determining how many members must be present at the initial session, how to temporarily excuse members, and how to cause members to be sworn before announcing the assembly of the court-martial.

R.C.M. 911(g) is amended to account for the randomization process in R.C.M. 911 and clarifies each party is entitled to a peremptory challenge when additional members not previously subject to peremptory challenge are present and sworn.

The Discussion accompanying R.C.M. 911 is amended to delete reference to the order in which members are sworn at a court-martial.

82. Rule 912 is revised as follows:

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

This rule is taken from Rule 912 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 912(a)(1) is amended and reflects the authority of the convening authority to detail alternate members. *See* Article 29, as amended by Section 5187 the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 912(a)(1) is amended and updates a cross-reference.

R.C.M. 912(b)(3) is amended and clarifies that failure to make a timely motion challenging the selection of the members shall forfeit, but not waive, the improper selection, except in specified

circumstances where the failure to make a timely motion neither forfeits nor waives the improper selection.

R.C.M. 912(f)(4) is amended and implements Article 25, as amended by Section 5182 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which eliminates the prohibition against detailing enlisted members from the same unit.

The Discussion accompanying R.C.M. 912(f)(4) is amended and updates a cross-reference.

R.C.M. 912(f)(5) is new and addresses the assignment of random numbers to members following challenges for cause for the purpose of impaneling members and alternate members as set forth in R.C.M. 912A.

The Discussion accompanying R.C.M. 912(g)(2) is amended and reflects the requirement for a specified number of members in special and general courts-martial. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 912(h) of the MCM (2016 edition) is deleted and R.C.M. 912(i) is redesignated as R.C.M. 912(h). This reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

83. Rule 912A is revised as follows:

Rule 912A Impaneling members and alternate members

This rule is taken from Rule 912A of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 912A is new and implements Articles 16, 25, and 29, as amended by Sections 5161, 5182, and 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the process for impaneling members after challenges for cause and peremptory challenges, and the process for impaneling alternate members if authorized by the convening authority. Article 16 was further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2022 Amendment:

R.C.M. 912A(d)(3)(C) is added to allow the convening authority to instruct the military judge to prioritize impaneling a specific number of alternate enlisted members before impaneling alternate officer members.

2023 Amendment:

R.C.M. 912A(a) is amended to account for the randomization process in R.C.M. 911. Additionally, R.C.M. 912A(a)(4) is amended to prevent notifying alternate members they are alternate members until the start of deliberations.

R.C.M. 912A(c) and (d) are amended to describe how the military judge orders additional detailed members to be present at the court-martial when the number of members is insufficient.

84. Rule 912B is revised as follows:

Rule 912B Excusal and replacement of members after impanelment

This rule is taken from Rule 912B of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 912B is new and implements Article 29, as amended by Section 5187 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which prescribes the process by which impaneled members may be excused and replaced by alternate members or additionally detailed members.

2023 Amendment:

R.C.M. 912B(a) and (b) are amended to clarify member excusal and impanelment of alternate members can only occur prior to the start of deliberations.

R.C.M. 912B(d) is added to require the military judge to declare a mistrial if, after the court has closed for deliberations, the number of members falls below the requirements of Article 29, UCMJ.

85. Rule 913 is revised as follows:

Rule 913 Presentation of the case on the merits

This rule is taken from Rule 913 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without amendment.

2018 Amendment:

The Discussion to R.C.M. 913(c)(2) is amended and updates a cross-reference.

The Discussion to R.C.M. 913(c)(3) is amended and deletes the first sentence, which reflected that views and inspections should be permitted only in extraordinary circumstances.

86. Rule 914 is revised as follows:

Rule 914 Production of statements of witnesses

This rule is taken from Rule 914 of MCM (2016⁹ edition) ~~without substantive the following amendments:~~

2022 Amendment:

R.C.M. 914(e) is amended to address situations in which there is a failure to produce a statement in good faith.

2023 Amendment:

R.C.M. 914(e) is amended to change “trial counsel” to “Government.”

87. Rule 914A is revised as follows:

Rule 914A Use of remote live testimony of a child

This rule is taken from Rule 914A of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

88. Rule 914B is revised as follows:

Rule 914B Use of remote testimony

This rule is taken from Rule 914B of MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

89. Rule 915 is revised as follows:

Rule 915 Mistrial

This rule is taken from Rule 915 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

The Discussion accompanying R.C.M. 915(b) is deleted and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military

Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

90. Rule 916 is revised as follows:

Rule 916 Defense

This rule is taken from Rule 916 of MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 916(e)(2)(B) is amended to align with Article 128, as amended by Section 5441 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by 1081(c)(1)(P) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 916(e)(3) and (5) and the Discussion accompanying R.C.M. 916(j) and R.C.M. 916(l)(2) are amended and reflect the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 916(k)(1) is amended and updates a cross-reference.

R.C.M. 916(k)(3)(B) and the accompanying discussion are amended and reflect the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2022 Amendment:

R.C.M. 916(e)(2) is amended to change “assault with a dangerous weapon or means likely to produce death or grievous bodily harm” to “aggravated assault.”

R.C.M. 916(e)(3) and (e)(5) are amended to include Article 128b, UCMJ.

91. Rule 917 is revised as follows:

Rule 917 Motion for finding of not guilty

This rule is taken from Rule 917 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 917(a) is amended and allows a military judge to rule on a motion under R.C.M. 917 after a panel returns findings, similar to the practice in U.S. District Court. *See* Fed. R. Crim. P. 29; *United States v. Wilson*, 420 U.S. 332 (1975).

The Discussion accompanying R.C.M. 917(a) is new and refers to R.C.M. 908(a) concerning the ability of the Government to file an interlocutory appeal when the military judge sets aside a panel’s finding of guilty. *See* Article 62, as amended by Section 5326 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(h) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

The Discussion accompanying R.C.M. 917(c) is amended and reflects the elimination of special courts-martial without a military judge. *See* Article 16, as amended by Section 5161 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(C) of the National Defense Authorization

Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 917(f) is amended and permits the military judge to reconsider a denial of a motion for a finding of not guilty at any time before entry of judgment. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

92. Rule 918 is revised as follows:

Rule 918 Finding

This rule is taken from Rule 918 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 918(a)(1) is amended and clarifies when the fact finder may consider a lesser included offense if the evidence fails to prove the offense charged. *See* Article 79, as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 918(a)(2) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 918(b) is amended and requires the entry of special findings prior to the entry of judgment. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2023 Amendment:

R.C.M. 918(a)(1)(B) is amended to remove “named” before “lesser included offenses.”

93. Rule 919 is revised as follows:

Rule 919 Argument by counsel on findings

This rule is taken from Rule 919 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 919(c) is amended and addresses the consequences of a failure to object to error in argument.

94. Rule 920 is revised as follows:

Rule 920 Instructions on findings

This rule is taken from Rule 920 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion accompanying R.C.M. 920(e) is amended and reflects the two statutory grounds by which to designate an offense as lesser included: those offenses that are “necessarily included” in the greater offense, and those offenses designated in regulations prescribed by the President that are “reasonably included” in the greater offense. *See* Article 79, as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 920(f) is amended and addresses the consequences of a failure to object to an instruction or the omission of an instruction.

2022 Amendment:

R.C.M. 920(g) is added to prohibit instructions on a lesser included offense when both parties agree to its waiver.

2023 Amendment:

R.C.M. 920(g) is amended to delete “the reading of” from before “a lesser included offense instruction.”

95. Rule 921 is revised as follows:

Rule 921 Deliberations and voting on findings

This rule is taken from Rule 921 of the MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

2018 Amendment:

R.C.M. 921(c) and the accompanying Discussion are amended and reflect Article 52, as amended by Section 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), concerning voting on findings in a non-capital case.

96. Rule 922 is revised as follows:

Rule 922 Announcement of findings

This rule is taken from Rule 922 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 922(a) is amended and conforms to Article 53, as amended by Section 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 922(b) and the accompanying Discussion are amended and conform to changes regarding the acceptance of guilty pleas by the military judge and the announcement of findings by the members.

2023 Amendment:

The Discussion accompanying R.C.M. 922(a) is deleted.

