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Presidential Documents

Title 3—

The President

Executive Order 13825 of March 1, 2018

2018 Amendments to the Manual for Courts-Martial, United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, Part III, and Part IV of the Manual for Courts-Martial, United States, are amended as described in Annex 1, which is attached to and made a part of this order.

Sec. 2. The amendments in Annex 1 shall take effect on the date of this order, subject to the following:

(a) Nothing in Annex 1 shall be construed to make punishable any act done or omitted prior to the date of this order that was not punishable when done or omitted.

(b) Nothing in Annex 1 shall be construed to invalidate the prosecution of any offense committed before the date of this order. The maximum punishment for an offense committed before the date of this order shall not exceed the maximum punishment in effect at the time of the commission of such offense.

(c) Nothing in Annex 1 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the date of this order, and any such nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action shall proceed in the same manner and with the same effect as if the amendments in Annex 1 had not been prescribed.

Sec. 3. (a) Pursuant to section 5542 of the Military Justice Act of 2016 (MJA), division E of the National Defense Authorization Act for Fiscal Year 2017, Public Law 114–328, 130 Stat. 2000, 2967 (2016), except as otherwise provided by the MJA or this order, the MJA shall take effect on January 1, 2019.

(b) Nothing in the MJA shall be construed to make punishable any act done or omitted prior to January 1, 2019, that was not punishable when done or omitted.

(c) Nothing in title LX of the MJA shall be construed to invalidate the prosecution of any offense committed before January 1, 2019. The maximum punishment for an offense committed before January 1, 2019, shall not exceed the maximum punishment in effect at the time of the commission of such offense.

(d) Nothing in the MJA shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to January 1, 2019. Except as otherwise provided in this order, the MJA shall not apply in any case in which charges are referred to trial by court-martial before January 1, 2019. Except as otherwise provided in this order, proceedings in any such case shall be held in the same manner and with the same effect as if the MJA had not been enacted.

Sec. 4. The Manual for Courts-Martial, United States, as amended by section 1 of this order, is amended as described in Annex 2, which is attached to and made a part of this order.

Sec. 5. The amendments in Annex 2, including Appendix 12A, shall take effect on January 1, 2019, subject to the following:

(a) Nothing in Annex 2 shall be construed to make punishable any act done or omitted prior to January 1, 2019, that was not punishable when done or omitted.

(b) Nothing in section 4 of Annex 2 shall be construed to invalidate the prosecution of any offense committed before January 1, 2019. The maximum punishment for an offense committed before January 1, 2019, shall not exceed the maximum punishment in effect at the time of the commission of such offense.

(c) Nothing in Annex 2 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to January 1, 2019. Except as otherwise provided in this order, the amendments in Annex 2 shall not apply in any case in which charges are referred to trial by court-martial before January 1, 2019. Except as otherwise provided in this order, proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been prescribed.

Sec. 6. (a) The amendments to Articles 2, 56(d), 58a, and 63 of the UCMJ enacted by sections 5102, 5301, 5303, and 5327 of the MJA apply only to cases in which all specifications allege offenses committed on or after January 1, 2019.

(b) If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority, in addition to the suspending authority in Article 60a(c) as enacted by the MJA, to the extent that Article 60:

(1) requires action by the convening authority on the sentence;

(2) permits action by the convening authority on findings;

(3) authorizes the convening authority to modify the findings and sentence of a court-martial, dismiss any charge or specification by setting aside a finding of guilty thereto, or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification;

(4) authorizes the convening authority to order a proceeding in revision or a rehearing; or

(5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

Sec. 7. The amendment to Article 15 of the UCMJ enacted by section 5141 of the MJA shall apply to any nonjudicial punishment imposed on or after January 1, 2019.

Sec. 8. The amendments to Articles 32 and 34 of the UCMJ enacted by sections 5203 and 5205 of the MJA apply with respect to preliminary hearings conducted and advice given on or after January 1, 2019.

Sec. 9. The amendments to Article 79 of the UCMJ enacted by section 5402 of the MJA and the amendments to Appendix 12A to the Manual for Courts-Martial, United States, made by this order apply only to offenses committed on or after January 1, 2019.

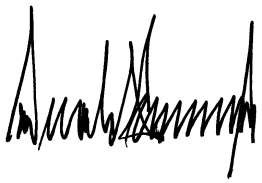
Sec. 10. Except as provided by Rule for Courts-Martial 902A, as promulgated by Annex 2, any change to sentencing procedures:

(a) made by Articles 16(c)(2), 19(b), 25(d)(2) and (3), 39(a)(4), 53, 53a, or 56(c) of the UCMJ, as enacted by sections 5161, 5163, 5182, 5222, 5236, 5237, and 5301 of the MJA; or

(b) included in Annex 2 in rules implementing those articles, applies only to cases in which all specifications allege offenses committed on or after January 1, 2019.

Sec. 11. The amendments to Article 146 of the UCMJ enacted by section 5521 of the MJA and the new Article 146a enacted by section 5522 of the MJA shall take effect on the day after the report for fiscal year 2017 required by Article 146(c) of the UCMJ (as in effect before the MJA's amendments) is submitted in accordance with Article 146(c)(1), but in no event later than December 1, 2018.

Sec. 12. In accordance with Article 33 of the UCMJ, as amended by section 5204 of the MJA, the Secretary of Defense, in consultation with the Secretary of Homeland Security, will issue nonbinding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to the disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34 of the UCMJ. That guidance will take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Federal Government with respect to the disposition of Federal criminal cases in accordance with the principle of fair and even-handed administration of Federal criminal law.



THE WHITE HOUSE,

March 1, 2018.

Billing code 3295–F8–P

ANNEX 1

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

(a) R.C.M. 104(b)(1)(B) is amended to read as follows:

"(B) Give a less favorable rating or evaluation of any defense counsel or special victims' counsel because of the zeal with which such counsel represented any client. 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."

(b) R.C.M. 601(d)(2)(B) is amended to read as follows:

"The convening authority has received the advice of the staff judge advocate required under R.C.M. 406. ~~These requirements may be waived by the accused.~~"

(c) R.C.M. 701(g)(2) is amended to read as follows:

"(2) *Protective and modifying orders.* Upon a sufficient showing, the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Subject to limitations in Part III of this Manual, if any rule requires or ~~U~~upon motion by a party, the military judge may review any materials in camera and permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge in camera. If the military judge reviews any materials in camera ~~grants relief after such an ex parte showing the entire text of the party's statement~~ , the entirety of any materials examined by the military judge shall be ~~sealed and~~ attached to the record of trial as an appellate exhibit. The military judge shall seal any materials examined in camera and not disclosed and may seal other materials as appropriate. Such material may be examined by reviewing or appellate authorities in accordance with R.C.M. 1103A~~closed proceedings for the purpose of reviewing the determination of the military judge~~."

(d) R.C.M. 704(c) is amended to read as follows:

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

(e) R.C.M. 704(c)(1) is amended to read as follows:

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

(f) R.C.M. 704(c)(3) is amended to read as follows:

"(3) *Other limitations.* Subject to Service regulations, ~~T~~the authority to grant immunity under this rule may ~~not~~ be delegated in writing at the discretion of the general court-martial convening authority to a subordinate special court-martial convening authority. Further delegation is not permitted. The authority to grant or delegate the authority to grant immunity may be limited by superior authority."

(g) R.C.M. 704(e) is amended to read as follows:

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

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

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

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses."

(h) The heading for R.C.M. 1103(b) is amended to read as follows:

"(b) *General and special courts-martial.*"

(i) R.C.M. 1103(b)(2)(A) is amended to read as follows:

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

(j) R.C.M. 1103(b)(3)(G) is amended to read as follows:

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

(k) R.C.M. 1103(b)(3)(H) is amended to read as follows:

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

(l) R.C.M. 1103(b)(3)(J) is amended to read as follows:

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

(m) R.C.M. 1103(c) is amended to read as follows:

"(c) [RESERVED]~~*Special courts-martial.*~~

~~(1) *Involving a bad-conduct discharge, confinement for more than six months, or*~~

~~*forfeiture of pay for more than six months*. The requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D), and (b)(3) of this rule shall apply in a special court-martial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged.~~

~~(2) *All other special courts-martial*. If the special court-martial resulted in findings of guilty but a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, was not adjudged, the requirements of subsections (b)(1), (b)(2)(D), and (b)(3)(A)-(F) and (I)-(M) of this rule shall apply.~~"

(n) R.C.M. 1103A is amended to read as follows:

Sealed exhibits ~~and~~, proceedings, and other materials.

"(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other ~~matter~~ materials ordered sealed by the preliminary hearing officer or military judge, counsel for the ~~government~~ Government, the court reporter, or trial counsel shall cause such materials to be sealed so as to prevent unauthorized ~~viewing~~ examination or disclosure. Counsel for the ~~government~~ Government, the court reporter, or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the ~~original~~ record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that ~~matters~~ materials were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or record of trial. This ~~Rule~~ rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

(b) *Examination and disclosure of sealed materials ~~exhibits and proceedings~~*. Except as

provided in ~~the following subsections to~~ this rule, sealed ~~exhibits~~ materials may not be examined or disclosed.

(1) *Prior to referral.* Prior to referral of charges, ~~The~~ the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, ~~the MCM~~ this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; and the general court-martial convening authority.

(2) *Referral through* ~~Prior to~~ *authentication.* Prior to authentication of the record by the military judge, sealed materials may not be examined or disclosed in the absence of an order from the military judge based ~~on~~ upon good cause.

(3) *Authentication through action.* After authentication and prior to disposition of the record of trial pursuant to Rule for Courts-Martial 1111, sealed materials may not be examined or disclosed in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39(a) session directed by the ~~Convening Authority~~ convening authority.

(4) *After action* ~~*Reviewing and appellate authorities.*~~

(A) *Examination by reviewing and appellate authorities.* Reviewing and appellate authorities may examine sealed materials when those authorities determine that examination ~~such action~~ is reasonably necessary to a proper fulfillment of their responsibilities under the UCMJ ~~Uniform Code of Military Justice~~, ~~the Manual for Courts-Martial~~ this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(B) *Examination by appellate counsel.* Appellate counsel may examine sealed materials subject to the following procedures.

(i) *Sealed materials released to trial counsel or defense counsel.* Materials presented or reviewed at trial and sealed, as well as materials reviewed in camera, released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules of practice and procedure, or rules of professional responsibility.

(ii) *Sealed materials reviewed in camera but not released to trial counsel or defense counsel.* Materials reviewed in camera by a military judge, not released to trial counsel or defense counsel, and sealed may be examined by reviewing or appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause.

(~~B~~C) *Disclosure.* ~~Reviewing and appellate authorities~~ Appellate counsel shall not~~,~~ ~~however,~~ disclose sealed ~~matter or information~~ materials in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under ~~Rule for Courts-Martial~~ R.C.M. 1201~~(b)~~; or

(ii) Prior authorization of the appellate court before which a case is pending review under ~~Rules for Courts-Martial~~ R.C.M. 1203 and 1204.

~~(C) In those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.~~

~~(D) The authorizing officials in paragraph (B)(ii) above may place conditions on authorized disclosures in order to minimize the disclosure.~~

(D~~E~~) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to ~~Rule for Courts-Martial~~ R.C.M. 1112;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to ~~Rule for Courts-Martial~~ R.C.M. 1201~~(b)~~ and 1210;

~~(iii) Appellate government counsel;~~

~~(iv) Appellate defense counsel;~~

(iii~~v~~) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(iv~~vi~~) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(v~~vii~~) The Justices of the United States Supreme Court and their professional staffs; and

(vi~~viii~~) Any other court of competent jurisdiction.

(E) Notwithstanding any other provision of this rule, in those cases in which United States Supreme Court review is sought or that are pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.

(5) *Examination of sealed materials ~~matters~~.* For ~~the~~ purposes of this rule, "examination" includes reading, inspecting, and viewing~~, photocopying, photographing, disclosing, or manipulating the sealed matters in any way~~.

(6) *Disclosure of sealed materials.* For purposes of this rule, "disclosure" includes photocopying, photographing, disseminating, releasing, manipulating, or communicating the contents of sealed materials in any way.

(n) R.C.M. 1109(d)(2)(A) is amended to read as follows:

"(A) *In general.* The officer exercising general court-martial jurisdiction over the probationer shall review the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether ~~there is probable cause to believe that~~ the probationer violated a condition of the probationer's suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence."

Section 2. Part III of the Manual for Courts-Martial, United States is amended as follows:

(a) Mil. R. Evid. 311(c)(4) is amended to read as follows:

"(4) *Reliance on Statute or Binding Precedent.* Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acted ~~acts~~ in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment."

(b) Mil. R. Evid. 311(d)(5)(A) is amended to read as follows:

"(A) *In general.* When the defense makes an appropriate motion or objection under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of

an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence."

(c) Mil. R. Evid. 505(l) is amended to read as follows:

"(l) *Record of Trial.* If under this rule any information is reviewed in camera by the military judge and withheld from the accused, the accused objects to such withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as ~~the prosecution's~~ any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) or 1103A and attached to the record of trial as an appellate exhibit. Such material must be made available to reviewing and appellate authorities in accordance with R.C.M. 701(g)(2) or R.C.M. 1103A ~~closed proceedings for the purpose of reviewing the determination of the military judge~~. The record of trial with respect to any classified matter will be prepared under R.C.M. 1103(h) and 1104(b)(1)(D)."

(d) Mil. R. Evid. 506(b) is amended to read as follows:

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

(e) Mil. R. Evid. 506(m) is amended to read as follows:

"(m) *Record of Trial.* If under this rule any information is reviewed in camera by the military judge and withheld from the accused, the accused objects to such withholding, and the trial is

continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as ~~the prosecution's~~ any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) or 1103A and attached to the record of trial as an appellate exhibit. Such material must be made available to reviewing and appellate authorities in accordance with R.C.M. 701(g)(2) or R.C.M. 1103A ~~closed proceedings for the purpose of reviewing the determination of the military judge~~."

(f) Mil. R. Evid. 513(e)(6) is amended to read as follows:

"(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1103A and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise."

(g) Mil. R. Evid. 514(e)(6) is amended to read as follows:

"(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1103A and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise."

Section 3. Part IV of the Manual for Courts-Martial, United States is amended as follows:

(a) Paragraph 45c, Article 120c—Other sexual misconduct, subsections b-f, are amended to read as follows:

"b. *Elements.*

(1) *Indecent viewing.*

(a) That the accused knowingly and wrongfully viewed the private area of another person;

(b) That said viewing was without the other person's consent; and

(c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

(2) *Indecent recording.*

(a) That the accused knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;

(b) That said recording was without the other person's consent; and

(c) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(3) *Broadcasting of an indecent recording.*

(a) That the accused knowingly broadcast a certain recording of another person's private area;

(b) That said recording was made ~~or broadcast~~ without the other person's consent;

(c) That the accused knew or reasonably should have known that the recording was made ~~or broadcast~~ without the other person's consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(4) *Distribution of an indecent recording.*

(a) That the accused knowingly distributed a certain recording of another person's private area;

(b) That said recording was made ~~or distributed~~ without the other person's consent;

(c) That the accused knew or reasonably should have known that said recording was made ~~or distributed~~ without the other person's consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(5) *Forcible pandering.*

That the accused compelled another person to engage in an act of prostitution with any person.

(6) *Indecent exposure.*

(a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;

(b) That the exposure was in an indecent manner; and

(c) That the exposure was intentional.

c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against adults (120), offenses against children (120b), and other offenses (120c).

(2) *Definitions.*

(a) *Recording.* A "recording" is a still or moving visual image captured or recorded by any means.

(b) Other terms are defined in subparagraph 45c.a.(d), *supra*.

d. *Lesser included offenses.* See paragraph 3 of this Part and Appendix 12A.

e. *Maximum punishment.*

(1) *Indecent viewing.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Broadcasting or distribution of an indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(4) *Forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 12 years.

(5) *Indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specifications.*

(1) *Indecent viewing, recording, or broadcasting.*

(a) *Indecent viewing.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, knowingly and wrongfully view the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(b) *Indecent ~~visual~~ recording.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, knowingly (photograph) (videotape) (film) (make a recording of) the

private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(c) *Broadcasting or distributing an indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, knowingly (broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made ~~(made) (and/or) (distributed/broadcast)~~ without the consent of _____ and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(2) *Forcible pandering.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, wrongfully compel _____ to engage in (a sexual act) (sexual contact) with _____, to wit: _____, for the purpose of receiving (money) (other compensation) (_____).

(3) *Indecent exposure.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, intentionally expose [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] in an indecent manner, to wit: _____."

ANNEX 2

Section 1. Part I of the Manual for Courts-Martial, United States is amended to read as follows:

PREAMBLE

1. Sources of military jurisdiction

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

2. Exercise of military jurisdiction

(a) *Kinds.* Military jurisdiction is exercised by:

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

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

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

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

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

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

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

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

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

3. Nature and purpose of military law

Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

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

The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, the Nonjudicial Punishment Procedures

(Parts I-V), and Appendix 12A. This Manual shall be applied in a manner consistent with the purpose of military law.

The Department of Defense, in conjunction with the Department of Homeland Security, publishes supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Preface, a Table of Contents, Discussions, Appendices (other than Appendix 12A, which was promulgated by the President), and an Index. These supplementary materials do not have the force of law.

The Manual shall be identified by the year in which it was printed; for example, "Manual for Courts-Martial, United States (20xx edition)." Any amendments to the Manual made by Executive Order shall be identified as "20xx" Amendments to the Manual for Courts-Martial, United States, "20xx" being the year the Executive Order was signed.

The Department of Defense Joint Service Committee (JSC) on Military Justice reviews the Manual for Courts-Martial and proposes amendments to the Department of Defense (DoD) for consideration by the President on an annual basis. In conducting its annual review, the JSC is guided by DoD Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice." DoD Directive 5500.17 includes provisions allowing public participation in the annual review process.

Sec. 2. Part II of the Manual for Courts-Martial, United States is amended to read as follows:

Rule 101. Scope, title

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

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

Rule 102. Purpose and construction

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

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

Rule 103. Definitions and rules of construction

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

(1) "Appellate military judge" means a judge of a Court of Criminal Appeals.

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

(3) "Capital case" means a general court-martial to which a capital offense has been referred with an instruction that the case be treated as capital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.C.M. 810(d).

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

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

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

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

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

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

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

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

(D) The military judge when the case is referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A); or

(E) The summary court-martial officer.

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

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

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

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

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

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

(15) "Military judge" means a judge advocate designated under Article 26(c) who is detailed under Article 26(a) or Article 30a to preside over a general or special court-martial or proceeding before referral. In the context of a summary court-martial, "military judge" means the summary court-martial officer. In the context of a pre-referral proceeding or a special court-martial consisting of a military judge alone, "military judge" includes a military magistrate designated under Article 19 or Article 30a.

(16) "Military magistrate" means a commissioned officer of the armed forces certified under Article 26a who is performing duties under Article 19 or 30a.

(17) "Party," in the context of parties to a court-martial or other proceeding under these rules, means—

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

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

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

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

(20) "UCMJ" refers to the Uniform Code of Military Justice.

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

(22) The terms "writings" and "recordings" have the same meaning as in Mil. R. Evid. 1001.

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

Rule 104. Unlawful command influence

(a) *General prohibitions.*

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

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

(3) *Scope.*

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

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

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

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

(b) *Prohibitions concerning evaluations.*

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

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

(B) Give a less favorable rating or evaluation of any defense counsel or special victims' counsel because of the zeal with which such counsel represented any client. 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) *Evaluation of military judge.*

(A) *General courts-martial.* Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to the performance of duty as a military judge.

(B) *Special courts-martial.* The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority,

the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

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

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

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

Rule 106. Delivery of military offenders to civilian authorities

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

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

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

Rule 108. Rules of court

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

Rule 109. Professional supervision of appellate military judges, military judges, military magistrates, judge advocates, and counsel

(a) *In general.* Each Judge Advocate General is responsible for the professional supervision and discipline of appellate military judges, military judges, military magistrates, judge advocates, and other lawyers who practice in proceedings governed by the UCMJ and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-

martial and in the Courts of Criminal Appeals. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension. Procedures to investigate complaints against appellate military judges, military judges, and military magistrates are contained in subsection (c) of this rule.

(b) *Action after suspension or disbarment.* When a Judge Advocate General suspends a person from practice or the Court of Appeals for the Armed Forces disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard in writing.

(c) *Investigation of appellate military judges, military judges, and military magistrates.*

(1) *In general.* These rules and procedures promulgated pursuant to Article 6a are established to investigate and dispose of charges, allegations, or information pertaining to the fitness of an appellate military judge, military judge, or military magistrate to perform the duties of the judge's or magistrate's office.

(2) *Policy.* Allegations of judicial misconduct or unfitness shall be investigated pursuant to the procedures of this rule and appropriate action shall be taken. Judicial misconduct includes any act or omission that may serve to demonstrate unfitness for further duty as a judge or magistrate, including, but not limited to violations of applicable ethical standards.

(3) *Complaints.* Complaints concerning an appellate military judge, military judge, or military magistrate will be forwarded to the Judge Advocate General of the Service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints.

(4) *Initial action upon receipt of a complaint.* Upon receipt, a complaint will be screened by the Judge Advocate General concerned or by the individual designated in paragraph (c)(3) of this rule to receive complaints. An initial inquiry is necessary if the complaint, taken as true, would constitute judicial misconduct or unfitness for further service as an appellate military judge, a military judge, or military magistrate. Prior to the commencement of an initial inquiry, the Judge Advocate General concerned shall be notified that a complaint has been filed and that an initial inquiry will be conducted. The Judge Advocate General concerned may temporarily suspend the subject of a complaint from performing judicial duties pending the outcome of any inquiry or investigation conducted pursuant to this rule. Such inquiries or investigations shall be conducted with reasonable promptness.

(5) *Initial Inquiry.*

(A) *In general.* An initial inquiry is necessary to determine if the complaint is substantiated. A complaint is substantiated upon finding that it is more likely than not that the subject appellate military judge, military judge, or military magistrate has engaged in judicial misconduct or is otherwise unfit for further service as a judge or magistrate.

(B) *Responsibility to conduct initial inquiry.* The Judge Advocate General concerned, or the person designated to receive complaints under paragraph (c)(3) of this rule will conduct or order an initial inquiry. The individual designated to conduct the inquiry should, if practicable, be senior to the subject of the complaint. If the subject of the complaint is a military judge or military magistrate, the individual designated to conduct the initial inquiry should, if practicable, be a military judge or an individual with experience as a military judge. If the subject of the complaint is an appellate military judge, the individual designated to conduct the inquiry should, if practicable, have experience as an appellate judge.

(C) *Due process.* During the initial inquiry, the subject of the complaint will, at a

minimum, be given notice and an opportunity to be heard.

(D) *Action following the initial inquiry.* If the complaint is not substantiated pursuant to subparagraph (c)(5)(A) of this rule, the complaint shall be dismissed as unfounded. If the complaint is substantiated, minor professional disciplinary action may be taken or the complaint may be forwarded, with findings and recommendations, to the Judge Advocate General concerned. Minor professional disciplinary action is defined as counseling or the issuance of an oral or written admonition or reprimand. The Judge Advocate General concerned will be notified prior to taking minor professional disciplinary action or dismissing a complaint as unfounded.

(6) *Action by the Judge Advocate General.*

(A) *In general.* The Judge Advocates General are responsible for the professional supervision and discipline of appellate military judges, military judges, and military magistrates under their jurisdiction. Upon receipt of findings and recommendations required by paragraph (c)(5) of this rule the Judge Advocate General concerned will take appropriate action.

(B) *Appropriate actions.* The Judge Advocate General concerned may dismiss the complaint, order an additional inquiry, appoint an ethics commission to consider the complaint, refer the matter to another appropriate investigative agency or take appropriate professional disciplinary action pursuant to the rules of professional conduct prescribed by the Judge Advocate General under subsection (a) of this rule. Any decision of the Judge Advocate General, under this rule, is final and is not subject to appeal.

(C) *Standard of proof.* Prior to taking professional disciplinary action, other than minor professional disciplinary action as defined in subparagraph (c)(5)(D) of this rule, the Judge Advocate General concerned shall find, in writing, that the subject of the complaint engaged in judicial misconduct or is otherwise unfit for continued service as an appellate military judge, military judge, or military magistrate, and that such misconduct or unfitness is established by clear and convincing evidence.

(D) *Due process.* Prior to taking final action on the complaint, the Judge Advocate General concerned will ensure that the subject of the complaint is, at a minimum, given notice and an opportunity to be heard.

(7) *The Ethics Commission.*

(A) *Membership.* If appointed pursuant to subparagraph (c)(6)(B) of this rule, an ethics commission shall consist of at least three members. If the subject of the complaint is a military judge or military magistrate, the commission should include one or more military judges or individuals with experience as a military judge. If the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Members of the commission should, if practicable, be senior to the subject of the complaint.

(B) *Duties.* The commission will perform those duties assigned by the Judge Advocate General concerned. Normally, the commission will provide an opinion as to whether the subject's acts or omissions constitute judicial misconduct or unfitness. If the commission determines that the affected appellate military judge, military judge, or military magistrate engaged in judicial misconduct or is unfit for continued judicial service, the commission may be required to recommend an appropriate disposition to the Judge Advocate General concerned.

(8) *Rules of procedure.* The Secretary of Defense or the Secretary of the Service concerned may establish additional procedures consistent with this rule and Article 6a.

Rule 201. Jurisdiction in general

(a) *Nature of court-martial jurisdiction.*

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

(2) The UCMJ applies in all places.

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

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

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

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

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

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

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

(c) [Reserved]

(d) *Exclusive and nonexclusive jurisdiction.*

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

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

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

(e) *Reciprocal jurisdiction.*

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

(2)(A) A commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces.

(B) So much of the authority vested in the President under Article 22(a)(9) to empower any commanding officer of a joint command or joint task force to convene courts-martial is delegated to the Secretary of Defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces assigned or attached to a combatant command or joint command.

(C) A commander who is empowered to convene a court-martial under subparagraphs (e)(2)(A) or (e)(2)(B) of this rule may expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force who is authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces assigned or attached to a joint command or joint task force, under regulations which the superior command may prescribe.

(3) A member of one armed force may be tried by a court-martial convened by a member of another armed force, using the implementing regulations and procedures prescribed by the Secretary concerned of the military service of the accused, when:

(A) The court-martial is convened by a commander authorized to convene courts-martial under paragraph (e)(2) of this rule; or

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

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

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

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

(6) When there is a disagreement between the Secretaries of two military departments or between the Secretary of a military department and the commander of a unified or specified combatant command or other joint command or joint task force as to which organization should exercise jurisdiction over a particular case or class of cases, the Secretary of Defense or an official acting under the authority of the Secretary of Defense shall designate which organization will exercise jurisdiction.

(7) Except as provided in paragraphs (5) and (6) or as otherwise directed by the President or Secretary of Defense, whenever action under this Manual is required or authorized to be taken by a person superior to—

(A) a commander of a unified or specified combatant command or;

(B) a commander of any other joint command or joint task force that is not part of a unified or specified combatant command, the matter shall be referred to the Secretary of the armed force of which the accused is a member. The Secretary may convene a court-martial, take other appropriate action, or, subject to R.C.M. 504(c), refer the matter to any person authorized to convene a court-martial of the accused.

(f) *Types of courts-martial.*

[Note: R.C.M. 201(f)(1)(D) and (f)(2)(D) apply to offenses committed on or after 24 June 2014.]

(1) *General courts-martial.*

(A) *Cases under the UCMJ.*

(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the UCMJ for any offense made punishable under the UCMJ. General courts-martial also may try any person for a violation of Article 103, 103b, or 104a.

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

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

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

(b) The case has not been referred with a special instruction that the case is to be tried as capital.

(B) *Cases under the law of war.*

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

(a) The law of war; or

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

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

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

(D) *Jurisdiction for certain sexual offenses.* Only a general court-martial has jurisdiction to try offenses under Article 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80.

(2) *Special courts-martial.*

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

(B) *Punishments.*

(i) Upon a finding of guilty, special courts-martial may adjudge, under limitations prescribed by this Manual, any punishment authorized under R.C.M. 1003 except death, dishonorable discharge, dismissal, confinement for more than 1 year, hard labor without confinement for more than 3 months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than 1 year.

(ii) A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged by a special court-martial when the case is referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(C) *Capital offenses*

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

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

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

(D) *Certain Offenses under Articles 120 and 120b.* Notwithstanding subparagraph (f)(2)(A), special courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80. Such offenses shall not be referred to a special court-martial.

(E) *Limitations on trial by special court-martial consisting of a military judge alone.*

(i) No specification may be tried by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A) if, before arraignment, the accused objects on the

grounds provided in subclause (I) or (II) of this subparagraph and the military judge determines that:

(I) the maximum authorized confinement for the offense it alleges would be greater than two years if the offense were tried by a general court-martial, with the exception of a specification alleging wrongful use or possession of a controlled substance in violation of Article 112a(b) or an attempt thereof under Article 80; or

(II) the specification alleges an offense for which sex offender notification would be required under regulations issued by the Secretary of Defense.

(ii) If the accused objects to trial by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), and the military judge makes a determination under clause (i), trial may be ordered by a special court-martial under Article 16(c)(1) or a general court-martial as may be appropriate.

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

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

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

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

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

(c) *Attachment of jurisdiction over the person.*

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

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

Rule 203. Jurisdiction over the offense

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

Rule 204. Jurisdiction over certain reserve component personnel

(a) *Service regulations.* The Secretary concerned shall prescribe regulations setting forth rules and procedures for the exercise of court-martial jurisdiction and nonjudicial punishment authority over reserve component personnel under Article 2(a)(3) and 2(d), subject to the limitations of this Manual and the UCMJ.

(b) *Courts-martial.*

(1) *General and special court-martial proceedings.* A member of a reserve component must be on active duty prior to arraignment at a general or special court-martial. A member ordered to active duty pursuant to Article 2(d) may be retained on active duty to serve any

adjudged confinement or other restriction on liberty if the order to active duty was approved in accordance with Article 2(d)(5), but such member may not be retained on active duty pursuant to Article 2(d) after service of the confinement or other restriction on liberty. All punishments remaining unserved at the time the member is released from active duty may be carried over to subsequent periods of inactive-duty training or active duty.

(2) *Summary courts-martial.* A member of a reserve component may be tried by summary court-martial either while on active duty or inactive-duty training. A summary court-martial conducted during inactive-duty training may be in session only during normal periods of such training. The accused may not be held beyond such periods of training for trial or service or any punishment. All punishments remaining unserved at the end of a period of active duty or the end of any normal period of inactive duty training may be carried over to subsequent periods of inactive-duty training or active duty

(c) *Applicability.* This rule is not applicable when a member is held on active duty pursuant to R.C.M. 202(c).

(d) *Changes in type of service.* A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while subject to the UCMJ, is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense. This subsection does not apply to a person whose military status was completely terminated after commission of an offense.

Rule 301. Report of offense

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

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

Rule 302. Apprehension

(a) *Definition and scope.*

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

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

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

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

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

(3) *Civilians authorized to apprehend deserters.* Under Article 8, any civilian officer having authority to apprehend offenders under laws of the United States or of a State, Territory,

Commonwealth, or possession, or the District of Columbia, when the apprehension is of a deserter from the armed forces.

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

(d) *How an apprehension may be made.*

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

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

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

(e) *Where an apprehension may be made.*

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

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

(A) Pursuant to consent under Mil. R. Evid. 314(e) or 316(c)(3);

(B) There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the person sought to be taken into custody evading apprehension;

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

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

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

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

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

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority. A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in paragraph (e)(2) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

Rule 303. Preliminary inquiry into reported offenses

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

Rule 304. Pretrial restraint

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

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

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

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

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

(b) *Who may order pretrial restraint.*

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

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

(3) *Delegation of authority.* The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

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

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

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

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

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

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

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

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

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

Rule 305. Pretrial confinement

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

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

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

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

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

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

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

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

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

(3) The right to retain civilian counsel at no expense to the United States, and the right to

request assignment of military counsel; and

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

(f) *Military counsel.* If requested by the confinee and such request is made known to military authorities, military counsel shall be provided to the confinee before the initial review under subsection (i) of this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the confinee shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a confinee does not have a right under this rule to have military counsel of the confinee's own selection.

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

(h) *Notification and action by commander.*

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

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after the commander's ordering of a confinee into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander's compliance with this subparagraph may also satisfy the 48-hour probable cause determination of paragraph (i)(1) of this rule, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsection (d), paragraph (i)(1), or this subparagraph prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

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

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

(ii) The confinee committed it;

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

(a) The confinee will not appear at trial, pretrial hearing, or preliminary hearing, or

(b) The confinee will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to

the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

(C) *72-hour memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subparagraph (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under paragraph (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement.*

(1) *48-hour probable cause determination.* Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the confinee is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the confinee under military control in a timely fashion.

(2) *7-day review of pretrial confinement.* Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 7-day review.*

(i) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the confinee's commander under subparagraph (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the confinee. The confinee and the confinee's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

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

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

(iv) *Victim's right to be reasonably heard.* A victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the 7-day review; the right to confer with the representative of the command and counsel for the government, if any; and the right to be reasonably heard during the review. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel and the right to be reasonably protected from the confinee during the 7-day review. The victim of an alleged offense shall be notified of these rights in accordance with regulations of the Secretary concerned.

(B) *Extension of time limit.* The 7-day reviewing officer may, for good cause, extend the

time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release. If the reviewing officer orders immediate release, a victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person.

(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. The memorandum shall also state whether the victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the government, and was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the confinee based upon any significant information not previously considered.

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

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

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subparagraph (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the confinee should be released under subparagraph (h)(2)(B) of this rule; or

(C) The provisions of paragraph (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subparagraph (h)(2)(B) of this rule.

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

(k) *Remedy.* The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement using the conversion formula under R.C.M. 1003(b)(6), restriction using the conversion formula under R.C.M. 1003(b)(5), fine, and forfeiture of pay, in that order. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(l) *Confinement after release.* No person whose release from pretrial confinement has been

directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

(m) *Exceptions.*

(1) *Operational necessity.* The Secretary of Defense may suspend application of paragraphs (e)(3), (e)(4), subsection (f), subparagraphs (h)(2)(A) and (C), and subsection (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) *At sea.* Paragraphs (e)(3) and (e)(4), subsection (f), subparagraph (h)(2)(C), and subsection (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subparagraph (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

(n) *Notice to victim of escaped confinee.* A victim of an alleged offense committed by the confinee for which the confinee has been placed in pretrial confinement has the right to reasonable, accurate, and timely notice of the escape of the prisoner, unless such notice may endanger the safety of any person.

Rule 306. Initial disposition

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

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

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

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

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

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

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

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

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

(e) *Sex-related offenses.*

(1) For purposes of this subsection, a "sex-related offense" means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80, UCMJ.

(2) Under such regulations as the Secretary concerned may prescribe, for alleged sex-related offenses committed in the United States, the victim of the sex-related offense shall be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. The commander, and if charges are preferred, the convening authority, shall consider such views as to the victim's preference for jurisdiction, if available, prior to making an initial disposition decision. For purposes of this rule, "victim" is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense as defined in paragraph (e)(1) of this rule.

(3) Under such regulations as the Secretary concerned may prescribe, if the victim of an alleged sex-related offense expresses a preference for prosecution of the offense in a civilian court, the commander, and if charges are preferred, the convening authority, shall ensure that the civilian authority with jurisdiction over the offense is notified of the victim's preference for civilian prosecution. If the commander and, if charges are preferred, the convening authority learns of any decision by the civilian authority to prosecute or not prosecute the offense in civilian court, the commander or convening authority shall ensure the victim is notified.

Rule 307. Preferral of charges

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

(b) *How charges are preferred; oath.* In preferring charges and specifications—

(1) The person preferring the charges and specifications must sign them under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) The writing under paragraph (1) must state that—

(A) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

(B) the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer.

(c) *How to allege offenses.*

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

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

(3) *Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication; however, specifications under Article 134 must expressly allege the terminal element. Except for aggravating factors under R.C.M. 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

(4) *Multiple offenses.* Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of

charges against one person.

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

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

Rule 308. Notification to accused of charges

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

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

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

Rule 309. Pre-referral judicial proceedings

(a) *In general.*

(1) A military judge detailed under regulations of the Secretary concerned may conduct proceedings under Article 30a before referral of charges and specifications to court-martial for trial, and may issue such rulings and orders as necessary to further the purpose of the proceedings.

(2) The matters that may be considered and ruled upon by a military judge in proceeding under this rule are limited to those matters specified in subsection (b).

(3) If any matter in a proceeding under this rule becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter, to include any motions, related papers, and the record of the hearing, if any, shall be provided to the military judge detailed to the court-martial.

(b) *Pre-referral matters.*

(1) *Pre-referral investigative subpoenas.* A military judge may, upon application by the Government, consider whether to issue a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C). The proceeding may be conducted ex parte and may be conducted in camera.

(2) *Pre-referral warrants or orders for wire or electronic communications.* A military judge may, upon written application by a federal law enforcement officer or authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, consider whether to issue a warrant or order for wire or electronic communications and related information as provided under R.C.M. 703A. The proceeding may be conducted ex parte and may be conducted in camera.

(3) *Requests for relief from subpoena or other process.* A person in receipt of a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C) or a service provider in receipt of an order to disclose information about wire or electronic communications under R.C.M. 703A may

request relief on grounds that compliance with the subpoena or order is unreasonable, oppressive or prohibited by law. The military judge shall review the request and shall either order the person or service provider to comply with the subpoena or order, or modify or quash the subpoena or order as appropriate. In a proceeding under this paragraph, the United States shall be represented by an authorized counsel for the Government.

(4) *Pre-referral matters referred by an appellate court.* When a Court of Criminal Appeals or the Court of Appeals for the Armed Forces, in the course of exercising the jurisdiction of such court, remands the case for a pre-referral judicial proceeding, a military judge may conduct such a proceeding under this rule.

(c) *Procedure for submissions.* The Secretary concerned shall prescribe the procedures for receiving requests for proceedings under this rule and for detailing military judges to such proceedings.

(d) *Hearings.* Any hearing conducted under this rule shall be conducted in accordance with the procedures generally applicable to sessions conducted under Article 39(a) and R.C.M. 803.

(e) *Record.* A separate record of any proceeding under this rule shall be prepared and forwarded to the convening authority or commander with authority to dispose of the charges or offenses in the case. If charges are referred to trial in the case, such record shall be included in the record of trial.

(f) *Military magistrate.* If authorized under regulations of the Secretary concerned, a military judge detailed to a proceeding under this rule, other than a proceeding under paragraph (b)(2), may designate a military magistrate to preside and exercise the authority of the military judge over the proceeding.

Rule 401. Forwarding and disposition of charges in general

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

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

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

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

(2) *Forwarding charges.*

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

(B) *Other cases.* When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made.

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

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

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

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

(1) Dismiss any charges; or

(2) Forward them to a superior commander for disposition.

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

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

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

(1) Dismiss any charges;

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

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

(4) Subject to R.C.M. 601(d) and 1301(c), refer charges to a summary court-martial for trial; or

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

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

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

(1) Dismiss any charges;

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

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

(4) Subject to R.C.M. 201(f)(2)(D) and (E), 601(d), and 1301(c), refer charges to a summary court-martial or to a special court-martial for trial; or,

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

Rule 404A. Initial disclosures

(a) *Generally.* Except as otherwise provided in subsections (b)–(d), counsel for the Government shall provide the following information, matters, and disclosures to the defense:

(1) *After preferral of charges.* As soon as practicable after notification to the accused of preferred charges under R.C.M. 308, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect the charges and any matters that accompanied the charges when they were preferred.

(2) *After direction of a preliminary hearing.* As soon as practicable but no later than five days after direction of an Article 32 preliminary hearing, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect:

(A) the order directing the Article 32 preliminary hearing pursuant to R.C.M. 405;

(B) statements, within the control of military authorities, of witnesses that counsel for the Government intends to call at the preliminary hearing;

(C) evidence counsel for the Government intends to present at the preliminary hearing; and

(D) any matters provided to the convening authority when deciding to direct the preliminary hearing.

(b) *Contraband.* If items covered by subsection (a) of this rule are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the preliminary hearing.

(c) *Privilege.* If items covered by subsection (a) of this rule are privileged, classified, or otherwise protected under Section V of Part III, the Military Rules of Evidence, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, classified, or otherwise protected information covered by subsection (a) of this rule if authorized by the holder of the privilege, or in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

(d) *Protective order if privileged information is disclosed.* If the Government agrees to disclose to the accused information to which the protections afforded by Section V of Part III may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)–(6) or 506(g)(2)–(5).