97. Rule 923 is revised as follows:

Rule 923 Impeachment of findings

This rule is taken from Rule 923 of MCM (2016⁹ edition) ~~with the following amendments:~~ without substantive amendment.

98. Rule 924 is revised as follows:

Rule 924 Reconsideration of findings

This rule is taken from Rule 924 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 924(b) is amended and implements Article 52, as amended by Section 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which reflects the changes in voting requirements. The subsection is also amended and reflects the elimination of any provisions imposing a mandatory death penalty.

R.C.M. 924(c) is amended and reflects the requirement for an entry of judgment and the elimination of authentication of the record of trial. *See* Article 60c, as added by Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2023 Amendment:

R.C.M. 924(c)(2) is amended to replace “in the case of a complete acquittal” with “where there are no findings of guilt.”

99. A new Rule 925 is inserted immediately after Rule 924 and reads as follows:

Rule 925 Application of sentencing rules

This rule is new and identifies which sentencing rules apply at a court-martial.

2023 Amendment:

R.C.M. 925 determines the applicable sentencing rules based on the date of an offense for which the accused has been found guilty. If the accused is convicted of any offense committed on or before 27 December 2023, then the court-martial shall follow the sentencing rules in effect at the time of the offense. R.C.M. 902A(d), regarding the accused's irrevocable election made prior to arraignment, is no longer applicable. If the accused is convicted only of offenses occurring after 27 December 2023, then the court-martial shall follow R.C.M. 925(c)(2), and the military judge shall sentence the accused.

100. Rule 1001 is revised as follows:

Rule 1001 Presentencing procedure

This rule is taken from Rule 1001 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1001 is amended and implements Articles 25, 53 and 56, as amended by Sections 5182, 5236, and 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). R.C.M. 1001(b)(1), (b)(2), and (h) set forth the consequences for failure to object to matters presented by the prosecution or argument on sentence.

The Discussion following R.C.M. 1001(b)(3)(C) is amended and reflects the new requirement for the entry of judgment in R.C.M. 1111.

R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the MCM (2016 edition).

2023 Amendment:

R.C.M. 1001(a)(1) is amended to remove the reference to the accused's sentencing election.

R.C.M. 1001(b)(4) is amended to include additional aggravating factors, such as pregnancy and gender identity.

R.C.M. 1001(c)(2) is amended to add the right for a crime victim to be heard on any objection to an unsworn statement.

R.C.M. 1001(c)(3) is amended to remove the prohibition that a crime victim's statement not include a recommendation of a specific sentence. However, R.C.M. 1001(c)(2) is amended to prohibit a crime victim's statement in a capital case from including a recommendation on a specific sentence.

R.C.M. 1001(c)(5) is amended to allow a crime victim's unsworn statement to be made by the crime victim, counsel representing the crime victim, or both.

R.C.M. 1001(f)(1) is amended to clarify that during presentencing proceedings, a dispute as to the production of a witness at Government expense is a matter within the discretion of the military judge.

R.C.M. 1001(h) is amended to specify trial counsel's argument may not speak for the convening authority or any other higher authority, including the OSTC or OSTC leadership.

101. Rule 1002 is revised as follows:

Rule 1002 Sentencing determination

This rule is taken from Rule 1002 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

This rule and its accompanying Discussions amend R.C.M. 1002 of the MCM (2016⁹ edition) in its entirety and implement Articles 25, 53, 53a, and 56, as amended by Sections 5182, 5236, 5237, and 5301

of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which provides an accused the option to elect sentencing by members in lieu of sentencing by military judge in a general or special court-martial with a military judge and members; reflects that sentences adjudged by a military judge shall provide for segmented sentences of confinement and fines; and sets forth statutory guidance for determining an appropriate sentence. Article 53a was further amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

Article 56 was further amended by Section 531(e) the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 1002(a)(2) is added to incorporate sentencing parameters and criteria. R.C.M. 1002(a)(2), now R.C.M. 1002(a)(3), is amended to clarify when a military judge may reject a plea agreement, in accordance with the FY22 NDAA, Sec. 539E.

R.C.M. 1002(b) – (d) are amended and combined into subsection (b), deleting all references to sentencing forum selection and sentencing by members in noncapital cases.

R.C.M. 1002(e) is incorporated into an updated R.C.M. 1004.

The remaining sections are renumbered accordingly.

102. Rule 1003 is revised as follows:

Rule 1003 Punishments

This rule is taken from Rule 1003 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1003(b)(2) is amended by adding the last sentence, which is consistent with *United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

R.C.M. 1003(c)(1)(C) is amended and removes discussion of the available remedies for Multiplicity and Unreasonable Multiplication of Charges. Such remedies are addressed in R.C.M. 906(b)(12).

The discussion immediately following R.C.M. 1003(c)(1)(C) is replaced with language directing practitioners to R.C.M. 906(b)(12).

2022 Amendment:

R.C.M. 1003(b) is amended to clarify when forfeitures greater than two-thirds' pay may be imposed.

R.C.M. 1003(c)(2)(A)(ii) is deleted and the remaining subsections are renumbered. Under the amended rule, a commissioned or warrant officer or a cadet or midshipman can be sentenced to confinement by a special or general court-martial.

2023 Amendment:

R.C.M. 1003(b) is amended to clarify the maximum restriction that may be adjudged is two months.

103. Rule 1004 is revised as follows:

Rule 1004 Capital cases

This rule is taken from Rule 1004 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1004(a)(2) is amended and implements Articles 45 and 52, as amended by Sections 5227 and 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1004(b)(4) is amended and clarifies that the members must find unanimously that at least one of the aggravating factors under subsection (c) existed beyond a reasonable doubt before death may be adjudged.

R.C.M. 1004(b)(6) is amended and requires that the military judge instruct the members of the charges and specifications for which they shall determine a sentence, because the accused has the option to choose

sentencing by members, rather than the military judge, for those charges and specifications for which death may not be adjudged, in accordance with R.C.M. 1002(b)(2).

A Discussion is added after R.C.M. 1004(b)(6) and addresses an accused's right to elect sentencing by members in lieu of sentencing by military judge. *See* Articles 25 and 53 as amended by Sections 5182 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1004(b)(7) is amended and reflects the requirement that members must unanimously concur in a finding of the existence of at least one aggravating factor and unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances before a sentence of death may be considered.

R.C.M. 1004(c)(3) is amended and deletes the reference to Article 120.

R.C.M. 1004(c)(4) is amended and deletes the reference to Article 120 and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(c)(6) is amended and deletes the reference to Article 120.

R.C.M. 1004(c)(7)(B) is amended and adds the phrase “a separate murder, or” and deletes the reference to forcible sodomy and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(c)(8) is amended and deletes the reference to forcible sodomy and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(c)(9) is deleted.

R.C.M. 1004(c)(11) is amended and reflects the reorganization of the punitive articles. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1004(d) is deleted and subsection “(e)” is redesignated as subsection “(d)” and reflects the reorganization of the punitive articles and the removal of the mandatory death penalty for spying. *See* Section 5414 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)(eliminating mandatory death penalty for spying). *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 1004 is re-written to consolidate the rules pertaining to sentencing in capital cases (R.C.M. 1004-1006, 1008, and 1009). Additionally, it amends member voting for capital cases and accounts for the authorities of special trial counsel in the referral process.

104. Rule 1005 is revised as follows:

Rule 1005 ~~Instructions on sentence~~ Reconsideration of sentence in noncapital cases

This rule is taken from Rule 1005 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

The Discussion after R.C.M. 1005(e)(1) is amended and includes instructions to the members regarding the available range of permissible punishments when a plea agreement contains sentencing limitations.

The discussion after R.C.M. 1005(e)(5) is amended and reflects the terms of Article 56(c), as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1005(e)(6) is new and implements Article 56(c), as amended by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1005(e)(7) is new and allows a military judge to provide additional instructions as may be required.

R.C.M. 1005(f) is amended and changes “waiver” to “forfeiture” when a party fails to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence.