Rule 405. Preliminary hearing

(a) *In general.* Except as provided in subsection (m), no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with this rule. The issues for determination at a preliminary hearing are limited to the following: whether each specification alleges an offense; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case. Failure to comply with this rule shall have no effect on the disposition of any charge if the charge is not referred to a general court-martial.

(b) *Earlier preliminary hearing.* If a preliminary hearing on the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the preliminary hearing and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further preliminary hearing is required.

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

(d) *Personnel.*

(1) *Preliminary hearing officer.*

(A) The convening authority directing the preliminary hearing shall detail an impartial judge advocate, not the accuser, who is certified under Article 27(b)(2) to conduct the hearing. When it is impracticable to appoint a judge advocate certified under Article 27(b)(2) due to exceptional circumstances:

(i) The convening authority may detail an impartial commissioned officer as the preliminary hearing officer, and

(ii) An impartial judge advocate certified under Article 27(b)(2) shall be available to provide legal advice to the detailed preliminary hearing officer.

(B) Whenever practicable, the preliminary hearing officer shall be equal or senior in grade to the military counsel detailed to represent the accused and the Government at the preliminary hearing.

(C) The Secretary concerned may prescribe additional limitations on the detailing of preliminary hearing officers.

(D) The preliminary hearing officer shall not depart from an impartial role and become an advocate for either side. The preliminary hearing officer is disqualified to act later in the same case in any other capacity.

(2) *Counsel for the Government.* A judge advocate, not the accuser, shall serve as counsel to represent the Government.

(3) *Defense counsel.*

(A) *Detailed counsel.* Military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the Government. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subparagraphs (A) and (B).

(4) *Others.* The convening authority who directed the preliminary hearing may also detail or request an appropriate authority to detail a reporter, an interpreter, or both.

(e) *Scope of preliminary hearing.*

(1) The preliminary hearing officer shall limit the inquiry to the examination of evidence, including witnesses, relevant to the issues for determination under subsection (a).

(2) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense, the preliminary hearing officer may examine evidence and hear witnesses presented by the parties relating to the subject matter of such offense and make the determinations specified in subsection (a) regarding such offense without the accused first having been charged with the offense. The rights of the accused under subsection (f), and, where it would not cause undue delay to the proceedings, the procedure applicable for production of witnesses and other evidence under subsection (h), are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, the preliminary hearing officer shall inform the accused of the general nature of each uncharged offense considered, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the preliminary hearing of any charged offense.

(f) *Rights of the accused.* At any preliminary hearing under this rule the accused shall have the right to:

(1) Be advised of the charges under consideration;

(2) Be represented by counsel;

(3) Be informed of the purpose of the preliminary hearing;

(4) Be informed of the right against self-incrimination under Article 31;

(5) Except in the circumstances described in R.C.M. 804(c)(2), be present throughout the taking of evidence;

(6) Cross-examine witnesses on matters relevant to the issues for determination under subsection (a);

(7) Present matters relevant to the issues for determination under subsection (a); and

(8) Make a sworn or unsworn statement relevant to the issues for determination under subsection (a).

(g) *Notice to and presence of victim.*

(1) For the purposes of this rule, a "victim" is an individual who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.

(2) A victim of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense and the reasonable right to confer with counsel for the Government.

(3) A victim has the right not to be excluded from any public proceeding of the preliminary hearing, except to the extent a similarly situated victim would be excluded at trial.

(h) *Notice, Production of Witnesses, and Production of Other Evidence.*

(1) *Notice.* Prior to any preliminary hearing under this rule the parties shall, in accordance with timelines set by the preliminary hearing officer, provide to the preliminary hearing officer and the opposing party the following notices:

(A) Notice of the name and contact information for each witness the party intends to call at the preliminary hearing; and

(B) Notice of any other evidence that the party intends to offer at the preliminary hearing; and

(C) Notice of any additional information the party intends to submit under subsection (k).

(2) *Production of Witnesses.*

(A) *Military Witnesses.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government the names of proposed military witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under subsection (a).

(iii) If the Government does not object to the proposed defense military witness or the

preliminary hearing officer determines that the military witness is relevant, not cumulative, and necessary, counsel for the Government shall request that the commanding officer of the proposed military witness make that person available to provide testimony. The commanding officer shall determine whether the individual is available, and if so, whether the witness will testify in person, by video teleconference, by telephone, or by similar means of remote testimony, based on operational necessity or mission requirements. If the commanding officer determines that the military witness is available, counsel for the Government shall make arrangements for that individual's testimony. The commanding officer's determination of unavailability due to operational necessity or mission requirements is final. A victim who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration shall not be required to testify at a preliminary hearing.

(B) *Civilian Witnesses.*

(i) Defense counsel shall provide to counsel for the Government the names of proposed civilian witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under subsection (a).

(iii) If the Government does not object to the proposed civilian witness or the preliminary hearing officer determines that the civilian witness' testimony is relevant, not cumulative, and necessary, counsel for the Government shall invite the civilian witness to provide testimony and, if the individual agrees, shall make arrangements for that witness' testimony. If expense to the Government is to be incurred, the convening authority who directed the preliminary hearing, or the convening authority's delegate, shall determine whether the witness testifies in person, by video teleconference, by telephone, or by similar means of remote testimony.

(3) *Production of other evidence.*

(A) *Evidence under the control of the Government.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence under the control of the Government the accused requests the Government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and shall make reasonable efforts to obtain the evidence; or (2) the Government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced.

The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a). If the preliminary hearing officer determines that the evidence shall be produced, counsel for the Government shall make reasonable efforts to obtain the evidence.

(iii) 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.

(B) *Evidence not under the control of the Government.*

(i) Evidence not under the control of the Government may be obtained through noncompulsory means or by a pre-referral investigative subpoena issued by a military judge under R.C.M. 309 or counsel for the Government in accordance with the process established by R.C.M. 703(g)(3)(C).

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence not under the control of the Government that the accused requests the Government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and shall issue a pre-referral investigative subpoena for the evidence; or (2) the Government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(iii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and that the issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the Government to issue a pre-referral investigative subpoena for the defense-requested evidence. If counsel for the Government refuses, the counsel shall set forth the reasons for such refusal in a written statement that shall be included in the preliminary hearing report under subsection (l).

(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.

(i) *Military Rules of Evidence.*

(1) *In general.*

(A) Only the following Military Rules of Evidence apply to preliminary hearings:

(i) Mil. R. Evid. 301–303 and 305.

(ii) Mil. R. Evid. 412(a), except as provided in paragraph (2) of this subsection.

(iii) Mil. R. Evid., Section V, Privileges, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply.

(B) In applying the rules to a preliminary hearing in accordance with subparagraph (A), the term "military judge," as used in such rules, means the preliminary hearing officer, who shall assume the military judge's authority to exclude evidence from the preliminary hearing, and who shall, in discharging this duty, follow the procedures set forth in such rules. Evidence offered in violation of the procedural requirements of the rules in subparagraph (A) shall be excluded from the preliminary hearing, unless good cause is shown.

(2) *Sex-offense cases.*

(A) *Inadmissibility of certain evidence.* In a case of an alleged sexual offense, as defined under Mil. R. Evid. 412(d), evidence offered to prove that any alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victim's sexual predisposition is not admissible at a preliminary hearing unless—

(i) the evidence would be admissible at trial under Mil. R. Evid. 412(b)(1)(A) or (B); and

(ii) the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) of this rule.

(B) *Initial procedure to determine admissibility.* A party intending to offer evidence under subparagraph (A) shall, no later than five days before the preliminary hearing begins, submit a written motion specifically describing the evidence and stating why the evidence is admissible. The preliminary hearing officer may permit a different filing time, but any motion shall be filed prior to the beginning of the preliminary hearing. The moving party shall serve the motion on the opposing party, who shall have the opportunity to respond in writing. Counsel for the Government shall cause the motion and any written responses to be served on the victim, or victim's counsel, if any, or, when appropriate, the victim's guardian or representative. After reviewing the motion and any written responses, the preliminary hearing officer shall either—

(i) deny the motion on the grounds that the evidence does not meet the criteria specified in clauses (i)(2)(A)(i) or (ii); or

(ii) conduct a hearing to determine the admissibility of the evidence.

(C) *Admissibility hearing.* If the preliminary hearing officer conducts a hearing to determine the admissibility of the evidence, the admissibility hearing shall be closed and should ordinarily be conducted at the end of the preliminary hearing, after all other evidence offered by the parties has been admitted. At the admissibility hearing, the parties may call witnesses and offer relevant evidence. The victim shall be afforded a reasonable opportunity to attend and be heard, to include being heard through counsel. If the preliminary hearing officer determines that the evidence should be admitted, the victim may directly petition the Court of Criminal Appeals for a writ of mandamus pursuant to Article 6b.

(D) *Sealing.* The motions, related papers, and the record of an admissibility hearing shall be sealed and remain under seal in accordance with R.C.M. 1113.

(j) *Preliminary hearing procedure.*

(1) *Generally.* The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under subsection (f). Counsel for the Government will then present evidence. Upon the conclusion of counsel for the Government's presentation of evidence, defense counsel may present matters. Both counsel for the Government and defense counsel shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary for a determination of the issues under subsection (a), the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence. Except as provided in subparagraph (l)(2)(J), the preliminary hearing officer shall not consider evidence not presented at the preliminary hearing in making the determinations under subsection (a). The preliminary hearing officer shall not call witnesses *sua sponte.*

(2) *Presentation of evidence.*

(A) *Testimony.* Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the issues for determination under subsection (a).

(B) *Other evidence.* If relevant to the issues for determination under subsection (a) and not cumulative, a preliminary hearing officer may consider other evidence offered by either counsel for the Government or defense counsel, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(3) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible. If there is an overriding interest that outweighs the value of an open preliminary hearing, the convening authority or the preliminary hearing officer may restrict or foreclose access by spectators to all or part of the proceedings. Any restriction or closure must be narrowly tailored to protect the overriding interest involved. Before ordering any restriction or closure, a convening authority or preliminary hearing officer must determine whether any reasonable alternatives to such restriction or closure exist, or if some lesser means can be used to protect the overriding interest in the case. The convening authority or preliminary hearing officer shall make specific findings of fact in writing that support the restriction or closure. The written findings of fact shall be included in the preliminary hearing report.

(4) *Presence of accused.* The accused shall be considered to have waived the right to be present at the preliminary hearing, if the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent; or

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

(5) *Recording of the preliminary hearing.* Counsel for the Government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim named in one of the specifications under consideration may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the Government shall provide the requested access to, or a copy of, the recording or, at the Government's discretion, a transcript, to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of rereferral, or court-martial adjournment. This rule does not entitle the victim to classified information or sealed materials consistent with an order issued in accordance with R.C.M. 1113(a).

(6) *Recording and broadcasting prohibited.* Video and audio recording, broadcasting, and the taking of photographs—except as required in paragraph (j)(5) of this rule—are prohibited. The convening authority may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under paragraph (j)(4) of this rule or by spectators when the facilities are inadequate to accommodate a reasonable number of spectators

(7) *Objections.* Any objection alleging a failure to comply with this rule, other than an objection under subsection (l), shall be made to the preliminary hearing officer promptly upon discovery of the alleged error. The preliminary hearing officer is not required to rule on any objection. An objection shall be noted in the preliminary hearing report if the person objecting so requests. The preliminary hearing officer may require a party to file any objection in writing.

(8) *Sealed exhibits and proceedings.* The preliminary hearing officer has the authority to order exhibits, recordings of proceedings, or other matters sealed as described in R.C.M. 1113.

(k) *Supplementary information for the convening authority.*

(1) No later than 24 hours from the closure of the preliminary hearing, counsel for the Government, defense counsel, and any victim named in one of the specifications under consideration (or, if applicable, counsel for such a victim) may submit to the preliminary hearing officer, counsel for the Government, and defense counsel additional information that the submitter deems relevant to the convening authority's disposition of the charges and specifications.

(2) Defense counsel may submit additional matters that rebut the submissions of counsel for the Government or any victim provided under paragraph (k)(1). Such matters must be provided to the preliminary hearing officer and to the counsel for the Government within 5 days of the closure of the preliminary hearing.

(3) The preliminary hearing officer shall examine all supplementary information submitted under subsection (k) and shall seal, in accordance with R.C.M. 1113, any matters the preliminary hearing officer deems privileged or otherwise not subject to disclosure.

(A) The preliminary hearing officer shall provide a written summary and an analysis of the supplementary information submitted under subsection (k) that is not sealed and is relevant to disposition for inclusion in the report to the convening authority under subsection (l).

(B) If the preliminary hearing officer seals any supplementary information submitted under subsection (k), the preliminary hearing officer shall provide an analysis of those materials. The analysis of the sealed materials shall be sealed. Additionally, the preliminary hearing officer shall generally describe those matters and detail the basis for sealing them in a separate cover sheet. This cover sheet shall accompany the sealed matters and shall not contain privileged information or be sealed.

(4) The supplementary information and any summary and analysis provided by the preliminary hearing officer, and any sealed matters and cover sheets, as applicable, shall be forwarded to the convening authority for consideration in making a disposition determination.

(5) Submissions under subsection (k) shall be maintained as an attachment to the preliminary hearing report provided under subsection (l).

(l) *Preliminary hearing report.*

(1) *In general.* The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority. This report is advisory and does not bind the staff judge advocate or convening authority.

(2) *Contents.* The preliminary hearing report shall include:

(A) A statement of names and organizations or addresses of counsel for the Government and defense counsel and, if applicable, a statement of why either counsel was not present at any time during the proceedings;

(B) The recording of the preliminary hearing under paragraph (j)(5);

(C) For each specification, the preliminary hearing officer's reasoning and conclusions with respect to the issues for determination under subsection (a), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations concerning the testimony of witnesses and the availability and admissibility of evidence at trial;

(D) If applicable, a statement that an essential witness may not be available for trial;

(E) An explanation of any delays in the preliminary hearing;

(F) A notation if counsel for the Government refused to issue a pre-referral investigative subpoena that was directed by the preliminary hearing officer and the counsel's statement of the reasons for such refusal;

(G) Recommendations for any necessary modifications to the form of the charges and specifications;

(H) A statement of whether the preliminary hearing officer examined evidence or heard witnesses relating to any uncharged offenses in accordance with paragraph (e)(2), and, for each such offense, the preliminary hearing officer's reasoning and conclusions as to whether there is probable cause to believe that the accused committed the offense and whether the convening authority would have court-martial jurisdiction over the offense if it were charged;

(I) A notation of any objections if required under paragraph (j)(7);

(J) The recommendation of the preliminary hearing officer as to the disposition that should be made of the charges and specifications in the interest of justice and discipline. In making this disposition recommendation, the preliminary hearing officer may consider any evidence admitted during the preliminary hearing and matters submitted under subsection (k); and

(K) The written summary and analysis required by subparagraph (k)(3)(A).

(3) *Sealed exhibits and proceedings.* If the preliminary hearing report contains exhibits, proceedings, or other matters ordered sealed by the preliminary hearing officer in accordance with R.C.M. 1113, counsel for the Government shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

(4) *Distribution of preliminary hearing report.* The preliminary hearing officer shall promptly cause the preliminary hearing report to be delivered to the convening authority. That convening authority shall promptly cause a copy of the report to be delivered to each accused and, in accordance with R.C.M. 401(b), shall promptly determine what disposition will be made in the interest of justice and discipline. If applicable, the convening authority shall promptly forward the report, together with the charges, to a superior commander for disposition.

(5) *Objections.* Any objection to the preliminary hearing report shall be made to the convening authority who directed the preliminary hearing, via the preliminary hearing officer. Upon receipt of the report, the accused has 5 days to submit objections to the preliminary hearing officer. The preliminary hearing officer will forward the objections to the convening authority as soon as practicable. This paragraph does not prohibit a convening authority from referring any charge or taking other action within the 5-day period.

(m) *Waiver.* The accused may waive a preliminary hearing. However, the convening authority authorized to direct the preliminary hearing may direct that a preliminary hearing be conducted notwithstanding the waiver. Failure to make a timely objection under this rule, including an objection to the report, shall constitute forfeiture of the objection. Relief from the waiver or forfeiture may be granted by the convening authority who directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.

Rule 406. Pretrial advice

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

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

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

(2) Conclusion with respect to whether there is probable cause to believe that the accused committed the offense charged in the specification;

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

(4) 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.

Rule 406A. Pretrial advice before referral to special court-martial

(a) *In general.* Before any charge may be referred for trial by special court-martial, the convening authority shall consult a judge advocate on relevant legal issues. Such issues may include:

(1) Whether each specification alleges an offense under the UCMJ;

(2) Whether there is probable cause to believe the accused committed the offense(s) charged;

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

(4) The form of the charges and specifications and any necessary modifications; and

(5) Any other factors relating to disposition of the charges and specifications in the interest of justice and discipline.

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

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

(1) Dismiss any charges;

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

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

(4) Subject to R.C.M. 201(f)(2)(D) and (E), 601(d), and 1301(c), refer charges to a summary court-martial or to a special court-martial for trial;

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

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

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

Rule 501. Composition and personnel of courts-martial

(a) *Composition of courts-martial.*

(1) *General courts-martial.*

(A) *Non-capital cases.* In non-capital cases, a general court-martial shall consist of:

(i) A military judge and eight members;

(ii) A military judge, eight members, and any alternate members authorized by the convening authority;

(iii) A military judge alone if trial by a military judge is requested and approved under R.C.M. 903; or

(iv) A military judge and six or seven members, but only if, after impanelment, the panel is reduced below eight members as a result of challenges or excusals.

(B) *Capital cases.* In capital cases, a general court-martial shall consist of:

(i) A military judge and twelve members; or

(ii) A military judge, twelve members, and any alternate members authorized by the convening authority.

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

(A) A military judge and four members;

(B) A military judge, four members, and any alternate members authorized by the convening authority;

(C) A military judge alone if trial by a military judge is requested and approved under R.C.M. 903; or

(D) A military judge alone if the case is referred for trial by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

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

(c) *Other personnel.* Other personnel, such as interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed or employed as appropriate but need not be detailed by the convening authority personally.

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

(a) *Members.*

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

(A) A commissioned officer;

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

(C) An enlisted person, except when the accused is either a commissioned or warrant officer.

(2) *Duties.*

(A) *Members.* The members of a court-martial shall determine whether the accused is proved guilty and, in a capital case in which the accused is found guilty of a capital offense, or in a non-capital case when the accused elects sentencing by members in accordance with R.C.M. 1002, the members shall determine an appropriate sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material.

(B) *Alternate members.* Members impaneled as alternate members shall have the same duties as members under subparagraph (A). However, an alternate member shall not vote or

participate in deliberations on findings or sentencing unless the alternate member has become a member by replacing a member who was excused after impanelment under R.C.M. 912B.

(b) *President.*

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

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

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

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

(c) *Qualifications of military judge and military magistrate.*

(1) *Military judge.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a federal court or a member of the bar of the highest court of a State and who is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial.

(2) *Military magistrate.* The Secretary concerned may establish a military magistrate program. A military magistrate shall be a commissioned officer of the armed forces who is a member of the bar of a federal court or a member of the bar of highest court of a State and who is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the Judge Advocate General of the armed force of which such military magistrate is a member.

(3) *Minimum tour lengths.* A person assigned for duty as a military judge shall serve as a military judge for a term of not less than three years, subject to such provisions for reassignment as may be prescribed in regulations issued by the Secretary concerned.

(d) *Counsel.*

(1) *Qualifications of trial counsel.*

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

(B) *Trial counsel in special courts-martial and assistant trial counsel in general or special courts-martial.* Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel in general or special courts-martial if that person—

(i) is determined to be competent to perform such duties by the Judge Advocate General; and

(ii) takes an oath in accordance with Article 42(a), certifies to the court that the person has read and is familiar with the applicable rules of procedure, evidence, and professional responsibility, and meets any additional qualifications the Secretary concerned may establish.

(2) *Qualifications of defense counsel.*

(A) *Detailed military counsel.* Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force

of which the counsel is a member may be detailed as defense counsel, assistant defense counsel, or associate defense counsel in general or special courts-martial.