2023 Amendment:

R.C.M. 1005 is a re-written version of R.C.M. 1009. It explains the process for reconsideration in noncapital cases and accounts for the authorities of special trial counsel in the reconsideration process.

105. Rule 1006 is revised as follows:

Rule 1006 ~~Deliberations and voting on sentence~~ Reserved

This rule is taken from Rule 1006 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1006(a) is amended and implements Articles 25 and 53 as amended by Sections 5182 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1006(d)(4)(B) of the MCM (2016 edition) is deleted and R.C.M. 1006(d)(4)(C) is redesignated as (d)(4)(B). This provision and its accompanying Discussion are amended and implement Article 52 as amended by Section 5235 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1006(d)(6) is new and implements Art 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), amended by Sections 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1006(e) is amended and implements Articles 52, 53, and 56 as amended by Sections 5235, 5236, and 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 56 was further amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 1006 is incorporated into an updated R.C.M. 1004. R.C.M. 1006 is now “Reserved” for future use.

106. Rule 1007 is revised as follows:

Rule 1007 Announcement of sentence

This rule is taken from Rule 1007 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1007(a) and its accompanying Discussion are amended and implement Article 53 as amended

by Section 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(G) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

R.C.M. 1007(b) and its accompanying Discussion are amended and conform with changes made to R.C.M. 1002. This rule reflects the accused's right to elect member sentencing in lieu of military judge sentencing for non-capital offenses and the requirement for the military judge to announce the sentence promptly after it has been determined.

2023 Amendment:

R.C.M. 1007 is amended to remove references to member sentencing in noncapital cases and incorporates language from R.C.M. 1004 requiring the military judge to announce which aggravating factors the member unanimously found to exist beyond a reasonable doubt.

107. Rule 1008 is revised as follows:

Rule 1008 Impeachment of sentence in noncapital cases

This rule is taken from Rule 1008 of the MCM (2016~~9~~ edition) with~~out substantive amendment.~~ the following amendments:

2023 Amendment:

R.C.M. 1008 is amended to remove references to member sentencing in noncapital cases.

108. Rule 1009 is revised as follows:

Rule 1009 ~~Reconsideration of sentence~~ Reserved

This rule is taken from Rule 1009 of the MCM (2016~~9~~ edition) with the following amendments:

2018 Amendment:

R.C.M. 1009 and its accompanying Discussion are amended and implement Articles 52 and 53, as amended by Sections 5235 and 5236 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding reconsideration of the sentence, including in a capital sentencing proceeding.

R.C.M. 1009(b)(3) is new and reflects the addition of Article 53a, as added by Section 5237 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 531(d) and 1081(c)(1)(H) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 1009 is incorporated into an updated R.C.M. 1004. R.C.M. 1009 is now "Reserved" for future use.

109. Rule 1010 is revised as follows:

Rule 1010 Notice concerning post-trial and appellate rights

This rule is taken from Rule 1010 of the MCM (2016~~9~~ edition) with~~out substantive amendment.~~ the following amendments:

2018 Amendment:

R.C.M. 1010 is amended and implements Articles 60a, 60b, 61, 64-67, and 69, as amended by Sections 5322, 5323, 5325, 5328, 5329, 5330, 5331, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding appellate procedure.

The Discussion following R.C.M. 1010(d) is amended and corrects a cross-reference.

110. Rule 1011 is revised as follows:

Rule 1011 Adjournment

This rule is taken from Rule 1011 of the MCM (2016⁹ edition) without substantive amendment. ~~The Discussion accompanying R.C.M. 1011 is amended and corrects a cross-reference.~~

111. Rule 1101 is revised as follows:

Rule 1101 Statement of trial results

This rule is taken from Rule 1101 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 1101 (“Report of result of trial; post-trial restraint; deferment of confinement, forfeitures and reduction in grade; waiver of Article 58b forfeitures”) of the MCM (2016 edition) is deleted.

R.C.M. 1101 (“Statement of trial results”) and its accompanying Discussion are new. R.C.M. 1101 implements Article 60, as amended by Section 5321 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the requirement that the military judge of a general or special court-martial enter into the record of trial a document entitled “Statement of Trial Results

2022 Amendment:

R.C.M. 1101(e) is new and describes how the Statement of Trial Results may be modified.

112. Rule 1102 is revised as follows:

Rule 1102 Execution and effective date of sentences

This rule is taken from Rule 1102 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 1102 (“Post-trial Sessions”) of the MCM (2016 edition) is deleted.

R.C.M. 1102 (“Execution and effective date of sentences”) and its accompanying Discussion are new. R.C.M. 1102 implements Articles 57 and 60-60c, as amended by Sections 5302, 5321, 5322, 5323 and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the execution and effective date of sentences.

2022 Amendment:

R.C.M. 1102(b)(1) is amended and R.C.M. 1102(b)(6) is added to clarify language for enlisted reductions in grade.

113. Rule 1102A is revised as follows:

Rule 1102A Post-trial hearing for person found not-guilty only by reason of lack of mental responsibility [REMOVED]

2018 Amendment:

R.C.M. 1102A (“Post-trial hearing for person found not guilty only by reason of lack of mental responsibility”) of the MCM (2016 edition) is deleted and its provisions are incorporated into R.C.M. 1105 without substantial amendment.

114. Rule 1103 is revised as follows:

Rule 1103 Deferment of confinement, forfeitures, and reduction in grade; waiver of Article 58b forfeitures

This rule is taken from Rule 1103 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 1103 (“Preparation of record of trial”) of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), is deleted.

R.C.M. 1103 (“Deferment of confinement, forfeitures, and reduction in grade; waiver of Article 58b forfeitures”) and its accompanying Discussion are new. R.C.M. 1103 implements Article 57(b), as amended by Section 5302 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

R.C.M. 1103 also incorporates portions of R.C.M. 1101 and 1107 of the MCM (2016 edition), regarding deferment of confinement, forfeitures, and reduction in grade, as well as waiver of Article 58b forfeitures.

2023 Amendment:

R.C.M. 1103(a)(1) is amended to add a notice requirement to special trial counsel in cases over which special trial counsel has exercised authority when there is a request by an accused for deferment of confinement, forfeitures, and reduction in grade and when the convening authority makes a decision on the request.

115. Rule 1103A is revised as follows:

Rule 1103A Sealed exhibits and proceedings [REMOVED]

2018 Amendment:

R.C.M. 1103A (“Sealed exhibits and proceedings”) of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), and its accompanying Discussion are deleted and its provisions are incorporated into R.C.M. 1113.

116. Rule 1104 is revised as follows:

Rule 1104 Post-trial motions and proceedings

This rule is taken from Rule 1104 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 1104 (“Records of trial: Authentication; service; loss; correction; forwarding”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1104 (“Post-trial motions and proceedings”) and its accompanying Discussion are new. R.C.M. 1104 implements the provisions of Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and authorizes the filing of post-trial motions before entry of judgment.

R.C.M. 1104 also incorporates portions of R.C.M. 1102 of the MCM (2016 edition).

2023 Amendment:

R.C.M. 1104(e) is amended to require notice to victims of certain post-trial motions and hearings.

117. Rule 1105 is revised as follows:

Rule 1105 Post-trial hearing for person found not guilty only by reason of lack of mental responsibility

This rule is taken from Rule 1105 of the MCM (2019 edition) without substantive amendment.

2018 Amendment:

RCM 1105 (“Matters submitted by the accused”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1105 (“Post-trial hearing for person found not guilty only by reason of lack of mental responsibility”) is new and incorporates R.C.M. 1102A of the MCM (2016 edition) regarding a post-trial hearing for a person found not guilty only by reason of lack of mental responsibility without substantive

amendments.

118. Rule 1105A is revised as follows:

Rule 1105A Matters submitted by a crime victim [\[REMOVED\]](#)

2018 Amendment:

R.C.M. 1105A (“Matters submitted by a crime victim”) of the MCM (2016 edition) and its accompanying Discussion are deleted and its provisions are substantially incorporated into R.C.M. 1106A.

119. Rule 1106 is revised as follows:

Rule 1106 Matters submitted by accused

[This rule is taken from Rule 1106 of the MCM \(2019 edition\) without substantive amendment.](#)

2018 Amendment:

R.C.M. 1106 (“Recommendation of the staff judge advocate or legal officer”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1106 (“Matters submitted by the accused”) and its accompanying Discussion are new and incorporate portions of R.C.M. 1105 of the MCM (2016 edition) addressing the post-trial submission of matters to the convening authority by the accused.

120. Rule 1106A is revised as follows:

Rule 1106A Matters submitted by crime victim

[This rule is taken from Rule 1106A of the MCM \(2019 edition\) without substantive amendment.](#)

2018 Amendment:

R.C.M. 1106A and its accompanying Discussion are new and incorporate portions of R.C.M. 1105A of the MCM (2016 edition) addressing the post-trial submission of matters by the crime victim to the convening authority.

121. Rule 1107 is revised as follows:

Rule 1107 Suspension of execution of sentence; remission

[This rule is taken from Rule 1107 of the MCM \(2019 edition\) with the following amendments:](#)

2018 Amendment:

R.C.M. 1107 (“Action by convening authority”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1107 (“Suspension of execution of sentence; remission”) is new and implements Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding suspension of a sentence and the remission of a sentence in limited circumstances.

The rule incorporates portions of R.C.M. 1108 of the MCM (2016 edition).

2022 Amendment:

[R.C.M. 1107\(b\)\(2\) is amended to clarify only the convening authority may suspend the unexecuted portions of the sentence.](#)

122. Rule 1108 is revised as follows:

Rule 1108 Vacation of suspension of sentence

[This rule is taken from Rule 1108 of the MCM \(2019 edition\) without substantive amendment.](#)

2018 Amendment:

R.C.M. 1108 (“Suspension of execution of sentence; remission”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1108 (“Vacation of suspension of sentence”) and its accompanying Discussion are new. R.C.M. 1108 implements Articles 60-60c and 72 as amended by Sections 5321, 5322, 5323, 5324, and 5335 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding procedures for the vacation of a suspension of a sentence.

R.C.M. 1108 incorporates portions of R.C.M. 1109 of the MCM (2016 edition).

123. Rule 1109 is revised as follows:

Rule 1109 Reduction of sentence, general and special courts-martial

[This rule is taken from Rule 1109 of the MCM \(2019 edition\) with the following amendments:](#)

2018 Amendment:

R.C.M. 1109 (“Vacation of suspension of sentence”) of the MCM (2016 edition), as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), and its accompanying Discussion, are deleted.

R.C.M. 1109 (“Reduction of Sentence, general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1109 implements Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the reduction of a sentence in specified general or special court-martials.

R.C.M. 1109 incorporates portions of R.C.M. 1107 of the MCM (2016 edition).

[2022 Amendment:](#)

[R.C.M. 1109\(e\) is amended to clarify only the convening authority may act on reducing the sentence of the accused for substantial assistance. R.C.M. 1109\(g\)\(2\) is amended to expand the written requirement to explain when any part of a sentence is reduced, commuted, or suspended.](#)

124. Rule 1110 is revised as follows:

Rule 1110 Action by convening authority in certain general and special court-martial

[This rule is taken from Rule 1110 of the MCM \(2019 edition\) without substantive amendment.](#)

2018 Amendment:

R.C.M. 1110 (“Waiver or withdrawal of appellate review”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1110 (“Action by convening authority in certain general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1110 implements Articles 60-60c, as amended by Sections 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the action that the convening authority may take in certain general and special courts-martial.

R.C.M. 1110 incorporates portions of R.C.M. 1107 of the MCM (2016 edition).

125. Rule 1111 is revised as follows:

Rule 1111 Entry of judgment

[This rule is taken from Rule 1111 of the MCM \(2019 edition\) with the following amendments:](#)

2018 Amendment:

R.C.M. 1111 (“Disposition of the record of trial after action”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1111 (“Entry of judgment”) and its accompanying Discussion are new. R.C.M. 1111 implements Articles 60c and 63, as added by Sections 5324 and 5327 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 63 was amended by Section 531(i) of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131Stat. 1283 (2017).

The entry of judgment replaces the action by the convening authority as the means by which the trial proceedings terminate and the appellate process begins. The judgment replaces the promulgating order as the document that reflects the outcome of the court-martial.

2022 Amendment:

R.C.M. 1109(e) is amended to clarify the process for a military judge to modify a judgment.

126. Rule 1112 is revised as follows:

Rule 1112 Certification of record of trial; general and special courts-martial

This rule is taken from Rule 1112 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 1112 (“Review by a judge advocate”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1112 (“Certification of record of trial; general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1112 implements Articles 54 and 60-60c, as amended by Sections 5238, 5321, 5322, 5323, and 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), providing for the certification and contents of records of trial in general and special courts-martial.

R.C.M. 1112 incorporates portions of R.C.M. 1103 of the MCM (2016 edition).

The Discussion following R.C.M. 1112(e)(3)(B)(iii) reflects that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside of the procedures set forth in R.C.M. 1113(b).

2022 Amendment:

R.C.M. 1112(b)(5) is amended to require the election for application of sentencing rules in effect on or after January 1, 2019 to be included in the record of trial.

2023 Amendment:

R.C.M. 1112(b)(5) is deleted and subsequent subparagraphs are redesignated.

127. Rule 1113 is revised as follows:

Rule 1113 Sealed exhibits, proceedings, and other materials

This rule is taken from Rule 1113 of the MCM (2019 edition) with the following amendments:

2018 Amendment:

R.C.M. 1113 (“Execution of sentences”) of the MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1113 (“Sealed exhibits and proceedings”) and its accompanying Discussion are new and incorporate R.C.M. 1103A of the MCM (2016 edition) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018). R.C.M. 1113(b) conforms to changes in R.C.M. 1112(c) regarding certification of records of trial.

The Discussion following R.C.M. 1113(b) is new and reflects that the terms of a sealing order may authorize listed persons or entities to examine or receive disclosure of sealed materials outside of the procedures set forth in R.C.M. 1113(b).

2022 Amendment:

R.C.M. 1113(b)(3)(C) is amended to add authorization by the Judge Advocate General for a case eligible for review under R.C.M. 1203 or 1204.

2023 Amendment:

R.C.M. 1113(b)(1) is amended to authorize special trial counsel to examine and disclose sealed materials for the purposes of making a determination on referral.

128. Rule 1114 is revised as follows:

Rule 1114 Transcription of proceedings

This rule is taken from Rule 1114 of the MCM (2019 edition) without substantive amendment.

2018 Amendment:

R.C.M. 1114 (“Promulgating orders”) of MCM (2016 edition) and its accompanying Discussion are deleted.

R.C.M. 1114 (“Transcription of proceedings”) and its accompanying Discussion are new. R.C.M. 1114 implements Article 54(c), as amended by Section 5238 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the contents of a record of trial.

129. Rule 1115 is revised as follows:

Rule 1115 Waiver or withdrawal of appellate review

This rule is taken from Rule 1115 of the MCM (2019 edition) without substantive amendment.

2018 Amendment:

R.C.M. 1115 (“Waiver or withdrawal of appellate review”) and its accompanying Discussion are new and are taken from Rule 1110 of the MCM (2016 edition) with the following amendments:

R.C.M. 1115 and its accompanying Discussion are new. R.C.M. 1115 implements Article 61, as amended by Section 5325 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding waiver or withdrawal of appellate review.

130. Rule 1116 is revised as follows:

Rule 1116 Transmittal of records of trial for general and special courts-martial

This rule is taken from Rule 1116 of the MCM (2019 edition) without substantive amendment.

2018 Amendment:

R.C.M. 1116 (“Transmittal of records of trial for general and special courts-martial”) and its accompanying Discussion are new. R.C.M. 1116 implements Articles 65 and 66, as amended by Sections 5329 and 5330 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the transmittal of records of trial in general and special courts-martial to the Judge Advocate General and the Courts of Criminal Appeals. Article 66 was further amended by Sections 531(j) and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

131. Rule 1117 is revised as follows:

Rule 1117 Appeal of sentence by the United States

This rule is taken from Rule 1117 of the MCM (2019 edition) with the following amendments:

2018 Amendment.

R.C.M. 1117 (“Appeal of sentence by the United States”) and its accompanying Discussion are new. R.C.M. 1117 implements Article 56(d), as added by Section 5301 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130

Stat. 2000 (2016), as amended by Section 531(e) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 1117(a) is amended to permit the Government to appeal a sentence to the Court of Criminal Appeals on the grounds that the sentence is a result of an incorrect application of a sentencing parameter, established under Article 56(c), UCMJ.