(B) *Individual military counsel and civilian defense counsel.* Individual military or civilian defense counsel who represents an accused in accordance with Article 38(b) in a court-martial shall be:

(i) a member of the bar of a federal court or of the bar of the highest court of a State; or

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

(C) *Counsel in capital cases.*

(i) *In general.* In any capital case, to the greatest extent practicable, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

(ii) *Qualifications.* A counsel learned in the law applicable to capital cases is an attorney whose background, knowledge, or experience would enable him or her to competently represent an accused in a capital case, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation.

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

(A) The accuser;

(B) An investigating or preliminary hearing officer;

(C) A military judge or appellate military judge; or

(D) A member.

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

(4) *Duties of trial and assistant trial counsel.* Trial counsel shall prosecute cases on behalf of the United States. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the Service.

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

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

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

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

(A) The accuser;

(B) A witness;

(C) An investigating or preliminary hearing officer;

(D) Counsel for any party; or

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

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

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

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

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

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

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

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

(a) Members.

(1) *In general.* The convening authority shall—

(A) detail qualified persons as members for courts-martial;

(B) detail not fewer than the number of members required under R.C.M. 501(a), as applicable; and

(C) state whether the military judge is—

(i) authorized to impanel a specified number of alternate members; or

(ii) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain.

(2) *Member election by enlisted accused.* An enlisted accused may, before assembly, request orally on the record or in writing that the membership of the court-martial to which that accused's case has been referred be comprised entirely of officers or of at least one-third enlisted members. If such a request is made, the court-martial membership must be consistent with the accused's request unless eligible members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of members cannot be obtained, the court-martial may be assembled and the members impaneled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why such members could not be obtained which must be appended to the record of trial.

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

(4) This subsection does not apply to charges referred to a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(b) *Military judge.*

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

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

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

(4) *Military magistrate.* If authorized under regulations of the Secretary concerned, a detailed military judge may designate a military magistrate to perform pre-referral duties under R.C.M. 309, and, with the consent of the parties, to preside over a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(c) *Counsel.*

(1) *By whom detailed.* Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person that person may detail himself or herself as counsel for a court-martial. In a capital case, counsel learned in the law applicable to such cases under R.C.M. 502(d)(2)(C) shall be assigned in accordance with regulations of the Secretary concerned.

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

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

Rule 504. Convening courts-martial

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

(b) *Who may convene courts-martial.*

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

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

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

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

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

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

(iii) In a combatant command or joint command, by the officer exercising general court-martial jurisdiction over the command.

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

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

(c) *Disqualification.*

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

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

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

(d) *Convening orders.*

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

(A) A convening order for a general or special court-martial shall—

(i) designate the type of court-martial; and

(ii) detail the members, if any, in accordance with R.C.M. 503(a);

(B) A convening order may designate where the court-martial will meet.

(C) If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

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

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

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

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

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

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

(c) *Changes of members.*

(1) *Before assembly.*

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

(B) *By convening authority's delegate.*

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

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

(2) *After assembly.*

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

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

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

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

(iv) By the military judge when the number of members is in excess of the number of members required for impanelment.

(B) *New members.* New members may be detailed after assembly only when, as a result of excusals under subparagraph (c)(2)(A), the number of members of the court-martial is reduced below the number of members required under R.C.M. 501(a), or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third of the total membership.

(d) *Changes of detailed counsel.*

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

(2) *Defense counsel.*

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

(B) *After formation of attorney-client relationship.* After an attorney-client relationship

has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

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

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

(iii) For other good cause shown on the record

(e) *Change of military judge or military magistrate.*

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

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

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

Rule 506. Accused's rights to counsel

(a) *In general.*

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

(2) *Capital courts-martial.* In a case referred with a special instruction that the case is to be tried as capital, the accused may be represented by more than one counsel. To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases under R.C.M. 502(d)(2)(C). If necessary, this counsel may be a civilian, and if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

(b) *Individual military counsel.*

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

(A) A general or flag officer;

(B) A trial or appellate military judge;

(C) A trial counsel;

(D) An appellate defense or government counsel;

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

(F) An instructor or student at a Service school or academy:

(G) A student at a college or university;

(H) A member of the staff of the Judge Advocate General of the Army, Navy, Air Force, Coast Guard, or the Staff Judge Advocate to the Commandant of the Marine Corps.

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

(2) *Procedure.* Subject to this subsection, the Secretary concerned shall prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through trial counsel to the convening authority. If the requested person is among those not reasonably available under paragraph (b)(1) of this rule or under regulations of the Secretary concerned, the convening authority shall deny the request and notify the accused, unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or preliminary hearing for which requested, be among those so listed as not reasonably available. If the accused's request makes such a claim, or if the person is not among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. That authority shall make an administrative determination whether the requested person is reasonably available in accordance with the procedure prescribed by the Secretary concerned. This determination is a matter within the sole discretion of that authority. An adverse determination may be reviewed upon request of the accused through that authority to the next higher commander or level of supervision, but no administrative review may be made which requires action at the departmental or higher level.

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

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

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

be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.
(e) *Nonlawyer present.* Subject to the discretion of the military judge, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under R.C.M. 502.

Rule 601. Referral
(a) *In general.* Referral is the order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial.
(b) *Who may refer.* Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.
(c) *Disqualification.* An accuser may not refer charges to a general or special court-martial.
(d) *When charges may be referred.*

(1) *Basis for referral.* If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general or special court-martial except in compliance with paragraph (d)(2) or (d)(3) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

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

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

(B) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406 and Article 34(a).

(3) *Special courts-martial.* The convening authority may not refer charges and specifications to a special court-martial unless the convening authority has consulted with a judge advocate as required under R.C.M. 406A and Article 34(b).
(e) *How charges shall be referred.*

(1) *Order, instructions.* Referral shall be by the personal order of the convening authority.

(A) *Capital cases.* If a case is to be tried as a capital case, the convening authority shall so indicate by including a special instruction on the charge sheet in accordance with R.C.M. 1004(b)(1).

(B) *Special court-martial consisting of a military judge alone.* If a case is to be tried as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), the convening authority shall so indicate by including a special instruction on the charge sheet prior to arraignment.

(C) *Other instructions.* The convening authority may include any other additional instructions in the order as may be required.

(2) *Joinder of offenses.* In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with

other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

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

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

(g) *Parallel convening authorities.* If it is impracticable for the original convening authority to continue exercising authority over the charges, the convening authority may cause the charges, even if referred, to be transmitted to a parallel convening authority. This transmittal must be in writing and in accordance with such regulations as the Secretary concerned may prescribe. Subsequent actions taken by the parallel convening authority are within the sole discretion of that convening authority.

Rule 602. Service of charges; commencement of trial

(a) *Service of charges.* Trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet.

(b) *Commencement of trial.*

(1) Except in time of war, no person may, over objection, be brought to trial by general or special court-martial—including an Article 39(a) session—within the following time periods:

(A) In a general court-martial, from the time of service of charges under subsection (a) through the fifth day after the date of service.

(B) In a special court-martial, from the time of service of charges under subsection (a) through the third day after the date of service.

(2) If the first session of the court-martial occurs before the end of the applicable period under paragraph (1), the military judge shall, at the beginning of that session, inquire as to whether the defense objects to proceeding during the applicable period. If the defense objects, the trial may not proceed. If the defense does not object, the issue is waived.

Rule 603. Changes to charges and specifications

(a) *In general.* Any person forwarding, acting upon, or prosecuting charges on behalf of the United States except a preliminary hearing officer appointed under R.C.M. 405 may make major and minor changes to charges or specifications in accordance with this rule.

(b) *Major and minor changes defined.*

(1) *Major changes.* A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged.

(2) *Minor changes.* A minor change in a charge or specification is any change other than a major change.

(c) *Major and minor changes before referral.* Before referral, subject to paragraph (d)(2), a major or minor change may be made to any charge or specification.

(d) *Major changes after referral or preliminary hearing.*

(1) After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew.

(2) In the case of a general court-martial, a major change made to a charge or specification after the preliminary hearing may require reopening the preliminary hearing in accordance with R.C.M. 405.

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

Rule 604. Withdrawal of charges

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

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

Rule 701. Discovery

(a) *Disclosure by trial counsel.* Except as otherwise provided in subsection (f) and paragraph (g)(2) of this rule, and unless previously disclosed to the defense in accordance with R.C.M. 404A, trial counsel shall provide the following to the defense:

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

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

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

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

(2) *Documents, tangible objects, reports.*

(A) After service of charges, upon request of the defense, the Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities and—

(i) the item is relevant to defense preparation;

(ii) the government intends to use the item in the case-in-chief at trial;

(iii) the government anticipates using the item in rebuttal; or

(iv) the item was obtained from or belongs to the accused.

(B) After service of charges, upon request of the defense, the Government shall permit the defense to inspect the results or reports of physical or mental examinations, and of any scientific tests or experiments, or copies thereof, which are within the possession, custody, or

control of military authorities, the existence of which is known or by the exercise of due diligence may become known to trial counsel if

(i) the item is relevant to defense preparation;

(ii) the government intends to use the item in the case-in-chief at trial; or

(iii) the government anticipates using the item in rebuttal.

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

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

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

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

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

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

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

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

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

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

(C) Reduce the punishment; or

(D) Adversely affect the credibility of any prosecution witness or evidence.

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

(1) *Names of witnesses and statements.*

(A) Before the beginning of the trial on the merits, the defense shall notify trial counsel in writing of the names and contact information of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of trial counsel, the defense shall also—

(i) Provide trial counsel with the names and contact information of any witnesses whom the defense intends to all at the presentencing proceedings under R.C.M. 1001(d); and

(ii) Permit trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

(2) *Notice of certain defenses.* The defense shall notify trial counsel in writing before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in

question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

(3) *Documents and tangible items.* If the defense requests disclosure under subparagraph (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall permit trial counsel to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, or copies or portions of any of these items, or, in the case of buildings or places or portions thereof, inspect or photograph, if—

(A) the item is within the possession, custody, or control of the defense; and

(B) the defense intends to use the item in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit trial counsel to inspect the results or reports of any physical or mental examinations and of any scientific tests or experiments made in connection with the particular case, or copies thereof, if the item is within the possession, custody, or control of the defense; and —

(A) the defense intends to use the item in the defense case-in-chief at trial; or

(B) the item was prepared by a witness who the defense intends to call at trial and the results or reports relate to that witness' testimony.

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

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

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

(e) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in paragraph (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence.

(1) *Counsel for the Accused Interview of Victim of Alleged Offense.*

(A) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense whom counsel for the Government intends to call as a witness at a proceeding, counsel for the accused, or that lawyer's representative, as defined in Mil. R. Evid. 502(b) (3), shall make any request to interview that victim through the special victims' counsel or other counsel for the victim, if applicable.

(B) If requested by an alleged victim who is subject to a request for interview under subparagraph (e)(1)(A) of this rule, any interview of the victim by counsel for the accused, or that lawyer's representative, as defined in Mil. R. Evid. 502(b)(3), shall take place only in the presence of counsel for the Government, counsel for the victim, or if applicable, a victim advocate.

(2) [Reserved]

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

(g) *Regulation of discovery.*

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

(2) *Protective and modifying orders.* Upon a sufficient showing, the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Subject to limitations in Part III of the Manual for Courts-Martial, if any rule requires, or upon motion by a party, the military judge may review any materials in camera, and permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge in camera. If the military judge reviews any materials in camera, the entirety of any materials examined by the military judge shall be attached to the record of trial as an appellate exhibit. The military judge shall seal any materials examined in camera and not disclosed and may seal other materials as appropriate. Such material may only be examined by reviewing or appellate authorities in accordance with R.C.M. 1113.

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

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

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

Rule 702. Depositions

(a) *In general.*

(1) A deposition may be ordered at the request of any party if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial.

(2) "Exceptional circumstances" under this rule includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial.

(3) A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered "exceptional circumstances" under this rule.

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

(5) A request for an oral deposition may be approved without the consent of the opposing party.

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

a party.

(c) *Request to take deposition.* A party requesting a deposition shall do so in writing, and shall include in such written request—

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

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

(3) A statement of the reasons for needing to preserve the testimony of the prospective witness; and

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

(d) *Action on request.*

(1) *Prompt notification.* The authority under subsection (b) who acts on a request for deposition shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(2) *Action when request is denied.* If a request for deposition is denied by the convening authority, the requesting party may seek review of the decision by the military judge after referral.

(3) *Action when request is approved.*

(A) *Detail of deposition officer.* When a request for a deposition is approved, the convening authority shall detail a judge advocate certified under Article 27(b) to serve as deposition officer. In exceptional circumstances, when the appointment of a judge advocate as deposition officer is not practicable, the convening authority may detail an impartial commissioned officer or appropriate civil officer authorized to administer oaths, other than the accuser, to serve as deposition officer. If the deposition officer is not a judge advocate certified under Article 27(b), an impartial judge advocate so certified shall be made available to provide legal advice to the deposition officer.

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

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

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

(e) *Duties of the deposition officer.* In accordance with this rule, and subject to any instructions under subparagraph (d)(3)(C), the deposition officer shall—

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

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

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

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

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

(6) Cause the proceedings to be recorded so that a verbatim transcript may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Certify the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

(f) *Rights of accused.*

(1) *Oral depositions.*

(A) At an oral deposition, the accused shall have the following rights:

(i) Except as provided in subparagraph (B), the right to be present.

(ii) The right to be represented by counsel as provided in R.C.M. 506.

(B) At an oral deposition, the accused shall not have the right to be present when—

(i) the accused, absent good cause shown, fails to appear after notice of time and place of the deposition;

(ii) the accused is disruptive within the meaning of R.C.M. 804(c)(2); or

(iii) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused.

(2) *Written depositions.* The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial unless otherwise provided by the Secretary concerned.

(g) *Procedure.*

(1) *Oral depositions.*

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

(B) *How recorded.* In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including video and audio recording.

(2) *Written depositions.*

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

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

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

(h) *Objections.*

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

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

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

(i) *Admissibility and use as evidence.*

(1) *In general.*

(A) The ordering of a deposition under paragraph (a)(1) does not control the admissibility of the deposition at court-martial. Except as provided in paragraph (2), a party may use all or part of a deposition as provided by the rules of evidence.

(B) In the discretion of the military judge, audio or video recorded depositions may be played for the court-martial or may be transcribed and read to the court-martial.

(2) *Capital cases.* Testimony by deposition may be presented in capital cases only by the defense.

(j) *Deposition by agreement not precluded.*

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

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

Rule 703. Production of witnesses and evidence

(a) *In general.* The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process.

(b) *Right to witnesses.*

(1) *On the merits or on interlocutory questions.* Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. With the consent of both the accused and Government, the military judge may authorize any witness to testify via remote means. Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance (although such testimony will not be admissible over the accused's objection as evidence on the ultimate issue of guilt). Factors to be considered include, but are not limited to: the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training; and, for child witnesses, the traumatic effect of providing in-court testimony

(2) *On sentencing.* Each party is entitled to the production of a witness whose testimony on

sentencing is required under R.C.M. 1001(f).

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

(c) *Determining which witnesses will be produced.*

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

(2) *Witnesses for the defense.*

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

(B) *Contents of request.*

(i) *Witnesses on merits or interlocutory questions.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

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

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

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

(d) *Employment of expert witnesses and consultants.*

(1) *In general.* When the employment at Government expense of an expert witness or consultant is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.

(2) *Review by military judge.*

(A) A request for an expert witness or consultant denied by the convening authority may be renewed after referral of the charges before the military judge who shall determine—

(i) in the case of an expert witness, whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute; or

(ii) in the case of an expert consultant, whether the assistance of the expert is necessary for an adequate defense.

(B) If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which they are entitled under subparagraph (g)(3)(E).

(e) *Right to evidence.*

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

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

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

(g) *Procedures for production of witnesses and evidence.*

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

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

(3) *Civilian witnesses and evidence not under the control of the Government—subpoenas.*

(A) *In general.* The presence of witnesses not on active duty and evidence not under control of the Government may be obtained by subpoena.

(B) *Contents.* A subpoena shall state the command by which the proceeding or investigation is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein, or to produce evidence—including books, papers, documents, data, writings, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties. A subpoena shall not command any person to attend or give testimony at an Article 32 preliminary hearing.

(C) *Investigative subpoenas.*

(i) *In general.* In the case of a subpoena issued before referral for the production of evidence for use in an investigation, the subpoena shall command each person to whom it is

directed to produce the evidence requested for inspection by the Government counsel who issued the subpoena or for inspection in accordance with an order issued by the military judge under R.C.M. 309(b).

(ii) *Subpoenas for personal or confidential information about a victim.* After preferral, a subpoena requiring the production of personal or confidential information about a victim named in a specification may be served on an individual or organization by those authorized to issue a subpoena under subparagraph (D) or with the consent of the victim. Before issuing a subpoena under this subparagraph and unless there are exceptional circumstances, the victim must be given notice so that the victim can move for relief under subparagraph (g)(3)(G) or otherwise object.

(D) *Who may issue.* A subpoena may be issued by

(i) the summary court-martial;

(ii) the trial counsel of a general or special court-martial;

(iii) the president of a court of inquiry;

(iv) an officer detailed to take a deposition; or

(v) in the case of a pre-referral investigative subpoena, a military judge or, when issuance of the subpoena is authorized by a general court-martial convening authority, the detailed trial counsel or counsel for the Government.

(E) *Service.* A subpoena may be served by the person authorized by this rule to issue it, a United States Marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and, in the case of a subpoena of an individual to provide testimony, by providing to the person named travel orders and a means for reimbursement for fees and mileage as may be prescribed by the Secretary concerned, or in the case of hardship resulting in the subpoenaed witness' inability to comply with the subpoena absent initial Government payment, by providing to the person named travel orders, fees, and mileage sufficient to comply with the subpoena in rules prescribed by the Secretary concerned.

(F) *Place of service.*

(i) *In general.* A subpoena may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) *Foreign territory.* In foreign territory, the attendance of civilian witnesses and evidence not under the control of the Government may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

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

(G) *Relief.* If a person subpoenaed requests relief on grounds that compliance is unreasonable, oppressive, or prohibited by law, the military judge or, if before referral, a military judge detailed under Article 30a shall review the request and shall—

(i) order that the subpoena be modified or quashed, as appropriate; or

(ii) order the person to comply with the subpoena.

(H) *Neglect or refusal to appear or produce evidence.*

(i) *Issuance of warrant of attachment.* If the person subpoenaed neglects or refuses to appear or produce evidence, the military judge or, if before referral, a military judge detailed under Article 30a or a general court-martial convening authority, may issue a warrant of attachment to compel the attendance of a witness or the production of evidence, as appropriate.

(ii) *Requirements.* A warrant of attachment may be issued only upon probable cause to

believe that the witness or evidence custodian was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that a means of reimbursement of fees and mileage, if applicable, was provided to the witness or advanced to the witness in cases of hardship, that the witness or evidence is material, that the witness or evidence custodian refused or willfully neglected to appear or produce the subpoenaed evidence at the time and place specified on the subpoena, and that no valid excuse is reasonably apparent for the witness' failure to appear or produce the subpoenaed evidence.

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

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

(v) *Definition.* For purposes of clause (g)(3)(H)(i) "military judge" does not include a summary court-martial.

(4) *Preservation requests.* In the case of evidence under control of the Government as well as evidence not under control of the Government, the person seeking production of the evidence may include with any request for evidence or subpoena a request that the custodian of the evidence take all necessary steps to preserve specifically described records and other evidence in its possession until such time as they may be produced or inspected by the parties.

Rule 703A. Warrant or order for wire or electronic communications

(a) *In general.* A military judge detailed in accordance with Article 26 or Article 30a may, upon written application by a federal law enforcement officer, trial counsel, or other authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, issue one or more of the following:

(1) A warrant for the disclosure by a provider of electronic communication service of the contents of any wire or electronic communication that is in electronic storage in an electronic communications system for 180 days or less.

(2) A warrant or order for the disclosure by a provider of electronic communication service of the contents of any wire or electronic communication that is in electronic storage in an electronic communications system for more than 180 days.

(3) A warrant or order for the disclosure by a provider of remote computing service of the contents of any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(4) A warrant or order for the disclosure by a provider of electronic communication service

or remote computing service of a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications), to include the subscriber or customer's—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number).

(b) *Warrant procedures.*

(1) *Probable cause required.* A military judge shall issue a warrant authorizing the search for and seizure of information specified in subsection (a) if—

(A) The federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the warrant presents an affidavit or sworn testimony, subject to examination by the military judge, in support of the application; and

(B) Based on the affidavit or sworn testimony, the military judge determines that there is probable cause to believe that the information sought contains evidence of a crime.

(2) *Issuing the warrant.* The military judge shall issue the warrant to the federal law enforcement officer, trial counsel, or other authorized Government counsel who applied for the warrant.

(3) *Contents of the warrant.* The warrant shall identify the property to be searched, identify any property or other information to be seized, and designate the military judge to whom the warrant must be returned.

(4) *Executing the warrant.* The presence of the federal law enforcement officer, trial counsel, or other authorized Government counsel identified in the warrant shall not be required for service or execution of a search warrant issued in accordance with this rule requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(c) *Order procedures.*

(1) A military judge shall issue an order authorizing the disclosure of information specified in paragraph (a)(2), (3), or (4) if the federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the order—

(A) Offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation; and

(B) Except in the case of information specified in paragraph (a)(4), has provided prior notice to the subscriber or customer of the application for the order, unless the military judge approves a request for delayed notice under subsection (d).

(2) *Quashing or modifying order.* A military judge issuing an order under paragraph (c)(1), on a motion made promptly by the service provider, may quash or modify such order, if the order is determined to be unreasonable, oppressive, or prohibited by law.

(d) *Delayed notice of order.*

(1) A federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for an order to obtain information specified in paragraph (a)(2) or (3) may include in the application a request for an order delaying the notification required under subparagraph (c)(1)(B) for a period not to exceed 90 days. The military judge reviewing the application and the request shall grant the request and issue the order for delayed notification if the military judge determines that there is reason to believe that notification of the existence of the order may have an adverse result described in paragraph (4). Extensions of the delay of notification required under subparagraph (c)(1)(B) of up to 90 days each may be granted by the military judge upon application, but only in accordance with paragraph (2).

(2) A federal law enforcement officer, trial counsel, or other authorized counsel for the Government acting under this rule, when not required to notify the subscriber or customer under subparagraph (c)(1)(B), or to the extent that delayed notification has been ordered under paragraph (1), may apply to a military judge for an order commanding a provider of electronic communications service or remote computing service to whom a warrant or order under this rule is directed, for such period as the military judge deems appropriate, not to notify any other person of the existence of the warrant or order. The military judge shall issue the order for delayed notification if the military judge determines that there is reason to believe that notification of the existence of the warrant or order will result in an adverse result described in paragraph (4).

(3) Upon expiration of the applicable period of delay of notification under paragraph (2), the federal law enforcement officer, trial counsel, or other authorized Government counsel shall serve upon, or deliver by registered first-class mail to, the customer or subscriber a copy of the process or request together with notice that—

(A) states with reasonable specificity the nature of the law enforcement inquiry; and

(B) informs such customer or subscriber—

(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;

(ii) that notification of such customer or subscriber was delayed;

(iii) which military judge made the determination pursuant to which that delay was made; and

(iv) which provision of this rule allowed such delay.

(4) An adverse result for the purposes of paragraphs (1) and (2) is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(e) *No cause of action against a provider disclosing information under this rule.* As provided under 18 U.S.C. § 2703(e), no cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a warrant or order under this rule.

(f) *Requirement to preserve evidence.* To the same extent as provided in 18 U.S.C. § 2703(f)—

(1) A provider of wire or electronic communication services or a remote computing service, upon the request of a federal law enforcement officer, trial counsel, or other authorized

Government counsel, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of an order or other process; and

(2) Shall retain such records and other evidence for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) *Definition.* As used in this rule, the term "federal law enforcement officer" includes an employee of the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, or the Coast Guard Investigative Service, who has authority to request a search warrant.

Rule 704. Immunity

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

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

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

(b) *Scope.* Nothing in this rule bars:

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

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

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

(1) *Persons subject to the UCMJ.* A general court-martial convening authority, or designee, may grant immunity to a person subject to the UCMJ. However, a general court-martial convening authority, or designee, may grant immunity to a person subject to the UCMJ extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under chapter 601 of title 18 of the U.S. Code.

(2) *Persons not subject to the UCMJ.* A general court-martial convening authority, or designee, may grant immunity to persons not subject to the UCMJ only when specifically authorized to do so by the Attorney General of the United States or other authority designated chapter 601 of title 18 of the U.S. Code.

(3) *Other limitations.* Subject to Service regulations, the authority to grant immunity under this rule may be delegated in writing at the discretion of the general court-martial convening authority to a subordinate special court-martial convening authority. Further delegation is not permitted. The authority to grant or delegate the authority to grant immunity may be limited by superior authority.

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

(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the general court-martial convening authority or designee. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the

affected charges and specifications, the proceedings against the accused be abated, upon findings that:

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

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

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

Rule 705. Plea agreements

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

(b) *Nature of agreement.* A plea agreement may include:

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

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

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

(B) Refer a capital offense as noncapital;

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

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

(E) Limit the sentence that may be adjudged by the court-martial for one or more charges and specifications in accordance with subsection (d).

(c) *Terms and conditions.*

(1) *Prohibited terms and conditions.*

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

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

(2) *Permissible terms and conditions.* Subject to subparagraph (1)(A), subparagraph (1)(B) does not prohibit either party from proposing the following additional conditions:

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

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

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority in a summary court-martial or before entry of judgment in a general or special court-martial as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1108 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement;

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

(F) When applicable, a provision requiring that the sentences to confinement adjudged by the military judge for two or more charges or specifications be served concurrently or consecutively. Such an agreement shall identify the charges or specifications that will be served concurrently or consecutively; and

(G) Any other term or condition that is not contrary to or inconsistent with this rule.

(d) *Sentence limitations.*

(1) *In general.* A plea agreement that limits the sentence that can be adjudged by the court-martial for one or more charges and specifications may contain:

(A) a limitation on the maximum punishment that can be imposed by the court-martial;

(B) a limitation on the minimum punishment that can be imposed by the court-martial; or,

(C) limitations on the maximum and minimum punishments that can be imposed by the court-martial.

(2) *Confinement and fines.*

(A) G*eneral or special courts-martial.*

(i) In a plea agreement in which the accused waives the right to elect sentencing by members and agrees to a limitation on the confinement or the amount of a fine that may be imposed by the military judge for more than one charge or specification under paragraph (1), the agreement shall include separate limitations, as applicable, for each charge or specification.

(ii) In a plea agreement in which the convening authority and accused agree to sentencing by members, limitations on the sentence that may be adjudged shall be expressed as limitations on the total punishment that may be imposed by the members.

(B) *Summary court-martial.* A plea agreement involving limitations on the sentence that may be adjudged shall be expressed as limitations on the total punishment that may be imposed by the court-martial.

(3) *Other punishments.* A plea agreement may include a limitation as to other authorized punishments as set forth in R.C.M. 1003.

(4) *Capital cases.* A sentence limitation under paragraph (1) may not include the possibility of a sentence of death.

(5) *Mandatory minimum punishments for certain offenses.* A sentence limitation under paragraph (1) may not provide for a sentence less than the applicable mandatory minimum sentence for an offense referred to in Article 56(b)(2), except as follows:

(A) If the accused pleads guilty to the offense, the agreement may have the effect of reducing a mandatory dishonorable discharge to a bad-conduct discharge.

(B) Upon recommendation of trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, a plea agreement may provide for a sentence that is less than the mandatory minimum sentence for the offense charged.

(e) *Procedure.*

(1) *Negotiation.* Plea agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the Government may propose any term or condition not

prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under paragraph (1), if the accused elects to propose a plea agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any.

(3) *Acceptance by the convening authority.*

(A) *In general.* The convening authority may either accept or reject an offer of the accused to enter into a plea agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a plea agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

(B) *Victim consultation.* Whenever practicable, prior to the convening authority accepting a plea agreement the victim shall be provided an opportunity to submit views concerning the plea agreement terms and conditions in accordance with regulations prescribed by the Secretary concerned. The convening authority shall consider any such views provided prior to accepting a plea agreement. For purposes of this rule, a "victim" is an individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration.

(4) *Withdrawal.*

(A) *By accused.* The accused may withdraw from a plea agreement at any time prior to the sentence being announced. If the accused elects to withdraw from the plea agreement after the acceptance of the plea agreement but before the sentence is announced, the military judge shall permit the accused to withdraw only for good cause shown. Additionally, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a plea agreement only as provided in R.C.M. 910(h) or 811(d).

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

(f) *Nondisclosure of existence of a plea agreement.* No court-martial member shall be informed of the existence of a plea agreement, except upon request of the accused or when the military judge finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a plea agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

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

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge, or member that

there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

(b) *Ordering an inquiry.*

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

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

(c) *Inquiry.*

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

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

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

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

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

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

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

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

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

Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Preferral of charges;

(2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or

(3) Entry on active duty under R.C.M. 204.

(b) *Accountability.*

(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple Charges.* When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which affect time periods.*

(A) *Dismissal or mistrial.* In the event of dismissal of charges or mistrial, a new 120-day period begins as follows:

(i) For an accused under pretrial restraint under R.C.M. 304(a)(2)-(4) at the time of the dismissal or mistrial, a new 120-day period begins on the date of the dismissal or mistrial.

(ii) For an accused not under pretrial restraint at the time of dismissal or mistrial, a new 120-day period begins on the earliest of:

(I) the date on which charges are preferred anew;

(II) the date of imposition of restraint under R.C.M. 304(a)(2)-(4); or

(III) in the case of a mistrial in which charges are not dismissed or preferred anew, the date of the mistrial.

(iii) In a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under subsection (a) shall continue to run.

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or

(iii) date of entry on active duty under R.C.M. 204.

(C) *Government appeals.* If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Criminal Appeals under R.C.M. 908, if there is a further appeal to the Court of Appeals for the Armed Forces or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Appeals for the Armed Forces, or, if appropriate, the Supreme Court.

(D) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

(E) *Commitment of the incompetent accused.* If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

(2) *Motions.* Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* Dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the

delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

(e) *Forfeiture.* Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty forfeites any speedy trial issue as to that offense, unless affirmatively waived.

(f) *Priority.* When considering the disposition of charges and the ordering of trials, a convening authority shall give priority to cases in which the accused is held under those forms of pretrial restraint defined by R.C.M. 304(a)(3)-(4). Trial of or other disposition of charges against any accused held in arrest or confinement pending trial shall be given priority.

Rule 801. Military judge's responsibilities; other matters

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

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

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

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

(4) Rule on all interlocutory questions and all questions of law raised during the court-martial as provided under subsection (e);

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

(6) At the military judge's discretion, in the case of a victim of an offense under the UCMJ who is under 18 years of age and not a member of the armed forces, or who is incompetent, incapacitated, or deceased, designate the legal guardian(s) of the victim or the representative(s) of the victim's estate, family members, or any other person deemed as suitable by the military judge toassume the victim's rights under the UCMJ.

(A) The military judge is not required to hold a hearing before determining whether a designation is required or before making such a designation under this rule.

(B) If the military judge determines a hearing under Article 39(a), UCMJ, is necessary, the victim shall be notified of the hearing and afforded the right to be present at the hearing.

(C) The individual designated shall not be the accused.

(D) At any time after appointment, a designee shall be excused upon request by the designee or a finding of good cause by the military judge.

(E) If the individual appointed to assume the victim's rights is excused, the military may designate a successor consistent with this rule.

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

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

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

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

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

(e) *Interlocutory questions and questions of law.*

(1) *Rulings by the military judge.*

(A) *Finality of rulings.* Any ruling by the military judge upon a question of law,

including a motion for a finding of not guilty, or upon any interlocutory question is final.

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

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

(2) [Reserved]

(3) [Reserved]

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

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

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute forfeiture unless the applicable rule provides that failure to raise the defense or objection constitutes waiver.

Rule 802. Conferences

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

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

(c) *Rights of parties.* No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

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

(e) *Admission.* No admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.

(f) *Limitations.* This rule shall not be invoked in the case of an accused who is not represented by counsel.

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

A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. Such sessions may be held before and after assembly of the court-martial, and when authorized in

these rules, after adjournment and before entry of the judgment in the record. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.C.M. 804 and 805, and shall be made a part of the record.

Rule 804. Presence of the accused at trial proceedings

(a) *Presence required.* The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, presentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule. Attendance at these proceedings shall constitute the accused's appointed place of duty and, with respect to the accused's travel allowances, none of these proceedings shall constitute disciplinary action. This does not in any way limit authority to implement restriction, up to and including confinement, as necessary in accordance with R.C.M. 304 or R.C.M. 305.

(b) *Presence by remote means.* The military judge may order the use of audiovisual technology, such as video teleconferencing technology, between the parties and the military judge for purposes of Article 39(a) sessions. Use of such audiovisual technology will satisfy the 'presence' requirement of the accused only when the accused has a defense counsel physically present at his location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other. Defense counsel must be physically present at the accused's location during an inquiry prior to the acceptance of a plea under R.C.M. 910(d), (e) and (f). Presence by remote means is not authorized during presentencing proceedings under R.C.M. 1001.

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

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

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

(d) *Voluntary absence for limited purpose of child testimony.*

(1) *Election by accused.* Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914A.

(2) *Procedure.* The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, transmission of the testimony will include a system that will transmit the accused's image and voice into the courtroom from a remote location as well as transmission of the child's testimony from the courtroom to the accused's location. A one-way transmission may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) *Effect on accused's rights generally.* An election by the accused to be absent pursuant to paragraph (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

(e) *Appearance and security of accused.*

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

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

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

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

(a) *Military judge.* No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge. For purposes of Article 39(a) sessions solely, the presence of the military judge may be satisfied by the use of audiovisual technology, such as video teleconferencing technology.

(b) *Members.* Unless the accused is tried or sentenced by military judge alone, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 803; examination of members under R.C.M. 912(d); when the member has been excused under R.C.M. 505, 912(f), or 912A; or as otherwise provided in R.C.M. 1104(d)(1).

(c) *Counsel.* As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel. For purposes of Article 39(a) sessions, other than presentencing proceedings under R.C.M. 1001, the presence of counsel may be satisfied by the use of audiovisual technology, such as video teleconferencing technology.

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

(1) *Members.* When after presentation of evidence on the merits has begun, a new member is impaneled under R.C.M. 912A, trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to or played for the new member in the presence of the military judge, the accused, and counsel for both sides, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

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

Rule 806. Public trial

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

(b) *Control of spectators and closure.*

(1) *Limitation on number of spectators.* In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.

(2) *Exclusion of spectators.* When excluding specific persons, the military judge must make findings on the record establishing the reason for the exclusion, the basis for the military judge's belief that exclusion is necessary, and that the exclusion is as narrowly tailored as possible.

(3) *Right of victim not to be excluded.* A victim of an alleged offense committed by the accused may not be excluded from any public hearing or proceeding in a court-martial relating to the offense unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) *Closure.* Courts-martial shall be open to the public unless (A) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (B) closure is no broader than necessary to protect the overriding interest; (C) reasonable alternatives to closure were considered and found inadequate; and (D) the military judge makes case-specific findings on the record justifying closure.

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

(d) *Protective orders.* The military judge may, upon request of any party or *sua sponte*, issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.

Rule 807. Oaths

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

(b) *Oaths in courts-martial.*

(1) *Who must be sworn.*

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

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

(2) *Procedure for administering oaths.* Any procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth, or, in the

case of one other than a witness, properly to perform certain duties, is sufficient.

Rule 808. Record of trial

Trial counsel of a general or special court-martial shall take such action as may be necessary to ensure that a record that will meet the requirements of R.C.M. 1112 can be prepared.

Rule 809. Contempt proceedings

(a) *In general.* The contempt power under Article 48 may be exercised by a judicial officer specified under subsection (a) of that article.

(b) *Method of disposition.*

(1) *Summary disposition.* When conduct constituting contempt is directly witnessed by the judicial officer during the proceeding, the conduct may be punished summarily; otherwise, the provisions of paragraph (b)(2) shall apply. If a contempt is punished summarily, the judicial officer shall ensure that the record accurately reflects the misconduct that was directly witnessed by the judicial officer during the proceeding.

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

(c) *Procedure.* The judicial officer shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The judicial officer shall also determine when during the court-martial or other proceeding the contempt proceedings shall be conducted. In the case of a court of inquiry, the judicial officer shall consult with the appointed legal advisor or a judge advocate before imposing punishment for contempt.

(d) *Record; review.*

(1) *Record.* A record of the contempt proceedings shall be part of the record of the court-martial or other proceeding during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and forwarded for review in accordance with paragraph (2) or (3), as applicable.

(2) *Review by convening authority.* If the contempt punishment was imposed by a court of inquiry, the contempt proceedings shall be forwarded to the convening authority for review. The convening authority may approve or disapprove the contempt finding and all or part of the sentence. The action of the convening authority is not subject to further review or appeal.

(3) *Review by Court of Criminal Appeals.* If the contempt punishment was imposed by a military judge or military magistrate, the alleged offender may file an appeal to the Court of Criminal Appeals in accordance with the uniform rules of procedure for the Courts of Criminal Appeals. The Court of Criminal Appeals may set aside the finding or the sentence, in whole or in part.

(e) *Sentence.*

(1) *In general.* The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall be designated by the judicial officer who imposed punishment for contempt, in accordance with regulations prescribed by the Secretary concerned. A judicial officer who imposes punishment for contempt may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in

the proceedings.

(2) *Maximum punishment.* If imposed by a court of inquiry, the maximum punishment that may be imposed for contempt is a fine of $500. Otherwise the maximum punishment that may be imposed for contempt is confinement for 30 days, a fine of $1,000, or both.

(3) *Execution of sentence when imposed by court of inquiry.* A sentence of a fine pursuant to a finding of contempt by a court of inquiry shall not become effective until approved by the convening authority.

(4) *Execution of sentence when imposed by military judge or magistrate.*

(A) A sentence of confinement pursuant to a finding of contempt by a military judge or military magistrate shall begin to run when it is announced unless—

(i) the person held in contempt notifies the judicial officer of an intent to file an appeal; and

(ii) the judicial officer, in the exercise of the judicial officer's discretion, defers the sentence pending action by the Court of Criminal Appeals under paragraph (d)(3).

(B) A sentence of a fine pursuant to a finding of contempt by a military judge or military magistrate shall become effective when it is announced.

(f) *Informing person held in contempt.* The person held in contempt shall be informed by the judicial officer in writing of the holding and sentence, if any, of the judicial officer, and of the applicable procedures and regulations concerning execution and review of the contempt punishment. The reviewing authority shall notify the person held in contempt and of the action of the reviewing authority upon the sentence.

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

(a) *In general.*

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

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

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

(B) *Plea.* The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based.

(3) *Combined rehearings.* When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits. Reference to the offenses being reheard on sentence is permissible only as provided for by the Military Rules of Evidence. The presentencing proceedings procedure shall be the same as at an original trial, except as otherwise provided in this rule.

(4) *Additional charges.* A convening authority may refer additional charges for trial together with charges as to which a rehearing has been directed.

(5) *Rehearing impracticable.* If a rehearing was authorized on one or more findings, the convening authority may dismiss the affected charges if the convening authority determines that a rehearing is impracticable. If the convening authority dismisses such charges, a rehearing may proceed on any remaining charges not dismissed by the convening authority.

(6) *Forwarding.* When a rehearing, new trial, other trial, or remand is ordered, a military judge shall be detailed to the proceeding, and the matter forwarded to the military judge. In the case of a summary court-martial, when any proceeding is ordered, a new summary court-martial officer shall be detailed.

(b) *Composition.*

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

(2) *Military judge.* The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.

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

(c) *Examination of record of former proceedings.* No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except when permitted to do so by the military judge after such matters have been received in evidence.

(d) *Sentence limitations.*

(1) *In general.* Sentences at rehearings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003. Except as otherwise provided in paragraph (d)(2), the new adjudged sentence for offenses on which a rehearing, new trial, or other trial has been ordered shall not exceed or be more severe than the original sentence as set forth in the judgment under R.C.M. 1111. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be imposed shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited in this rule, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty.