R.C.M. 1117(c)(3) is amended to add the statement of reasons required for an appeal of an incorrect application of a sentencing parameter. The subsequent paragraphs are redesignated.

R.C.M. 1117(c)(3), now R.C.M. 1117(c)(4), and R.C.M. 1117(e) (deleted) are amended to clarify the standard of “plainly unreasonable.”

132. Rule 1201 is revised as follows:

Rule 1201 Review by the Judge Advocate General

This rule is taken from Rule 1201 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1201 and its accompanying Discussion are amended. R.C.M. 1201 implements Articles 65, 66, and 69, as amended by Sections 5329, 5330, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the post-trial review of certain records of trial by the Judge Advocate General. Article 66 was further amended by Sections 531(j) of and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 1201(f)(4) is amended to account for special trial counsel.

133. Rule 1202 is revised as follows:

Rule 1202 Appellate counsel

This rule is taken from Rule 1202 of the MCM (2016⁹ edition) without substantive amendment. the following amendments:

2018 Amendment:

R.C.M. 1202(b)(2)(A) is amended and implements Article 65, as amended by Section 5329 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(J) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), addressing the requirement to detail appellate defense counsel to review cases eligible for direct appeal.

R.C.M. 1202(c) and its accompanying Discussion are new. R.C.M. 1202(c) implements Article 70, as amended by Section 5334 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), addressing the requirements regarding counsel learned in the law applicable to capital cases.

134. Rule 1203 is revised as follows:

Rule 1203 Review by a Court of Criminal Appeals

This rule is taken from Rule 1203 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1203 and its accompanying Discussion are amended and implements Articles 65, 66, and 69, as amended by Sections 5329, 5330, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding review by a Court of Criminal Appeals and minimum tour lengths for appellate military judges.

Article 66 was further amended by Sections 531(j) of and 1081(c)(1)(K) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2023 Amendment:

R.C.M. 1203(e)(2) is added to address when a finding is set aside. The convening authority or special trial counsel, as applicable, shall determine if a rehearing is impracticable and, if so, determine whether to dismiss a charge. All subsequent sections are redesignated.

R.C.M. 1203(e)(2), now R.C.M. 1203(e)(3), is amended to authorize special trial counsel to determine if a rehearing is impracticable when a sentence is set aside. If special trial counsel determines a rehearing is impracticable as to sentencing, special trial counsel may dismiss the applicable charges. Alternatively, if special trial counsel makes a determination to not dismiss the applicable charges, the convening authority shall order a sentence of no punishment be imposed.

135. Rule 1204 is revised as follows:

Rule 1204 Review by the Court of Appeals for the Armed Forces

This rule is taken from Rule 1204 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1204(a)(2) is amended and implements Article 67, as amended by Section 5331 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires that the Judge Advocate General provide appropriate notification to all other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps before certifying a case to the Court of Appeals for the Armed Forces.

2023 Amendment:

R.C.M. 1204 is amended to account for special trial counsel determining if a rehearing is impracticable.

136. Rule 1205 is revised as follows:

Rule 1205 Review by the Supreme Court

This rule is taken from Rule 1205 of the MCM (2016⁹ edition) with out substantive amendment. the following amendments:

2018 Amendment:

R.C.M. 1205(a) is amended and changes the reference to “Article 67(h)” and replaces it with “Article 67a.” Technical corrections are made to references to Article 67(a)(1), (2), and (3).

137. Rule 1206 is revised as follows:

Rule 1206 Powers and responsibilities of the Secretary

This rule is taken from Rule 1206 of the MCM (2016⁹ edition) with out substantive amendment. the following amendments:

2018 Amendment:

The Discussion to R.C.M. 1206(a) is amended and changes the reference to “Article 71(b)” and replaces it with “Article 57(a)(4).”

138. Rule 1207 is revised as follows:

Rule 1207 Sentences requiring approval by the President

This rule is taken from Rule 1207 of the MCM (2016⁹ edition) with out substantive amendment. the following amendments:

2018 Amendment:

The Discussion to R.C.M. 1207 is amended and changes the reference to “Article 71(a)” and replaces it with “Article 57(a)(3).”

139. Rule 1208 is revised as follows:

Rule 1208 Restoration

This rule is taken from Rule 1208 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1208(b) is amended and implements Article 75, as amended by Section 5337 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). R.C.M. 1208 now requires that in certain cases where an executed part of a court-martial sentence is set aside pending a rehearing, new trial, or other trial, that those punishments shall not be enforced from the effective date of the order setting aside that punishment.

R.C.M. 1208(a), 1208(b) and the Discussion to R.C.M. 1208(b) are amended and insert a reference to entry of a new judgment in the case.

2022 Amendment:

R.C.M. 1208(c) is added to clarify the effective date of the new sentence after a previous sentence has been set aside or disapproved.

140. Rule 1209 is revised as follows:

Rule 1209 Finality of courts-martial

This rule is taken from Rule 1209 of the MCM (2016⁹ edition) with out substantive amendment. ~~the following amendments:~~

2018 Amendment:

R.C.M. 1209 and its Discussion are amended and implement Articles 64, 65, and 69, as amended by Sections 5328, 5329, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), regarding the finality of courts-martial.

141. Rule 1210 is revised as follows:

Rule 1210 New trial

This rule is taken from Rule 1210 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1210 is amended and implements Article 73, as amended by Section 5336 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which increases the time in which an accused must file a petition for a new trial from two years to three years after entry of judgment. R.C.M. 1210 is amended and includes references to the entry of judgment in accordance with the addition of Article 60c, as reflected in Section 5324 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

The Discussion accompanying R.C.M. 1210(f)(3) is amended and corrects a cross-reference.

2023 Amendment:

R.C.M. 1210(h) is amended to change “convening authority” to “appropriate authority” to account for special trial counsel.

142. Rule 1301 is revised as follows:

Rule 1301 Summary courts-martial

This rule is taken from Rule 1301 of the MCM (2016⁹ edition) without substantive amendment. ~~the following amendments:~~

2018 Amendment:

R.C.M. 1301(b) is amended and implements Article 20, as amended by Section 5164 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which clarifies that a summary court-martial is not a criminal forum and a finding of guilt does not constitute a criminal conviction. This change does not deprive an accused at a summary court-martial of the protections previously applicable at a summary court-martial, to include the right to confront witnesses.

R.C.M. 1301(c) and the Discussion to R.C.M. 1301(c) are amended and align with the prohibition against trying certain offenses at a summary court-martial and the elimination of the discrete offense of forcible sodomy in accordance with Sections 5162 and 5439 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

143. Rule 1302 is revised as follows:

Rule 1302 Convening a summary court-martial

This rule is taken from Rule 1302 of the MCM (2016⁹ edition) without substantive amendment.

144. Rule 1303 is revised as follows:

Rule 1303 Right to object to trial by summary court-martial

This rule is taken from Rule 1303 of the MCM (2016⁹ edition) without substantive amendment.

145. Rule 1304 is revised as follows:

Rule 1304 Trial procedure

This rule is taken from Rule 1304 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1304(a)(4) and the accompanying Discussion are new and address the rights of a victim at summary courts-martial in accordance with Article 6b as amended by Section 5105 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Sections 531(a), 1081(a)(22) and 1081(c)(1)(B) of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 115-91, 131 Stat. 1283 (2017). The Discussion accompanying R.C.M. 1304(a)(4)(E) clarifies the meaning of the term “victim” as it pertains to this provision. R.C.M. 1304(b)(2)(F)(ii) is amended and directs the summary court-martial to use the procedures in R.C.M. 1001 and 1002 and the principles in the remainder of Chapter X in determining a sentence, with some exceptions.