(2) *Exceptions.* A rehearing, new trial, or other trial may adjudge any lawful sentence, without regard to the sentence of the previous hearing or trial when, as to any offense—

(A) the sentence prescribed for the offense is mandatory;

(B) in the case of an "other trial," the original trial was invalid because a summary or special court-martial tried an offense involving mandatory punishment, an offense for which only a general court-martial has jurisdiction, or one otherwise considered capital;

(C) the rehearing was ordered or authorized for any charge or specification for which a plea of guilty was entered at the first hearing or trial and a plea of not guilty was entered at the second hearing or trial to that same charge or specification;

(D) the rehearing was ordered or authorized for any charge or specification for which the sentence announced or adjudged by the first court-martial was in accordance with a plea agreement and, at the rehearing, the accused does not comply with the terms of the agreement; or

(E) the rehearing was ordered or authorized after an appeal by the Government under R.C.M. 1117.

(e) *Definition.* "Other trial" means another trial of a case in which the original proceedings

were declared invalid because of lack of jurisdiction or failure of a charge to state an offense. The authority ordering an "other trial" shall state in the action the basis for declaring the proceedings invalid.

(f) *Remands.*

(1) *In general.* A Court of Criminal Appeals may order a remand for additional fact finding, or for other reasons, in order to address a substantial issue on appeal. A remand under this subsection is generally not appropriate to determine facts or investigate matters which could, through a party's exercise of reasonable diligence, have been investigated or considered at trial. Such orders shall be directed to the Chief Trial Judge. The Judge Advocate General, or his or her delegate, shall designate a general court-martial convening authority who shall provide support for the hearing.

(2) *Detailing of military judge.* When the Court of Criminal Appeals orders a remand, the Chief Trial Judge shall detail an appropriate military judge to the matter and shall notify the commanding officer exercising general court-martial convening authority over the accused of the remand.

(3) *Remand impracticable.* If the general court-martial convening authority designated under paragraph (1) determines that the remand is impractical due to military exigencies or other reasons, a Government appellate attorney shall so notify the Court of Criminal Appeals. Upon receipt of such notification, the Court of Criminal Appeals may take any action authorized by law that does not materially prejudice the substantial rights of the accused.

Rule 811. Stipulations

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

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

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

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

(e) *Effect of stipulation.* Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or document's contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Rules of Evidence apply to the contents of stipulations.

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

Rule 812. Joint and common trials

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

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

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

(1) The order, including any amendment, by which the court is convened;

(2) The name, rank, and unit or address of the accused;

(3) The name and rank of the military judge presiding;

(4) The names and ranks of the members, if any, who are present;

(5) The names and ranks of members who are absent, if presence of members is required;

(6) The names and ranks (if any) of counsel who are present;

(7) The names and ranks (if any) of counsel who are absent; and

(8) The name and rank (if any) of any detailed court reporter.

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

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

Rule 901. Opening session

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

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

(c) *Swearing reporter and interpreter.* After the personnel have been accounted for as required in subsection (b) of this rule, trial counsel shall announce whether the reporter and interpreter, if any is present, have been properly sworn. If not sworn, the reporter and interpreter, if any, shall be sworn.

(d) *Counsel.*

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

(2) *Defense counsel.*

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

(B) *Capital cases.* A defense counsel who has been detailed to a capital case as a counsel learned in the law applicable to such cases shall, in addition to the requirements of subparagraph (A), state such qualifications and assignment.

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

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

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

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

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

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

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

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

(e) *Presence of members.* The procedures described in R.C.M. 901 through 910 shall be conducted without members present in accordance with the procedures set forth in R.C.M. 803.

Rule 902. Disqualification of military judge

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

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

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

(2) Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

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

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

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

(A) Is a party to the proceeding;

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

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

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

(1) "Proceeding" includes pretrial (to include pre-referral), trial, post-trial, appellate review, or other stages of litigation.

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

(d) *Procedure.*

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

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

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

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

Rule 902A. Application of sentencing rules

(a) *Generally.* Only one sentencing system applies in a court-martial. The accused at a single court-martial with specifications alleging offenses committed before 1 January 2019 and on or after 1 January 2019 will not be sentenced under separate sets of rules. Accordingly, if an accused is facing court-martial for several specifications alleging offenses, at least one of which was committed before 1 January 2019 and at least one of which was committed on or after 1 January 2019, the convening authority may refer these offenses to either—

(1) a single court-martial where the applicable sentencing rules are the sentencing rules in effect prior to 1 January 2019 and these apply to all offenses regardless of the date of the alleged offense, unless the accused makes an election under subsection (b); or,

(2) separate courts-martial for the offenses alleged to have been committed before 1 January 2019 and the offenses alleged to have been committed on or after 1 January 2019.

(b) *Election of sentencing rules applicable at a single trial.* If the convening authority has referred specifications alleging offenses committed before 1 January 2019 and on or after 1 January 2019 to a single court-martial pursuant to paragraph (a)(1), before the accused is arraigned, the military judge shall ascertain, as applicable, whether the accused elects to be sentenced under the sentencing rules in effect on 1 January 2019, which shall apply to all offenses regardless of the date of the alleged offense.

(c) *Form of election.* The accused's election under subsection (b) shall be in writing and signed by the accused or shall be made orally on the record. The military judge shall ascertain whether the accused has consulted with defense counsel and has been informed of the right to make the election of the applicable sentencing rules under subsection (b).

(d) *Irrevocable Election.* Unless the military judge allows the accused to withdraw the election for good cause shown, the accused's election of the applicable sentencing rules under subsection (b) is irrevocable once made on the record and accepted by the military judge.

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

(a) *In general.*

(1) Except in a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable:

(A) In the case of an enlisted accused, whether the accused elects to be tried by a court-martial composed of—

(i) at least one-third enlisted members; or

(ii) all officer members.

(B) In all noncapital cases, whether the accused requests trial by military judge alone.

(2) The accused may defer requesting trial by military judge alone until any time before assembly.

(b) *Form of election.* The accused's election or request, if any, under subsection (a), shall be in writing and signed by the accused or shall be made orally on the record.

(c) *Action on election.*

(1) *Request for specific panel composition.* If an enlisted accused makes a timely election under subparagraph (a)(1)(A), the convening authority, unless a sufficient number of members have already been detailed, shall detail a sufficient number of additional members to the court-martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exigencies prevented such detail. Proceedings that require the presence of members shall not proceed until either there is a sufficient number of additional members or the convening authority has prepared a written statement.

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

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

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

(3) *Composition.* Trial shall be by a court-martial composed of the members in accordance with the convening order, unless the case is referred for trial by military judge alone under Article 16(c)(2)(A), the military judge grants a request for trial by judge alone, or there is a request for a specific panel composition under subparagraph (a)(1)(A).

(d) *Right to withdraw request.*

(1) *Specific panel composition.* An election by an enlisted accused under subparagraph (a)(1)(A) may be withdrawn by the accused as a matter of right any time before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly.

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

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

Rule 904. Arraignment

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

Rule 905. Motions generally

(a) *Definitions and form.* A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control.

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

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

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

(3) Motions to suppress evidence;

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

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

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

(c) *Burden of proof.*

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

(2) *Assignment.*

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

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

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

(e) *Effect of failure to raise defenses or objections.*

(1) Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.

(2) Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case.

Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, absent an affirmative waiver.

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

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

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

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

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

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

Rule 906. Motions for appropriate relief

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

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

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

(2) *Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel granted.* If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. Trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not

dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

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

(4) *Amendment of charges or specifications.* After referral, a charge or specification may not be amended over the accused's objection except pursuant to R.C.M. 603(d) and (e).

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

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

(7) Discovery and production of evidence and witnesses.

(8) *Relief from pretrial confinement.* Upon a motion for release from pretrial confinement, a victim of an alleged offense committed by the accused has the right to reasonable, accurate, and timely notice of the motion and any hearing, the right to confer with counsel, and the right to be reasonably heard. Inability to reasonably afford a victim these rights shall not delay the proceedings. The right to be heard under this rule includes the right to be heard through counsel.

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

(10) *Severance of offenses.*

(A) *In general.* Offenses may be severed, but only to prevent manifest injustice.

(B) *Capital cases.* In a capital case, if the joinder of unrelated non-capital offenses appears to prejudice the accused, the military judge may sever the non-capital offenses from the capital offenses.

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

(12) *Unreasonable multiplication of charges.* The military judge may provide a remedy, as described in this rule, if he or she finds there has been an unreasonable multiplication of charges as applied to findings or sentence.

(A) *As applied to findings.* Charges that arise from substantially the same transaction, while not legally multiplicious, may still be unreasonably multiplied as applied to findings. When the military judge finds, in his or her discretion, that the offenses have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification.

(B) *As applied to sentence.* Where the military judge finds that the unreasonable multiplication of charges requires a remedy that focuses more appropriately on punishment than on findings, he or she may find that there is an unreasonable multiplication of charges as applied to sentence. If the military judge makes such a finding and sentencing is by members, the maximum punishment for those offenses determined to be unreasonably multiplied shall be the maximum authorized punishment of the offense carrying the greatest maximum punishment. If the military judge makes such a finding and sentencing is by military judge, the remedy shall be as set forth in R.C.M. 1002(d)(2).

(13) Preliminary ruling on admissibility of evidence.

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

Rule 907. Motions to dismiss

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

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

(1) *Nonwaivable grounds.* A charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction to try the accused for the offense.

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

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

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

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

(i) No court-martial proceeding is a trial in the sense of this rule unless—

(I) In the case of a trial by military judge alone, presentation of the evidence on the general issue of guilt has begun;

(II) In the case of a trial with a military judge and members, the members have been impaneled; or

(III) In the case of a summary court-martial, presentation of the evidence on the general issue of guilt has begun.

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

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

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

(D) Prosecution is barred by:

(i) A pardon issued by the President;

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

(iii) Prior punishment under Article 13 or 15 for the same offense, if that offense was punishable by confinement of one year or less.

(E) The specification fails to state an offense.

(3) *Permissible grounds.* A specification may be dismissed upon timely motion by the accused if one of the following is applicable:

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

(B) *Multiplicity.* When the specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice. A charge is multiplicious if the proof of such charge also proves every element of another charge.

Rule 908. Appeal by the United States

(a) *In general.* The United States may appeal an order or ruling by a military judge that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information. The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority. The United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification except when the military judge enters a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.

(b) *Procedure.*

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

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

(3) *Notice of appeal.* If the United States elects to appeal, trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

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

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

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

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

(ii) a severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) *Record.* Upon written notice to the military judge under paragraph (b)(3), trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed. The record shall be certified in accordance with R.C.M. 1112, and shall be reduced to a written transcript if required under R.C.M. 1114. The military judge or the Court of Criminal Appeals may direct that additional parts of the proceeding be included in the record.

(6) *Forwarding.* Upon written notice to the military judge under paragraph (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe. The person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Criminal Appeals and notify trial counsel of that decision.

(7) *Appeal filed.* If the United States elects to file an appeal, it shall be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court.

(8) *Appeal not filed.* If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(9) *Pretrial confinement of accused pending appeal.* If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under paragraph (b)(3) of this rule, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

(c) *Appellate proceedings.*

(1) *Appellate counsel.* The parties shall be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule.

(2) *Court of Criminal Appeals.* An appeal under Article 62 shall, whenever practicable, have priority over all other proceedings before the Court of Criminal Appeals. In determining an appeal under Article 62, the Court of Criminal Appeals may take action only with respect to matters of law.

(3) *Action following decision of Court of Criminal Appeals.* After the Court of Criminal Appeals has decided any appeal under Article 62, the accused may petition for review by the Court of Appeals for the Armed Forces, or the Judge Advocate General may certify a question to the Court of Appeals for the Armed Forces. The parties shall be notified of the decision of the Court of Criminal Appeals promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Appeals for the Armed Forces for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate General, who shall forward a copy to the clerk of the Court of Appeals for the Armed Forces when required by the Court. If the decision by the Court of Criminal Appeals permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Appeals for the Armed Forces or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Appeals for the Armed Forces, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Criminal Appeals. If the case is reviewed by the Court of Appeals for the Armed Forces, R.C.M. 1204 and 1205 shall apply.

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

(a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the

extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with subsection (e) of this rule.

(e) *Incompetence determination hearing.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall commit the accused to the custody of the Attorney General.

(f) *Hospitalization of the accused.* An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in subsection 4241(d) of title 18, United States Code. If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. If, at the end of the period of hospitalization, the accused's mental condition has not so improved, action shall be taken in accordance with section 4246 of title 18, United States Code.

(g) *Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment.

Rule 910. Pleas

(a) *Alternatives.*

(1) *In general.* An accused may plead as follows:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or

(D) not guilty.

A plea of guilty may not be received as to an offense for which a sentence of death is mandatory.

(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, trial counsel may consent on behalf of the Government.

(b) *Refusal to plead; irregular plea.* If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

(c) *Advice to accused.* Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, the maximum possible penalty provided by law, and if applicable, the effect of any sentence limitation(s) provided for in a plea agreement on the minimum or maximum possible penalty that may be adjudged including the effect of any concurrent or consecutive sentence limitations;

(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in paragraph (c)(3) of this rule;

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement; and

(6) That if an election by the accused to be tried by military judge alone has been approved, the accused will be sentenced by the military judge.

(d) *Ensuring that the plea is voluntary.* The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea.* The military judge shall not accept a plea of guilty without

making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(f) *Plea agreement inquiry.*

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

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

(3) *Disclosure.* If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted.

(4) *Inquiry.*

(A) The military judge shall inquire to ensure:

(i) that the accused understands the agreement; and

(ii) that the parties agree to the terms of the agreement.

(B) If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall:

(i) conform, with the consent of the Government, the agreement to the accused's understanding; or

(ii) permit the accused to withdraw the plea.

(5) *Sentence limitations in plea agreements.* If a plea agreement contains limitations on the punishment that may be imposed, the court-martial, subject to subparagraph (4)(B) and R.C.M. 705, shall sentence the accused in accordance with the agreement.

(6) *Accepted plea agreement.* After the plea agreement inquiry, the military judge shall announce on the record whether the plea and the plea agreement are accepted. Upon acceptance by the military judge, a plea agreement shall bind the parties and the court-martial.

(7) *Rejected plea agreement.* If the military judge does not accept a plea agreement, the military judge shall—

(A) issue a statement explaining the basis for the rejection;

(B) allow the accused to withdraw any plea; and

(C) inform the accused that if the plea is not withdrawn the court-martial may impose any lawful punishment.

(g) *Findings.* Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless the plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged.

(h) *Later action.*

(1) *Withdrawal by the accused.* If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge shall permit the accused to do so only for good cause shown.

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

(i) [Reserved]

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

Rule 911. Assembly of the court-martial

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

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

(a) *Pretrial matters.*

(1) *Questionnaires.* Before trial, trial counsel may, and shall upon request of defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;

(B) Sex;

(C) Race;

(D) Marital status and sex, age, and number of dependents;

(E) Home of record;

(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) Current unit to which assigned;

(H) Past duty assignments;

(I) Awards and decorations received;

(J) Date of rank; and

(K) Whether the member has acted as accuser, counsel, preliminary hearing officer, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member. For purposes of this rule, the term "members" includes any alternate members.

(2) *Other materials.* A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) *Challenge of selection of members.*

(1) *Motion.* Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

(2) *Procedure.* Upon a motion under paragraph (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) *Forfeiture.* Failure to make a timely motion under this subsection shall forfeit the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) *Stating grounds for challenge.* Trial counsel shall state any ground for challenge for cause against any member of which trial counsel is aware.

(d) *Examination of members.* The military judge may permit the parties to conduct examination of members or may personally conduct examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

(e) *Evidence.* Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) *Challenges and removal for cause.*

(1) *Grounds.* A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been a preliminary hearing officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

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

(2) *When made.*

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

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

(3) *Procedure.* Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily trial counsel shall enter any challenges for cause before defense counsel. The military judge shall rule finally

on each challenge. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) *Waiver.* The grounds for challenge in subparagraph (f)(1)(A) of this rule may not be waived. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review. Further, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.

(5) Following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges under subsection (g) of this rule, the military judge, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of impaneling members in accordance with R.C.M. 912A.

(g) *Peremptory challenges.*

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

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

(h) *Definitions.*

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

(2) *Preliminary hearing officer.* For purposes of this rule, "preliminary hearing officer" includes any person who has examined charges under R.C.M. 405 and any person who was counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Rule 912A. Impaneling members and alternate members

(a) *In general.* After challenges for cause and peremptory challenges are exercised, the military judge of a general or special court-martial with members shall impanel the members, and, if authorized by the convening authority, alternate members, in accordance with the following numerical requirements:

(1) *Capital cases.* In a general court-martial in which the charges were referred with a special instruction that the case be tried as a capital case, the number of members impaneled, subject to paragraph (4) of this subsection, shall be twelve.

(2) *General courts-martial.* In a general court-martial other than as described in paragraph (1) of this subsection, the number of members impaneled, subject to paragraph (4) of this

subsection, shall be eight.

(3) *Special courts-martial.* In a special court-martial, the number of members impaneled, subject to paragraph (4) of this subsection, shall be four.

(4) *Alternate members.* A convening authority may authorize the military judge to impanel alternate members. When authorized by the convening authority, the military judge shall designate which of the impaneled members are alternate members in accordance with these rules and consistent with the instructions of the convening authority.

(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this subsection, as applicable, plus the number of alternate members specified by the convening authority. The military judge shall not impanel the court-martial until the specified number of alternate members have been identified. New members may be detailed in order to impanel the specified number of alternate members.

(B) If the convening authority does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, the number of members impaneled shall be the number of members required under paragraphs (a)(1), (2), or (3) of this rule and no more than three alternate members. New members shall not be detailed in order to impanel alternate members.

(b) *Enlisted accused.* In the case of an enlisted accused, the members shall be impaneled under subsection (a) of this rule in such numbers and proportion that—

(1) If the accused elected to be tried by a court-martial composed of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members; and

(2) If the accused elected to be tried by a court-martial composed of all officer members, the membership of the panel includes all officer members.

(c) *Number of members detailed insufficient.* If, after the exercise of all challenges, the number of detailed members remaining is fewer than the number of members required for the court-martial under subsections (a) and (b) of this rule, the convening authority shall detail new members under R.C.M. 503.

(d) *Excess members following the exercise of all challenges.* If the number of members remaining after the exercise of all challenges is greater than the number of members required for the court-martial under subsections (a) and (b) of this rule, the military judge shall use the following procedures to identify the members who will be impaneled—

(1) *Enlisted panel.* In a case in which the accused has elected to be tried by a panel consisting of at least one-third enlisted members under R.C.M. 503(a)(2), the military judge shall—

(A) first identify the one-third enlisted members required under subsections (a) and (b) of this rule in numerical order beginning with the lowest random number assigned pursuant to R.C.M. 912(f)(5); and

(B) then identify the remaining members required for the court-martial under subsections (a) and (b) of this rule, in numerical order beginning with the lowest random number assigned pursuant to R.C.M. 912(f)(5).

(2) *Other panels.* For all other panels, the military judge shall identify the number of members required under subsections (a) and (b) of this rule in numerical order beginning

with the lowest random number assigned pursuant to R.C.M. 912(f)(5).

(3) *Alternate Members.*

(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the specified number of alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 912(f)(5), after first identifying members under paragraph (1) or (2) of this subsection.

(B) If the convening authority does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 912(f)(5), after first identifying the members under paragraph (1) or (2) of this subsection. The military judge shall identify no more than three alternate members.

(4) The military judge shall excuse any members not identified as members or alternate members, if any.

(e) *Lowest number.* The lowest number is the number with the lowest numerical value.

(f) *Announcement.* After identifying the members to be impaneled in accordance with this rule, and after excusing any excess members, the military judge shall announce that the members are impaneled.

Rule 912B. Excusal and replacement of members after impanelment

(a) *In general.* A member who has been excused after impanelment shall be replaced in accordance with this rule. Alternate members excused after impanelment shall not be replaced.

(b) *Alternate members available.* An excused member shall be replaced with an impaneled alternate member, if an alternate member is available. The alternate member with the lowest random number assigned pursuant to R.C.M. 912(f)(5) shall replace the excused member, unless in the case of an enlisted accused, the use of such member would be inconsistent with the specific panel composition established under R.C.M. 903.

(c) *Alternate members not available.*

(1) *Detailing of new members not required.* In a general court-martial in which a sentence of death may not be adjudged, if, after impanelment, a court-martial member is excused and alternate members are not available, the court-martial may proceed if—

(A) There are at least six members; and

(B) In the case of an enlisted accused, the remaining panel composition is consistent with the specific panel composition established under R.C.M. 903.

(2) *Detailing of additional members required.* In all cases other than those described in paragraph (1), if an impaneled member is excused and no alternate member is available to replace the excused member, the court-martial may not proceed until the convening authority details sufficient additional new members.