2022 Amendment:

R.C.M. 1304(b)(2)(F) is amended to correct a scrivener’s error.

146. Rule 1305 is revised as follows:

Rule 1305 Record of trial

This rule is taken from Rule 1305 of the MCM (2016⁹ edition) without substantive amendment. ~~the following amendments:~~

2018 Amendment:

R.C.M. 1305(c) and (d) and the Discussion accompanying R.C.M. 1305(c), (d), and (e) are amended and reflect Article 54, as amended by Section 5238 of the Military Justice Act of 2016, Division E of the

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which requires a certified record of trial in a summary court-martial.

R.C.M. 1305(d) is amended to include a cross-reference to procedures for classified information in the record of trial, and conforms with changes to Article 54 to provide procedures for the correction of a record of trial in a summary court-martial.

147. Rule 1306 is revised as follows:

Rule 1306 Post-trial procedure, summary court-martial

This rule is taken from Rule 1306 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

R.C.M. 1306 and its accompanying Discussion are amended and consolidate the post-trial process for summary courts-martial into one rule and removes most of the prior cross references to the post-trial process prescribed for general and special courts-martial. The rule is further amended to reflect the changes to post-trial and appellate procedures in summary courts-martial required by the changes to Articles 60b, 64, and 69 as amended by Sections 5323, 5328, and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2023 Amendment:

R.C.M. 1306 is amended to clarify the convening authority may approve the sentence as adjudged.

148. Rule 1307 is revised as follows:

Rule 1307 Review of summary courts-martial by a judge advocate

This rule is taken from Rule 1307 of the MCM (2019 edition) without substantive amendment.

2018 Amendment:

R.C.M. 1307 and its accompanying Discussion are new. R.C.M. 1307 implements Articles 64 and 69, as amended by Sections 5328 and 5333 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), which provides for review of the record of trial of a summary court-martial by a judge advocate and permits an accused to apply for appellate review for correction of legal error.

Section 7. Appendix 16, Analysis of the Military Rules of Evidence, of the Manual for Courts-Martial, United States, is amended as follows:

1. Rule 311 is revised as follows:

Rule 311 Evidence obtained from unlawful searches and seizures

This rule is taken from Rule 311 of the MCM (2016⁹ edition), ~~as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), without the following~~ amendments:-

2022 Amendment:

Mil. R. Evid. 311(c)(3) is amended to expand the good faith exception. See U.S. v. Perkins, 78 M.J. 381 (C.A.A.F. 2019).

2023 Amendment:

Mil. R. Evid. 311(d)(4)(B) is amended to include references to omitting a material fact knowingly and intentionally or with reckless disregard for the truth. See United States v. Garcia, 80 M.J. 379 (C.A.A.F. 2020).

2. Rule 315 is revised as follows:

Rule 315 Probable cause searches

This rule is taken from Rule 315 of the MCM (2016⁹ edition) without the following amendments:-
~~[except that the Discussion following Mil. R. Evid. 315(a) has been deleted].~~

2022 Amendment:

Mil. R. Evid. 315(b)(2) is amended to add reference to search warrants under R.C.M. 703A.

Mil. R. Evid. 315(b)(3) is amended to clarify only a military judge may issue a warrant for wire or electronic communications. Mil. R. Evid. 315(d)(3) is amended to add a “Other competent search authority” to the list of those who may authorize a search.

3. Rule 404 is revised as follows:

Rule 404 Character evidence, crimes or other acts

This rule is taken from Rule 404 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

Mil. R. Evid. 404(a)(2)(A) is amended and reflects the reorganization of the punitive articles in the Military Justice Act of 2016. *See* Articles 79-134, as amended by Sections 5401-5452 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as amended by Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2022 Amendment:

Mil. R. Evid. 404(b)(3) is amended to align with the Federal Rules of Evidence in accordance with the requirements in Mil. R. Evid. 1102.

4. Rule 503 is revised as follows:

Rule 503 Communications to clergy

This rule is taken from Rule 503 of the MCM (2016⁹ edition) without the following amendments:-

2023 Amendment:

Mil. R. Evid. 503 is amended to use gender-neutral language.

5. Rule 505 is revised as follows:

Rule 505 Classified information

This rule is taken from Rule 505 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

Mil. R. Evid. 505, as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), further amends Mil. R. Evid. 505(j)(3), 505(k)(1)(B), and 505(l) updates cross-references to R.C.M. 701(g)(2) and R.C.M. 1103A (which is deleted and redesignated as R.C.M. 1113), and updates cross-references to R.C.M. 1103(h) and 1104(b)(1)(D), which are deleted and redesignated as R.C.M. 1112(e)(3).

2023 Amendment:

Mil. R. Evid. 505(f)(4) is amended to account for special trial counsel.

6. Rule 506 is revised as follows:

Rule 506 Government information

This rule is taken from Rule 506 of the MCM (2016⁹ edition) with the following amendments:

2018 Amendment:

Mil. R. Evid. 506, as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), further amends Mil. R. Evid. 506(b) and broadens the scope of the rule to cover classified information. The government may now claim a privilege with respect to classified information under either Mil. R. Evid. 505 or Mil. R. Evid. 506, or both.

The Discussion accompanying Mil. R. Evid. 506(b) is new.

Mil. R. Evid. 506(j)(3), 506(l)(2), and 506(m) are amended and update cross-references to R.C.M. 1103A, which is deleted and redesignated as R.C.M. 1113.

2023 Amendment:

Mil. R. Evid. 506(f)(4) is amended to account for special trial counsel.

7. Rule 507 is revised as follows:

Rule 507 Identity of informants

This rule is taken from Rule 507 of the MCM (2016⁹ edition) with~~out~~ the following amendments:-

2023 Amendment:

Mil. R. Evid. 506(f)(4) is amended to account for special trial counsel.

8. Rule 611 is revised as follows:

Rule 611 Mode and order of examining witnesses and presenting evidence

This rule is taken from Rule 611 of the MCM (2016⁹ edition) with~~out~~ the following amendments:-

2023 Amendment:

Mil. R. Evid. 611(d)(2) is amended to clarify the definition of domestic violence.

9. Rule 803 is revised as follows:

Rule 803 Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness

This rule is taken from Rule 803 of the MCM (2016⁹ edition)) with~~out~~ the following amendments:-

2022 Amendment:

Mil. R. Evid. 803(16) is amended to change the requirement to require the document have been prepared before January 1, 1998.

10. Rule 807 is revised as follows:

Rule 807 Residual exception

This rule is taken from Rule 807 of the MCM (2016⁹ edition) with~~out~~ the following amendments:-

2022 Amendment:

Mil. R. Evid. 807 is amended to align with the Federal Rules of Evidence in accordance with the requirements in Mil. R. Evid. 1102.

11. Rule 902 is revised as follows:

Rule 902 Evidence that is self-authenticating

This rule is taken from Rule 902 of the MCM (2016⁹ edition) with~~out~~ the following amendments:-

2022 Amendment:

Mil. R. Evid. 902(12) is added and Reserved.

Mil. R. Evid. 902(13) is added and allows “Certified Records Generated by an Electronic Process or System” to be self-authenticating.

Mil. R. Evid. 902(14) is added and allows “Certified Data Copied from an Electronic Device Storage Medium, or File” to be self-authenticating.”

Section 8. Appendix 17, Analysis of Punitive Articles, of the Manual for Courts-Martial, United States, is amended as follows:

1. Paragraph 3 is revised as follows:

3. Article 79 (10 U.S.C 879)—Conviction of offense charged, lesser included offenses, and attempts

This paragraph is taken from paragraph 3 (Article 79—Conviction of lesser included offenses) of the MCM (2016 edition) with the following amendments:

2018 Amendment: a. Text of statute. Article 79 is amended and provides two statutory grounds for identifying “lesser included offenses.” Under the first, the lesser offense must be “necessarily included” in the greater offense. *See, e.g.,* the elements test articulated in *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010); *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). Under the second, the offense must be expressly designated by the President as a lesser included offense. The President’s authority extends only to an offense “reasonably included” in the greater offense. The President has done so in Appendix 12A. *See* Article 79 as amended by Section 5402 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

b. Explanation.

Subparagraph b.2. sets forth an explanation of “necessarily included offenses.” Subparagraph b.3. explains the President’s express authority under Article 79 to designate certain closely related offenses to be “reasonably included” lesser offenses of greater ones, including offenses that do not strictly meet the “necessarily included” elements test. Whether “necessarily included” or “reasonably included,” a lesser included offense must be raised by the evidence at trial. That is, while all presidentially designated lesser included offenses (*see* Appendix 12A) qualify as lesser included offenses, a party is not entitled to an instruction on a lesser included offense if the evidence at trial does not reasonably raise it. *See United States v. Bean*, 62 M.J. 264, 265 (C.A.A.F. 2005).

2023 Amendment: Subparagraph b. Explanation (4) Sua sponte duty is amended to align with R.C.M. 920(g) allowing the parties to waive instructions on a lesser included offense.

2. Paragraph 19 is revised as follows:

19. Article 93 (10 U.S.C. 893)—Cruelty and maltreatment

This paragraph is taken from paragraph 17 (Article 93—Cruelty and maltreatment) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. Maximum punishment. The maximum authorized confinement for a violation of Article 93 is increased from two years to three years.

2023 Amendment: Subparagraph c. Explanation (2) Nature of the Act is amended to clarify the definition of sexual harassment for purposes of Article 93.

3. Paragraph 20 is revised as follows:

20. Article 93a (10 U.S.C. 893a)—Prohibited activities with military recruit or trainee by person in position of special trust

2018 Amendment: This article is a new enumerated provision and implements Article 93a, as added by Section 5410 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and criminalizes acts of “prohibited sexual activity” specified in regulations by the Secretary concerned, between those in positions of special trust and junior military members in initial active duty training, officer qualification programs, other training programs for initial career qualification, in a delayed entry program, or applicants for military service.

2023 Amendment: Subparagraph b Elements is amended to change the knowledge requirement to “knew” from “knew, or reasonably should have known” for both offenses under Article 93a. For subparagraph b(2),

elements (c) and (d) are combined into one paragraph. Subparagraph c. *Explanation* is amended to add an explanation for “Prohibited activity” and update the definition for “Knowledge.” Subparagraph e. *Sample specifications* is amended to reflect the amendments in Subparagraph b.

4. A new paragraph 55a is inserted immediately after paragraph 55 and reads as follows:

55a. Article 117a (10 U.S.C. 917a)—Wrongful broadcast or distribution of intimate visual images

This is a new enumerated offense pursuant to Section 533 of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which criminalizes the wrongful broadcast or distribution of intimate visual images.

5. Paragraph 60 is revised as follows:

60. Article 120 (10 U.S.C. 920)—Rape and sexual assault generally

This paragraph is taken from paragraph 45 (Article 120—Rape and sexual assault generally) of MCM (2016 edition) with the following amendments that implement Article 120, as amended by Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(O) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017).

2018 Amendment: a. Text of statute. The definition of sexual act is amended.

b. *Elements.* The elements are consolidated to eliminate redundancy in repeating the specific intent necessary to accomplish a sexual act and sexual contact because the definitions of sexual act and sexual contact already contain within them the mens rea element of specific intent.

c. *Explanation.* (4) Consent as an element was removed from the explanation. Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) amended Article 120 to include lack of consent as an element in Article 120(b)(2), Sexual Assault.

(5) Scope of threatening or placing that other person in fear emphasizes that threatening or placing that other person in fear explicitly includes, but is not limited to, abuse of military rank, position, or power, in order to engage in a sexual act or contact with a victim. *See United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) (listing seven factors “demonstrating the relationship between the offenses at issue and Appellant’s superior rank and position” in a case involving “constructive force” under the pre-2007 version of Article 120).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment.* and f. *Sample specification.* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

e. *Sample specifications.* The sample specifications are consolidated to include the various acts constituting: (a) rape; (b) sexual assault; (c) aggravated sexual contact; and (d) abusive sexual contact, by consolidating the descriptions of a sexual act or sexual contact within each overarching specification.

2023 Amendment: Subparagraph e. Sample specifications is amended to add “[directly] (through the clothing)]” for all offenses under “Aggravated sexual contact” and “Abusive sexual contact.”

6. Paragraph 63 is revised as follows:

63. Article 120c (10 U.S.C. 920c)—Other sexual misconduct

This paragraph is taken from paragraph 45c (Article 120c—Other sexual misconduct) of the MCM (2016 edition) with the following amendments:

2018 Amendment: Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition)

have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* The maximum punishment for forcible pandering is increased and aligns with federal civilian law. See 18 U.S.C. § 2422.

2023 Amendment: Subparagraph b. *Elements* is amended to add “without legal justification or lawful authorization” for the offenses of “Indecent viewing,” “Indecent recording,” “Broadcast of an indecent recording,” and “Distribution of an indecent recording.” Subparagraph e. *Sample specifications* is amended to reflect the amendments in Subparagraph b.

7. Paragraph 69 is revised as follows:

69. Article 123 (10 U.S.C. 923)—Offenses concerning Government computers

This offense is new pursuant to Section 5436 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The offense is similar to 18 U.S.C. § 1030, but does not supersede or preempt the assimilation of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, clause 3. Also, this offense does not supersede or preempt Department of Defense and Service regulations applicable to offenses concerning Government computers, applied via Article 92. This offense is directed at certain types of criminal conduct concerning Government computers. For other types of criminal conduct concerning computers, including private computers, persons subject to this chapter may also be subject to 18 U.S.C. § 1030, and other criminal statutes, via clause 3 of Article 134, as well as orders and regulations via Article 92. See Report of the Military Justice Review Group Part I: UCMJ Recommendations (December 22, 2015). For explanation of Controlled Unclassified Information, see DoDM 5200.01-V4 (February 24, 2012).

2023 Amendment: Subparagraph c. *Explanation (1) Access* is amended to include “computer system or computer network.”

8. Paragraph 77 is revised as follows:

77. Article 128 (10 U.S.C. 928)—Assault

This paragraph is taken from paragraphs 54 (Article 128—Assault) and 64 (Article 134—Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking) of the MCM (2016 edition) pursuant to Section 5441 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(P) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017). with the following amendments:

2018 Amendment: a. Text of statute. (b) Aggravated Assault. Two amendments to this statute align it more closely with federal civilian practice under 18 U.S.C. § 113. First, the phrase “or other means or force likely to result in death or grievous bodily harm” has been removed from the statutory definition of “aggravated assault,” and replaced with the phrase “dangerous weapon.” This eliminates the likelihood of harm analysis previously necessary under the MCM (2016 edition) for this offense, and allows the offense to focus solely on the intent of the accused. In turn, the phrase “dangerous weapon” focuses on the capability of any object to inflict death or grievous bodily harm. See c. *Explanation (5)(a)(iii)*. Second, the intent necessary to complete an aggravated assault is modified to no longer require the specific intent to commit substantial or grievous bodily harm. This change aligns the specific intent requirement to federal civilian law under 18 U.S.C. § 113. Pursuant to Section 533 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. Law. No. 115-232, 132 Stat. 1636 (2018), subparagraph a. *Text of the statute* is amended to add element (b)(3).

(c) *Assault with intent to commit specified offenses.* The offense of assault with intent to commit specified offenses is taken from paragraph 64 (Article 134—Assault—with intent to commit murder, voluntary

manslaughter, rape, robbery, forcible sodomy, arson, burglary, or housebreaking) of the MCM (2016 edition) in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles. See Appendix 23, subparagraph 64.c. *Explanation* of the MCM (2016 edition). The scope of the offense remains substantively the same with two exceptions: (1) the offense now lists rape of a child, sexual assault, sexual assault of a child, and kidnapping, as specified offenses; and (2) proof of the terminal element of Article 134 is no longer required.

c. *Explanation.*(1) *Substantial bodily harm.* The definition of substantial bodily harm aligns with 18 U.S.C. § 113(b)(1). It provides a middle tier of harm between bodily harm and grievous bodily harm. The definition of grievous bodily harm aligns with the definition of serious bodily injury under 18 U.S.C. § 113(b)(2), which is the highest tier of bodily injury.