Rule 913. Presentation of the case on the merits

(a) *Preliminary instructions.* The military judge may give such preliminary instructions as may be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer

informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered.

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

(c) *Presentation of evidence.* Each party shall have full opportunity to present evidence.

(1) *Order of presentation.* Ordinarily the following sequence shall be followed:

(A) Presentation of evidence for the prosecution;

(B) Presentation of evidence for the defense;

(C) Presentation of prosecution evidence in rebuttal;

(D) Presentation of defense evidence in surrebuttal;

(E) Additional rebuttal evidence in the discretion of the military judge; and

(F) Presentation of evidence requested by the military judge or members.

(2) *Taking testimony.* The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual.

(3) *Views and inspections.* The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all parties, the members (if any), and the military judge. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made part of the record.

(4) Evidence subject to exclusion. When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

(5) Reopening case. The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

Rule 914. Production of statements of witnesses

(a) *Motion for production.* After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by trial counsel, in the possession of the United States; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

(b) *Production of entire statement.* If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge shall order that the statement be delivered to the moving party.

(c) *Production of excised statement.* If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection,

the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) *Recess for examination of the statement.* Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) *Remedy for failure to produce statement.* If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(f) *Definition.* As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a federal grand jury.

914A. Use of remote live testimony of a child

(a) *General procedures.* A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter, and the public;

(4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Definition.* As used in this rule, "remote live testimony" includes, but is not limited to, testimony by videoteleconference, closed circuit television, or similar technology.

(c) *Prohibitions.* The procedures described in this rule shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c)(1).

Rule 914B. Use of remote testimony

(a) *General procedures.* The military judge shall determine the procedures used to take testimony via remote means. At a minimum, all parties shall be able to hear each other, those in

attendance at the remote site shall be identified, and the accused shall be permitted private, contemporaneous communication with his counsel.
(b) *Definition.* As used in this rule, testimony via "remote means" includes, but is not limited to, testimony by videoteleconference, closed circuit television, telephone, or similar technology.

Rule 915. Mistrial
(a) *In general.* The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.
(b) *Procedure.* On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.
(c) *Effect of declaration of mistrial.*
(1) *Withdrawal of charges.* A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.
(2) *Further proceedings.* A declaration of a mistrial shall not prevent trial by another court-martial on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was:
(A) An abuse of discretion and without the consent of the defense; or
(B) The direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

Rule 916. Defenses
(a) *In general.* As used in this rule, "defenses" includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.
(b) *Burden of proof.*
(1) *General rule.* Except as listed in paragraphs (b)(2) and (3) of this rule, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.
(2) *Lack of mental responsibility.* The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.
(3) *Mistake of fact as to age.* In the defense of mistake of fact as to age as described in Article 120b(d)(2) in a prosecution under Article 120b(b) (sexual assault of a child) or Article 120b(c) (sexual abuse of a child), the accused has the burden of proving mistake of fact as to age by a preponderance of the evidence.
(c) *Justification.* A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.
(d) *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.
(e) *Self-defense.*
(1) *Homicide or assault cases involving deadly force.* It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

(2) *Certain aggravated assault cases.* It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:

(A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) In order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.

(3) *Other assaults.* It is a defense to any assault punishable under Article 89, 91, or 128 and not listed in paragraphs (e)(1) or (2) of this rule that the accused:

(A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

(4) *Loss of right to self-defense.* The right to self-defense is lost and the defenses described in paragraphs (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

(5) *Defense of another.* The principles of self-defense under paragraphs (e)(1) through (4) of this rule apply to defense of another. It is a defense to homicide, attempted homicide, assault with intent to kill, or any assault under Article 89, 91, or 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

(f) *Accident.* A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

(g) *Entrapment.* It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.

(h) *Coercion or duress.* It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

(i) *Inability.* It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or

mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(2) *Child Sexual Offenses.* It is a defense to a prosecution under Article 120b(b), sexual assault of a child, and Article 120b(c), sexual abuse of a child, that, at the time of the offense, the child was at least 12 years of age, and the accused reasonably believed that the child had attained the age of 16 years. The accused must prove this defense by a preponderance of the evidence.

(k) *Lack of mental responsibility.*

(1) *Lack of mental responsibility.* It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

(2) *Partial mental responsibility.* A mental condition not amounting to a lack of mental responsibility under paragraph (k)(1) of this rule is not an affirmative defense.

(3) *Procedure.*

(A) *Presumption.* The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense.

(B) *Inquiry.* If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under R.C.M. 706.

(C) *Determination.* The issue of mental responsibility shall not be considered as an interlocutory question.

(l) *Not defenses generally.*

(1) *Ignorance or mistake of law.* Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.

(2) *Voluntary intoxication.* Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Rule 917. Motion for a finding of not guilty

(a) *In general.* The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged at any time after the evidence on either side is closed but prior to entry of judgment if the evidence is insufficient to sustain a conviction of the offense affected. If a motion for a finding of not guilty at the close of the prosecution's case is denied, the defense may offer evidence on that offense without having reserved the right to do so.

(b) *Form of motion.* The motion shall specifically indicate wherein the evidence is insufficient.

(c) *Procedure.* Before ruling on a motion for a finding of not guilty, whether made by counsel or *sua sponte*, the military judge shall give each party an opportunity to be heard on the matter.

(d) *Standard.* A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could

reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

(e) *Motion as to greater offense.* A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

(f) *Effect of ruling.* Except as provided in R.C.M. 908(a), a ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time before entry of judgment.

(g) *Effect of denial on review.* If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Rule 918. Finding

(a) *General findings.* The general findings of a court-martial state whether the accused is guilty of each charge and specification. If two or more accused are tried together, separate findings as to each shall be made.

(1) *As to a specification.* General findings as to a specification may be:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any;

(D) not guilty only by reason of lack of mental responsibility; or

(E) not guilty.

Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

(2) *As to a charge.* General findings as to a charge may be:

(A) guilty;

(B) not guilty, but guilty of a violation of Article _____;

(C) not guilty only by reason of lack of mental responsibility; or

(D) not guilty.

(b) *Special findings.* In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. Only one set of special findings may be requested by a party in a case. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the court-

martial or in writing during or after the court-martial, but in any event shall be made before entry of judgment and included in the record of trial.
(c) *Basis of findings.* Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.

Rule 919. Argument by counsel on findings
(a) *In general.* After the closing of evidence, trial counsel shall be permitted to open the argument. Defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.
(b) *Contents.* Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.
(c) *Forfeiture of objection to improper argument.* Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute forfeiture of the objection.

Rule 920. Instructions on findings
(a) *In general.* The military judge shall give the members appropriate instructions on findings.
(b) *When given.* Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.
(c) *Request for instructions.* At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.
(d) *How given.* Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.
(e) *Required instructions.* Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that—

(A) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

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

(C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree

of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact under R.C.M. 916(j)(2) is raised, add: The accused has the burden of proving the defense of mistake of fact as to consent or age by a preponderance of the evidence.]

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given.

(f) *Forfeiture and objections.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection. The parties shall be given the opportunity to be heard on any objection to or request for instructions outside the presence of the members. When a party objects to an instruction, the military judge may require the party objecting to specify in what respect the instructions given were improper.

Rule 921. Deliberations and voting on findings

(a) *In general.* After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment.

(b) *Deliberations.* Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.

(c) *Voting.*

(1) *Secret ballot.* Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) *Numbers of votes required to convict.* A finding of guilty results only if at least three-fourths of the members present vote for a finding of guilty.

(3) *Acquittal.* If fewer than three-fourths of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) *Not guilty only by reason of lack of mental responsibility.* When the defense of lack of mental responsibility is in issue under R.C.M. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least three-fourths of the members present vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

(5) *Included offenses.* Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense

charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) *Procedure for voting.*

(A) *Order.* Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

(d) *Action after findings are reached.* After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

Rule 922. Announcement of findings

(a) *In general.* Findings shall be announced in the presence of all parties promptly after they have been determined.

(b) *Findings by members.* The president shall announce the findings by the members. In a capital case, if a finding of guilty is unanimous with respect to a capital offense, the president shall so state.

(c) *Findings by military judge.* The military judge shall announce the findings when trial is by military judge alone or in accordance with R.C.M. 910(g).

(d) *Erroneous announcement.* If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement in accordance with this rule. The error must be discovered and the new announcement made before the final adjournment of the court-martial in the case.

(e) *Polling prohibited.* Except as provided in Mil. R. Evid. 606, members may not be questioned about their deliberations and voting.

Rule 923. Impeachment of findings

Findings that are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Rule 924. Reconsideration of findings

(a) *Time for reconsideration.* Members may reconsider any finding reached by them before such finding is announced in open session.

(b) *Procedure.* Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner, the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-fourth of the members vote for reconsideration. Any finding of not guilty only by reason of lack of mental responsibility shall be reconsidered on the issue of the finding of guilty of the elements if more

than one-fourth of the members vote for reconsideration, and on the issue of mental responsibility if a majority vote for reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.C.M. 921 shall apply.

(c) *Military judge sitting alone.* In trial by military judge alone, the military judge may reconsider:

(1) any finding of guilty at any time before announcement of sentence; and

(2) the issue of the finding of guilty of the elements in a finding of not guilty only by reason of lack of mental responsibility at any time before announcement of sentence or, in the case of a complete acquittal, entry of judgment.

Rule 1001. Presentencing procedure

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, and the accused has had the opportunity to make a sentencing forum election under R.C.M. 1002(b), the prosecution and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Crime victim's right to be reasonably heard.

(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.*

(A) *Crime victim.* At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard.

(B) *Accused.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matters to be presented by the prosecution.*

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or

containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are forfeited.

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are forfeited.

(3) *Evidence of prior convictions of the accused.*

(A) *In general.* Trial counsel may introduce evidence of prior military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged. In a civilian case, a "conviction" includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. A "conviction" does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated, or pardoned.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a finding of guilty by summary court-martial may not be used for purposes of this rule until review has been completed pursuant to Article 64. Evidence of the pendency of an appeal is admissible.

(C) *Method of proof.* Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

(4) *Evidence in aggravation.* Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

(5) *Evidence of rehabilitative potential.* "Rehabilitative potential" refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

(A) *In general.* Trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation.

(B) *Foundation for opinion.* The witness or deponent providing opinion evidence regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

(C) *Bases for opinion.* An opinion regarding the accused's rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential.

(D) *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit.

(E) *Cross-examination.* On cross-examination, inquiry is permitted into relevant and specific instances of conduct.

(F) *Redirect.* Notwithstanding any other provision in this rule, the scope of opinion testimony permitted on redirect may be expanded, depending upon the nature and scope of the cross-examination.

(c) *Crime victim's right to be reasonably heard.*

(1) *In general.* After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense. A crime victim who makes an unsworn statement under subsection (c)(5) is not considered a witness for the purposes of Article 42(b). If the crime victim exercises the right to be reasonably heard, the crime victim shall be called by the court-martial. The exercise of the right is independent of whether the crime victim testified during findings or is called to testify by the government or defense under this rule.

(2) *Definitions.*

(A) *Crime victim.* For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.

(B) *Victim impact.* For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.

(C) *Mitigation.* For the purposes of this subsection, mitigation includes any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency.

(D) *Right to be reasonably heard.*

(i) *Capital cases.* In capital cases, for purposes of this subsection, the "right to be reasonably heard" means the right to make a sworn statement.

(ii) *Non-capital cases.* In non-capital cases, for purposes of this subsection, the "right to be reasonably heard" means the right to make a sworn statement, an unsworn statement, or both.

(3) *Contents of statement.* The content of statements made under paragraphs (4) and (5) may

only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence.

(4) *Sworn statement.* The crime victim may make a sworn statement and shall be subject to cross-examination concerning it by trial counsel and defense counsel or examination on it by the court-martial.

(5) *Unsworn statement.*

(A) *In general.* The crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both.

(B) *Procedure.* After the announcement of findings, a crime victim who elects to present an unsworn statement shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. The military judge may waive this requirement for good cause shown. Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement.

(C) *New factual matters in unsworn statement.* If during the presentencing proceeding a crime victim makes an unsworn statement containing factual matters not previously disclosed under subparagraph (5)(B), the military judge shall take appropriate action within the military judge's discretion.

(d) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, to rebut matters presented by the prosecution, or to rebut statements of fact contained in any crime victim's sworn or unsworn statement, whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. The accused may make a request for a specific sentence. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused.* The accused may give sworn oral testimony and shall be subject to cross-examination concerning it by trial counsel or examination on it by the court-martial, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by trial counsel upon it or examined upon it by the court-martial. The

prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) *Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(e) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under paragraph (d)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(f) *Production of witnesses.*

(1) *In general.* During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentencing proceedings is a matter within the discretion of the military judge, subject to the limitations in paragraph (2).

(2) *Limitations.* A witness may be produced to testify during presentencing proceedings through a subpoena or travel orders at Government expense only if—

(A) the testimony of the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence;

(B) the weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) the other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(g) *Additional matters to be considered.* In addition to matters introduced under this rule, the court-martial may consider—

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

(h) *Argument.* After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the

views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than the court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to the sentencing considerations set forth in R.C.M. 1002(f). Failure to object to improper argument before the military judge begins deliberations, or before the military judge instructs the members on sentencing, shall constitute forfeiture of the objection.

Rule 1002. Sentencing determination

(a) *Generally.* Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing under subsection (f), including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment except—

(1) When a mandatory minimum sentence is prescribed by the code, the sentence for an offense shall include any punishment that is made mandatory by law for that offense. The sentence for an offense may not be greater than the maximum sentence established by law or by the President for that offense; and

(2) If the military judge accepts a plea agreement with a sentence limitation, the court-martial shall sentence the accused in accordance with the limits established by the plea agreement.

(b) *Sentencing forum election.* In a general or special court-martial consisting of a military judge and members, upon the announcement of findings and before any matter is presented in the presentencing phase, the military judge shall inquire—

(1) In noncapital cases, whether the accused elects sentencing by members in lieu of sentencing by military judge for all charges and specifications for which the accused was found guilty; and

(2) In capital cases, whether the accused elects sentencing by members in lieu of sentencing by military judge for all charges and specifications for which the accused was found guilty and for which a sentence of death may not be adjudged.

(c) *Form of election.* The accused's election under subsection (b), shall be in writing and signed by the accused or shall be made orally on the record. The military judge shall ascertain whether the accused has consulted with defense counsel and has been informed of the right to make a sentencing forum election under subsection (b).

(d) *Noncapital cases.*

(1) *Sentencing by members.* In a general or special court-martial in which the accused has elected sentencing by members in lieu of sentencing by military judge under paragraph (b)(1), the members shall determine a single sentence for all of the charges and specifications of which the accused was found guilty. The military judge announces the sentence determined by the members in accordance with R.C.M. 1007.

(2) *Sentencing by military judge.* Unless a timely election for sentencing by members is made by the accused under subsection (b), the military judge shall determine the sentence of a general or special court-martial in accordance with this paragraph.

(A) *Segmented sentencing for confinement and fines.* The military judge at a general or special court-martial shall determine an appropriate term of confinement and fine, if applicable, for each specification for which the accused was found guilty. Subject to subsection (a), such a determination may include a term of no confinement or no fine when appropriate for the

offense.

(B) *Concurrent or consecutive terms of confinement.* If a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively. For each term of confinement, the military judge shall state whether the term of confinement is to run concurrently or consecutively with any other term or terms of confinement. The terms of confinement for two or more specifications shall run concurrently—

(i) when each specification involves the same victim and the same act or transaction;

(ii) when provided for in a plea agreement;

(iii) when the accused is found guilty of two or more specifications and the military judge finds that the charges or specifications are unreasonably multiplied; or

(iv) when otherwise appropriate under subsection (f); or

(v) in a special court-martial, to the extent necessary to reduce the total confinement to the maximum confinement authorized under R.C.M. 201(f)(2).

(C) *Unitary sentencing for other forms of punishment.* All punishments other than confinement or fine available under R.C.M. 1003, if any, shall be determined as a single, unitary component of the sentence, covering all of the guilty findings in their entirety. The military judge shall not segment those punishments among the guilty findings.

(e) *Capital cases.* The following applies to cases referred as capital in accordance with R.C.M. 1004(b)(1)(A) that include a finding of guilty for a charge and specification for which death may be adjudged.

(1) *Sentencing by members.*

(A) Where all of the findings of guilty are for charges and specifications for which death may be adjudged, the members shall determine whether the sentence for each such specification shall be death or a lesser punishment. The members shall then determine a single sentence for all charges and specifications for which the accused was found guilty. The military judge shall announce the sentence determined by the members in accordance with R.C.M. 1007.

(B) Where there is a finding of guilty for a specification for which death may be adjudged and a finding of guilty for a specification for which death may not be adjudged, and the accused elects sentencing by members under paragraph (b)(2) for those specifications for which a sentence of death may not be adjudged:

(i) The members shall determine whether the sentence for each specification for which death may be adjudged shall be death or a lesser punishment;

(ii) The members shall determine a single, unitary sentence for all the charges and specifications for which the accused was found guilty; and

(iii) The military judge shall announce the sentence determined by the members in accordance with R.C.M. 1007.

(2) *Sentencing by members and military judge.* Unless a timely election for sentencing by members is made by the accused under paragraph (b)(2), where there is a finding of guilty for a specification for which death may be adjudged and a finding of guilty for a specification for which death may not be adjudged:

(A) The members shall determine whether the sentence for each specification for which death may be adjudged shall be death or a lesser punishment;

(B) The members shall determine a single, unitary sentence for the specifications for which death may be adjudged;

(C) The military judge shall determine the sentence for all charges and specifications for which death may not be adjudged in accordance with paragraph (d)(2); and

(D) If the sentence determined in subparagraphs (B) and (C) include more than one term of confinement, the military judge shall determine, in accordance with paragraph (d)(2), whether the terms of confinement, including any term of confinement determined by members, will run concurrently or consecutively.

(E) The military judge shall ensure that the sentence, at a minimum, includes any authorized punishment determined by the members. The military judge, taking into account the noncapital offenses addressed in sentencing by the military judge, must include, at a minimum, the discharge determined by the members and may include a more severe form of discharge in the sentence.

(F) The military judge shall announce the sentence in accordance with R.C.M. 1007.

(f) *Imposition of sentence.* In sentencing an accused under this rule, the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

(1) the nature and circumstances of the offense and the history and characteristics of the accused;

(2) the impact of the offense on—

(A) the financial, social, psychological, or medical well-being of any victim of the offense; and

(B) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

(3) the need for the sentence to—

(A) reflect the seriousness of the offense;

(B) promote respect for the law;

(C) provide just punishment for the offense;

(D) promote adequate deterrence of misconduct;

(E) protect others from further crimes by the accused;

(F) rehabilitate the accused; and

(G) provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and

(4) the sentences available under these rules.

(g) *Information that may be considered.* The court-martial, in applying the factors listed in subsection (f) to the facts of a particular case, may consider—

(1) Any evidence admitted by the military judge during the presentencing proceeding under R.C.M. 1001; and

(2) Any evidence admitted by the military judge during the findings proceeding.

Rule 1003. Punishments

(a) *In general.* Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of one or more charges and specifications by a court-martial.

(b) *Authorized punishments.* Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

(1) *Reprimand.* A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority.

(2) *Forfeiture of pay and allowances.* Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.

Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or hardship duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced. In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month.

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. In the case of a member of the armed forces, summary and special courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In the case of a person serving with or accompanying an armed force in the field, a summary court-martial may not adjudge a fine in excess of two-thirds of one month of the highest rate of enlisted pay, and a special court-martial may not adjudge a fine in excess of two-thirds of one year of the highest rate of officer pay. To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.

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

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

(6) *Hard labor without confinement.* Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

(7) *Confinement.* The place of confinement shall not be designated by the court-martial. When confinement for life is authorized, it may be with or without eligibility for parole. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

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

(A) *Dismissal.* Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial.

Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;

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

(C) *Bad-conduct discharge.* A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

(9) *Death.* Death may be adjudged only in accordance with R.C.M. 1004; and

(10) *Punishments under the law of war.* In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) *Limits on punishments.*

(1) *Based on offenses.*

(A) *Offenses listed in Part IV.*

(i) *Maximum punishment.* The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) *Other punishments.* Except as otherwise specifically provided in this Manual, the types of punishments listed in paragraphs (b)(1), (3), (4), (5), (6) and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) *Offenses not listed in Part IV.*

(i) *Included or related offenses.* For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) *Not included or related offenses.* An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay

and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) *Multiple Offenses.* When the accused is found guilty of two or more specifications, the maximum authorized punishment may be imposed for each separate specification, unless the military judge finds that the specifications are unreasonably multiplied.