(5)(a)(iii) *Dangerous weapon.* The definition of dangerous weapon focuses attention on the nature of the weapon involved and the accused's intent to commit any bodily harm. To qualify as a dangerous weapon, it is sufficient that "an instrument [is] capable of inflicting death or serious bodily injury." *United States v. Sturgis*, 48 F.3d 784, 787 (4th Cir. 1995). See also *United States v. Bey*, 667 F.2d 7, 11 (5th Cir. 1982) (citation and internal quotation omitted) ("[w]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to endanger life or inflict great bodily harm.")

(5)(b)(i). Assault resulting in substantial or grievous bodily harm requires only a finding of general intent. See *United States v. Davis*, 237 F.3d 942, 944 (8th Cir. 2001).

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

d. *Maximum punishment.* Two new maximum punishment categories were added: (1) infliction of substantial bodily harm and (2) assaulting a spouse, intimate partner, or an immediate family member.

2022 Amendment: Subparagraph b. *Elements* is amended to remove references to "a spouse, intimate partner, or an immediate family member of the accused" for all applicable elements, which is now covered by Article 128b. Subsequent parallel amendments are made to subparagraphs c-e. Subparagraph b. *Elements* is amended to add the offense of "Aggravated Assault by strangulation or suffocation." Subsequent parallel amendments are added to subparagraphs c-e.

2023 Amendment: Subparagraph d. *Maximum punishment* (1)(b) is amended to "When committed with an unloaded firearm or other dangerous weapon" and to change the maximum confinement from three years to two years. Subparagraph d.(1)(c) is added. The maximum punishment under subparagraph d.(5)(b) is amended to align the offense under Subparagraph c.(6)(d).

9. A new paragraph 78a is inserted immediately after paragraph 78 and reads as follows:

78a. Article 128b (10 U.S.C. 928b)—Domestic Violence

This is a new punitive article enacted by Section 532 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. Law. No. 115-232, 132 Stat. 1636 (2018), which criminalizes domestic violence.

10. Paragraph 89 is revised as follows:

89. Article 132 (10 U.S.C. 932)—Retaliation

This is a new enumerated offense pursuant to Section 5450 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), as further amended by Section 1081(c)(1)(Q) of the National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, 131 Stat. 1283 (2017), which supplements and does not preempt Service regulations that address other types or categories of prohibited retaliatory actions. See also 10 U.S.C. §

1034, 18 U.S.C. § 1513. Service regulations may specify additional types of retaliatory conduct punishable at court-martial under Article 92 or Article 134.

2023 Amendment: Subparagraph c. Explanation (2)(b) is added to expand the definition for “Personnel action” to include a civilian employee.

11. Paragraph 90 is revised as follows:

90. Article 133 (10 U.S.C. 933)—Conduct unbecoming an officer ~~and a gentleman~~

This paragraph is taken from paragraph 59 (Article 133—Conduct unbecoming an officer and a gentleman) of the MCM (2016 edition) with the following amendments:

2018 Amendment: c. Explanation (1) Gentleman. This subparagraph is amended to emphasize that the term “gentleman” connotes failings in an officer’s personal character, regardless of gender.

Subparagraph d. *Lesser included offenses* from the MCM (2016 edition) has been deleted. Subparagraphs e. *Maximum punishment* and f. *Sample specification* from the MCM (2016 edition) have been redesignated as subparagraphs d. and e. respectively. For lesser included offenses, see Appendix 12A.

2022 Amendment: Pursuant to Section 532 of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No 117-81, 135 Stat. 1546 (2021), the name of this article and the text of the statute are amended to remove “and a gentleman.”

2023 Amendment: Subparagraph b. Elements (2) is amended to remove “and a gentleman.” Subparagraph c. Explanations are re-written in their entirety to clarify “officership” and other relevant definitions.

12. A new paragraph 107a is inserted immediately after paragraph 107 and reads as follows:

107a. Article 134—(Sexual Harassment)

This is a new enumerated offense establishing sexual harassment as a stand-alone offense under Article 134, UCMJ. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1546 (2021).

Section 9. Appendix 18, Analysis of Nonjudicial Punishment Procedure, of the Manual for Courts-Martial, United States, ¶1 is amended as follows:

“c. *Purpose.* This paragraph is based on the legislative history of Article 15, both as initially enacted and as modified in 1962. *See generally* H.R.Rep. No. 491, 81st Cong., 1st Sess. 14–15 (1949); S.Rep. No. 1911, 87th Cong., 2d Sess. (1962).

d. *Policy.* Subparagraph (1) is based on paragraph 129a of MCM, 1969 (Rev.). Subparagraph (2) is based on the last sentence of paragraph 129a of MCM, 1969 (Rev.) and on service regulations. *See, e.g.,* AR 27–10, para. 3–4 b (1 Sep. 1982); JAGMAN sec. 0

101. *Cf.* Article 37. Subparagraph (3) is based on the second paragraph 129b of MCM, 1969 (Rev.).

e. *Minor offenses.* This paragraph is derived from paragraph 128b of MCM, 1969 (Rev.), service regulations concerning “minor offenses” (*see, e.g.,* AR 27–10, para. 3–3d (1 Sep. 1982); AFR 111–9, para. 3a(3) (31 Aug. 1979)); *United States v. Fretwell*, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960). The intent of the paragraph is to provide the commander with enough latitude to appropriately resolve a disciplinary problem. Thus, in some instances, the commander may decide that nonjudicial punishment may be appropriate for an offense that could result in a dishonorable discharge or confinement for more than 1 year if tried by general court-martial, e.g., failure to obey an order or regulation. On the other hand, the commander could refer a case to a court-martial that would ordinarily be considered at nonjudicial punishment, e.g., a short unauthorized absence, for a servicemember with a long history of short unauthorized absences, which nonjudicial punishment has not been successful in correcting.

2018 Amendments: Paragraph 1.e. is amended and addresses the definition of minor offense.

f. *Limitations on nonjudicial punishment.*

(1) *Double punishment prohibited.* This subparagraph is taken from the first paragraph of paragraph 128d of MCM, 1969 (Rev.). Note that what is prohibited is the service of punishment twice. Where nonjudicial punishment is set aside, this does not necessarily prevent reimposition of punishment and service of punishment not previously served.

(2) *Increase in punishment prohibited.* This paragraph is taken from the second paragraph of paragraph 128d of MCM, 1969 (Rev.).

(3) *Multiple punishment prohibited.* This paragraph is based on the guidance for court-martial offenses, found in paragraph 30g and 33h of MCM, 1969 (Rev.).

(4) *Statute of limitations.*

2018 Amendment: Paragraph 1.f.(4) is amended and clarifies that a member may waive the statute of limitations applicable to nonjudicial punishment. This is consistent with court-martial practice. See United States v. Moore, 32 M.J. 170 (CMA 1991).

2022 Amendment: Updated citations to Article 43, UCMJ.

(5) *Civilian courts.* This paragraph is derived from service regulations (*see, e.g.*, AR 27–10, chap. 4 (1 Sep. 1982)) and is intended to preclude the possibility of a servicemember being punished by separate jurisdictions for the same offense, except in unusual cases.

g. *Relationship of nonjudicial punishment to administrative corrective measures.* This paragraph is derived from paragraph 128c of MCM, 1969 (Rev.) and service regulations.

h. *Burden of proof.*

2022 Amendment: This paragraph is amended to establish “preponderance of the evidence” as the burden of proof for imposition and appellate adjudication of nonjudicial punishment.

2023 Amendment: Added clarifying language regarding the burden of proof.

i. *Effect of errors.* This paragraph is taken from paragraph 130 of MCM, 1969 (Rev.).

j. *Applicable standards.*

2023 Amendment: This paragraph was deleted from subparagraph (h) in the 2022 Amendments and is now added to a new subparagraph (j). This subsection clarifies that nonjudicial punishment proceedings conducted in a combatant or joint command are to be conducted in accordance with the implementing regulations and procedures of the service of which the accused is a member.”