(2) *Based on rank of accused.*

(A) *Commissioned or warrant officers, cadets, and midshipmen.*

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

(iv) Only a general court-martial, upon conviction of any offense in violation of the UCMJ, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall by dishonorable discharge.

(B) *Enlisted persons.* See paragraph (b)(9) of this rule and R.C.M. 1301(d).

(3) *Based on reserve status in certain circumstances.*

(A) *Restriction on liberty.* A member of a reserve component whose order to active duty is approved pursuant to Article 2(d)(5) may be required to serve any adjudged restriction on liberty during that period of active duty. Other members of a reserve component ordered to active duty pursuant to Article 2(d)(1) or tried by summary court-martial while on inactive duty training may not—

(i) be sentenced to confinement; or

(ii) be required to serve a court-martial punishment consisting of any other restriction on liberty except during subsequent periods of inactive-duty training or active duty.

(B) *Forfeiture.* A sentence to forfeiture of pay of a member not retained on active duty after completion of disciplinary proceedings may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

(4) *Based on status as a person serving with or accompanying an armed force in the field.* In the case of a person serving with or accompanying an armed force in the field, no court-martial may adjudge forfeiture of pay and allowances, reduction in pay grade, hard labor without confinement, or a punitive separation.

(5) *Based on other rules.* The maximum limits on punishments in this rule may be further limited by other Rules for Courts-Martial.

(d) *Circumstances permitting increased punishments.*

(1) *Three or more convictions.* If an accused is found guilty of a specification or specifications for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing

the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) *Two or more convictions.* If an accused is found guilty of a specification or specifications for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) *Two or more specifications.* If an accused is found guilty of two or more specifications for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

Rule 1004. Capital cases

(a) *In general.* Death may be adjudged only when—

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by either—

(A) the unanimous vote of all twelve members of the court-martial; or

(B) the military judge pursuant to the accused's plea of guilty to such an offense; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) *Notice.*

(A) *Referral.* The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction on the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided that—

(i) the convening authority has otherwise complied with the notice requirement of subparagraph (B); and

(ii) if the accused demonstrates specific prejudice from such failure to include the special instruction, the military judge determines that a continuance or a recess is an adequate remedy.

(B) *Arraignment.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

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

(4) *Necessary findings.* Death may not be adjudged unless—

(A) The members unanimously find that at least one of the aggravating factors under subsection (c) existed beyond a reasonable doubt;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) *Basis for findings.* The findings in paragraph (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, the charge(s) and specification(s) for which the members shall determine a sentence, and on the requirements and procedures under paragraphs (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before a sentence of death may be determined by the members.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. A sentence of death may not be considered unless the members unanimously concur in a finding of the existence of at least one such aggravating factor and unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s) under subsection (c). After voting on the necessary findings, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement.* If the members voted unanimously for death, the military judge shall, in addition to complying with R.C.M. 1006(e) and 1007, announce which aggravating factors under subsection (c) the members unanimously found to exist beyond a reasonable doubt.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118;

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118;

(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 103a or 103b;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed: while the accused was engaged in the commission or attempted commission of a separate murder, or any robbery, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, aggravated arson, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid.315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, "substantial physical harm" means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term "substantial physical harm" does not mean minor injuries, such as a black eye or bloody nose. The term "substantial mental or physical pain or suffering" is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

(K) The victim of the murder was under 15 years of age.

(8) That only in the case of a violation of Article 118(a)(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

(9) [Reserved]

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 103, 103a, or 103b:

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

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Other penalties.* When death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.

Rule 1005. Instructions on sentence

(a) *In general.* The military judge shall give the members appropriate instructions on sentence.

(b) *When given.* Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

(c) *Requests for instructions.* During presentencing proceedings or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

(d) *How given.* Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) *Required instructions.* Instructions on sentence shall include—

(1) A statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any;

(2) A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances;

(3) A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

(4) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority;

(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5);

(6) A statement that the members shall consider the sentencing guidance set forth in R.C.M. 1002(f); and

(7) Such other explanations, descriptions, or directions that the military judge determines to be necessary, whether properly requested by a party or determined by the military judge *sua sponte*.

(f) *Failure to object.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence shall constitute forfeiture of the objection. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 1006. Deliberations and voting on sentence

(a) *In general.* With respect to charge(s) and specification(s) for which a sentence of death may be determined and in all other cases in which the accused elects sentencing by members under R.C.M. 1002(b), the members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) *Deliberations.* Deliberations require a full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) *Proposal of sentences.* Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president.

(d) *Voting.*

(1) *Duty of members.* Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused.

(2) *Secret ballot.* Proposed sentences shall be voted on by secret written ballot.

(3) *Procedure.*

(A) *Order.* All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under paragraph (d)(4) of this

rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

(4) *Number of votes required.*

(A) *Death.* A sentence may include death only if the members unanimously vote for the sentence to include death.

(B) *Other.* Any sentence other than death may be determined only if at least three-fourths of the members vote for that sentence.

(5) *Mandatory sentence.* When a mandatory minimum is prescribed for an offense under the UCMJ, the members shall vote on a sentence in accordance with this rule.

(6) *Plea agreements.* When the military judge accepts a plea agreement with a sentence limitation, the members shall vote on a sentence in accordance with the sentence limitation.

(7) *Effect of failure to agree.* If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

(e) *Action after a sentence is reached.* After the members have agreed upon a sentence by the required number of votes in accordance with this rule, the court-martial shall be opened and the president shall inform the military judge that the members have determined a sentence. The military judge may, in the presence of the parties, examine any writing used by the president to state the determination and may assist the members in putting the sentence in proper form. If the members voted unanimously for a sentence of death, the writing shall indicate which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

Rule 1007. Announcement of sentence

(a) *In general.* The sentence shall be announced in the presence of all parties promptly after it has been determined.

(b) *Announcement.*

(1) In the case of sentencing by members, the sentence shall be announced by the military judge in accordance with the members' determination.

(2) In all other cases, the military judge shall announce the sentence and shall specify—

(A) the term of confinement, if any, and the amount of fine, if any, determined for each offense;

(B) for each term of confinement announced under subparagraph (A), whether the term of confinement is to run concurrently or consecutively with any other term or terms of confinement adjudged; and

(C) any other punishments under R.C.M. 1003 as a single, unitary sentence.

(c) *Erroneous announcement.* If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before entry of the judgment into the record. This action shall not constitute reconsideration of the sentence. If the court-martial is adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

(d) *Polling prohibited.* Except as provided in Mil. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting.

Rule 1008. Impeachment of sentence

A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Rule 1009. Reconsideration of sentence

(a) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) *Exceptions.*

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence upon reconsideration in accordance with subsection (e) of this rule.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(3) If the sentence announced in open session is not in accordance with a sentence limitation in the plea agreement, if any, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(c) *Clarification of sentence.* A sentence may be clarified at any time before entry of judgment.

(1) *Sentence determined by the military judge.* When a sentence determined by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practicable after the ambiguity is discovered.

(2) *Sentence determined by members.* When a sentence determined by the members is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members as soon as practicable after the ambiguity is discovered.

(d) *Action by the convening authority.* Prior to entry of judgment, if a convening authority becomes aware that the sentence of the court-martial is ambiguous, the convening authority shall return the matter to the court-martial for clarification. When the sentence of the court-martial appears to be illegal, the convening authority shall return the matter to the court-martial for correction.

(e) *Reconsideration procedure.* A military judge may reconsider a sentence once announced only under the circumstances described in subsection (b). Any member of the court-martial may propose that a sentence determined by the members be reconsidered.

(1) *Instructions.* When a sentence has been determined by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration.

(2) *Voting.* The members shall vote by secret written ballot in closed session whether to reconsider a sentence already determined by them.

(3) *Number of votes required.*

(A) *Necessary findings in capital sentencing.* Members may reconsider a unanimous vote under R.C.M. 1004(b)(4)(A) that an aggravating factor was proven beyond a reasonable doubt if at least one member votes to reconsider. Members may reconsider a unanimous vote under R.C.M. 1004(b)(4)(C) that any extenuating and mitigating circumstances are substantially

outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under R.C.M. 1004(c), if at least one member votes to reconsider. In all other circumstances, a vote under R.C.M. 1004(b)(4)(A) or (C) may be reconsidered only if at least a majority of the members vote for reconsideration.

(B) *Sentence Determinations.*

(i) *With a view toward increasing.* Members may reconsider a sentence with a view toward increasing the sentence only if at least a majority votes for reconsideration.

(ii) *With a view toward decreasing.* Members may reconsider a sentence with a view toward decreasing the sentence only if:

(I) In the case of a sentence which includes death, at least one member votes to reconsider; or

(II) In the case of any other sentence, more than one-fourth of the members vote to reconsider.

(4) *Successful vote.* If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply.

Rule 1010. Notice concerning post-trial and appellate rights

In each general and special court-martial, prior to adjournment, the military judge shall ensure that defense counsel has informed the accused orally and in writing of:

(a) The right to submit matters to the convening authority to consider before taking action;

(b) The right to appellate review, and the effect of waiver or withdrawal of such right, or failure to file an appeal, as applicable;

(c) The right to apply for relief from the Judge Advocate General if the case is not reviewed by a Court of Criminal Appeals under Article 66; and

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

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and defense counsel and inserted in the record of trial as an appellate exhibit.

Rule 1011. Adjournment

The military judge may adjourn the court-martial at the end of the trial of an accused or proceed to trial of other cases referred to that court-martial. Such an adjournment may be for a definite or indefinite period.

Rule 1101. Statement of trial results

(a) *Content.* After final adjournment of a general or special court-martial, the military judge shall sign and include in the record of trial a Statement of Trial Results. The Statement of Trial Results shall consist of the following—

(1) *Findings.* For each charge and specification referred to trial—

(A) a summary of each charge and specification;

(B) the plea(s) of the accused; and

(C) the finding or other disposition of each charge and specification.

(2) *Sentence.* The sentence of the court-martial and the date the sentence was announced by the court-martial, and the amount of credit, if any, applied to the sentence for pretrial

confinement or for other reasons. If the accused was convicted of more than one specification and any part of the sentence was determined by a military judge, the Statement of Trial Results shall also specify—

(A) the confinement and fine for each specification, if any;

(B) whether any term of confinement is to run consecutively or concurrently with any other term(s) of confinement;

(C) the total amount of any fine(s) and the total amount of any confinement, after accounting for any credit and any terms of confinement that are to run consecutively or concurrently.

(3) *Forum.* The type of court-martial and the command by which it was convened.

(4) *Plea agreements.* In a case with a plea agreement, the statement shall specify any limitations on the punishment as set forth in the plea agreement.

(5) *Suspension recommendation.* If the military judge recommends that any portion of the sentence should be suspended, the statement shall specify—

(A) the portion(s) of the sentence to which the recommendation applies;

(B) the minimum duration of the suspension; and

(C) the facts supporting the suspension recommendation.

(6) *Other information.* Any additional information directed by the military judge or required under regulations prescribed by the Secretary concerned.

(b) *Not guilty only by reason of lack of mental responsibility.* If an accused was found not guilty only by reason of lack of mental responsibility of any charge or specification, the military judge shall sign the Statement of Trial Results only after a hearing is conducted under R.C.M. 1105.

(c) *Abatement.* If the military judge abated the proceedings and the court-martial adjourned without a disposition as to at least one specification, the military judge shall include a brief explanation as to the reasons for abatement in the record of trial. If all charges are subsequently withdrawn, dismissed, or otherwise disposed of, the military judge shall sign a Statement of Trial Results in accordance with this rule.

(d) *Distribution.* Trial counsel shall promptly provide a copy of the Statement of Trial Results to the accused's immediate commander, the convening authority or the convening authority's designee, and, if appropriate, the officer in charge of the confinement facility. A copy of the Statement of Trial Results shall be provided to the accused or to the accused's defense counsel. If the statement is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy. A copy of the Statement of Trial Results shall be provided to any crime victim or victim's counsel in the case, without regard to whether the accused was convicted or acquitted of any offense.

Rule 1102. Execution and effective date of sentences

(a) *In general.* Except as provided in subsection (b), a sentence is executed and takes effect as follows:

(1) *General and special courts-martial.* In the case of a general or special court-martial, a sentence is executed and takes effect when the judgment is entered into the record under R.C.M. 1111.

(2) *Summary courts-martial.* In the case of a summary court-martial, a sentence is executed and takes effect when the convening authority acts on the sentence.

(b) *Exceptions.*

(1) *Forfeitures and reductions.* Unless deferred under R.C.M. 1103 or suspended under R.C.M. 1107, that part of an adjudged sentence that includes forfeitures or confinement is

executed and takes effect as follows:

(A) Subject to subparagraph (B), if a sentence includes forfeitures in pay or allowances or reduction in grade, or, if forfeiture or reduction is required by Articles 58a or 58b, the sentence shall take effect on the earlier of—

(i) 14 days after the sentence is announced under R.C.M. 1007; or

(ii) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

(B) If an accused is not confined and is performing military duties, that portion of the sentence that provides for more than two-thirds forfeitures of pay shall not be executed.

(2) *Confinement.*

(A) *In general.* A commander shall deliver the accused into post-trial confinement when the sentence of the court-martial includes death or confinement, unless a sentence of confinement is deferred under R.C.M. 1103.

(B) *Calculation.* Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is announced by the court-martial. If the accused was earlier ordered into confinement under R.C.M. 305, the accused's sentence shall be credited one day for each day of confinement already served.

(C) *Exclusions in calculating confinement.* The following periods shall be excluded in computing the service of the term of confinement:

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

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

(iii) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to Article 57(b)(2), has postponed the service of a sentence to confinement;

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

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

(D) *Multiple sentences of confinement.* If a court-martial sentence includes more than one term of confinement, each term of confinement shall be served consecutively or concurrently as determined by the military judge.

(E) *Nature of the confinement.* The omission of hard labor from any sentence of a court-martial which has adjudged confinement shall not prohibit an appropriate authority from requiring hard labor as part of the punishment.

(F) *Place of confinement.* The place of confinement for persons sentenced to confinement by courts-martial shall be determined by regulations prescribed by the Secretary concerned. Under such regulations as the Secretary concerned may prescribe, a sentence to confinement adjudged by a court-martial or other military tribunal, regardless whether the sentence includes a punitive discharge or dismissal and regardless whether the punitive discharge or dismissal has

been executed, may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. No member of the armed forces, or person serving with or accompanying an armed force in the field, may be placed in confinement in immediate association with enemy prisoners, or with individuals who are detained under the law of war and are foreign nationals and not members of the armed forces. The Secretary concerned may prescribe regulations governing the conditions of confinement.

(3) *Dishonorable or a bad-conduct discharge, self-executing.* A bad-conduct or dishonorable discharge shall be executed under regulations prescribed by the Secretary concerned after an appropriate official designated by those regulations has certified that the accused's case is final within the meaning of R.C.M. 1209. Upon completion of the certification, the official shall forward the certification to the accused's personnel office for preparation of a final discharge order and certificate.

(4) *Dismissal of a commissioned officer, cadet, or midshipman.* Dismissal of a commissioned officer, cadet, or midshipman shall be executed under regulations prescribed by the Secretary concerned—

(A) after the conviction is final within the meaning of R.C.M. 1209 and Article 57(c)(1) as certified by the approval authority designated pursuant to Article 57(a)(4); and

(B) only after the approval by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

(5) *Sentences extending to death.* A punishment of death shall be carried out in a manner prescribed by the Secretary concerned—

(A) after the conviction is final within the meaning of R.C.M. 1209; and

(B) only after the approval of the President under R.C.M. 1207.

(c) *Other considerations concerning the execution of certain sentences.*

(1) *Death; action when accused lacks mental capacity.* An accused lacking the mental capacity to understand the punishment to be suffered or the reason for imposition of the death sentence may not be put to death during any period when such incapacity exists. The accused is presumed to possess the mental capacity to understand the punishment to be suffered and the reason for imposition of the death sentence. If a substantial question is raised as to whether the accused lacks capacity, the convening authority then exercising general court-martial jurisdiction over the accused shall order a hearing on the question. A military judge, counsel for the Government, and defense counsel shall be detailed. The convening authority shall direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining whether the accused understands the punishment to be suffered and the reason therefor. The military judge shall consider all evidence presented, including evidence provided by the accused. The accused has the burden of proving such lack of capacity by a preponderance of the evidence. The military judge shall make findings of fact, which will then be forwarded to the convening authority ordering the hearing. If the accused is found to lack capacity, the convening authority shall stay the execution until the accused regains appropriate capacity.

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

Rule 1103. Deferment of confinement, forfeitures, and reduction in grade; waiver of Article 58b forfeitures

(a) *In general.*

(1) After a sentence is announced, the convening authority may defer a sentence to confinement, forfeitures, or reduction in grade in accordance with this rule. Deferment may be at the request of the accused as provided in subsection (b), or without a request of the accused as provided in subsection (c).

(2) Deferment of a sentence to confinement, forfeitures, or reduction in grade is a postponement of the running of the sentence.

(b) *Deferment requested by an accused.* The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused, at any time after the adjournment of the court-martial and before the entry of judgment, defer the accused's service of a sentence to confinement, forfeitures, and reduction in grade.

(c) *Deferment without a request from the accused.*

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

(2) Paragraph (1) applies to an accused who, while in custody of a State or foreign country, is temporarily returned by that State or foreign country to the armed forces for trial by court-martial and, after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(3) As used in this subsection, the term "State" means a State of the United States, the District of Columbia, a territory, and a possession of the United States.

(d) *Action on deferment request.*

(1) The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement, forfeitures, or reduction in grade.

(2) In a case in which the accused requests deferment, the accused shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment request shall be subject to judicial review only for abuse of discretion. The action of the authority acting on the deferment request shall be in writing. A copy of the action on the deferment request, to include any rescission, shall be included in the record of trial and a copy shall be provided to the accused and to the military

judge.

(e) *Restraint when deferment is granted.* When deferment of confinement is granted, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused's liberty during the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(f) *End of deferment.* Deferment of a sentence to confinement, forfeitures, or reduction in grade ends:

(1) In a case where the accused requested deferment under subsection (b)—

(A) When the military judge of a general or special court-martial enters the judgment into the record of trial under R.C.M. 1111; or

(B) When the convening authority of a summary court-martial acts on the sentence of the court-martial;

(2) In a case where the deferment was granted under subsection (c), when the accused has been permanently released to the armed forces by a State or foreign country;

(3) When the deferred confinement, forfeitures, or reduction in grade are suspended;

(4) When the deferment expires by its own terms; or

(5) When the deferment is otherwise rescinded in accordance with subsection (g).

(g) *Rescission of deferment.*

(1) *Who may rescind.* The authority who granted the deferment or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(2) *Action.* Deferment of confinement, forfeitures, or reduction in grade may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under paragraph (d)(2). The accused and the military judge shall promptly be informed of the basis for the rescission. The accused shall also be informed of the right to submit written matters and to request that the rescission be reconsidered. The accused may be required to serve the sentence to confinement, forfeitures, or reduction in grade pending this action.

(3) *Orders.* Rescission of a deferment before or concurrently with the entry of judgment shall be noted in the judgment that is entered into the record of trial under R.C.M. 1111.

(h) *Waiving forfeitures resulting from a sentence to confinement to provide for dependent support.*

(1) With respect to forfeiture of pay and allowances resulting only by operation of law and not adjudged by the court, the convening authority may waive, for a period not to exceed six months, all or part of the forfeitures for the purpose of providing support to the accused's dependent(s). The convening authority may waive and direct payment of any such forfeitures when they become effective by operation of Article 58(b).

(2) Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059.

(3) For the purposes of this rule, a "dependent" means any person qualifying as a "dependent"

under 37 U.S.C. 401.

Rule 1104. Post-trial motions and proceedings

(a) *Post-trial Article 39(a) sessions.*

(1) *In general.* Upon motion of either party or *sua sponte,* the military judge may direct a post-trial Article 39(a) session at any time before the entry of judgment under R.C.M. 1111 and, when necessary, after a case has been returned to the military judge by a higher court. Counsel for the accused shall be present in accordance with R.C.M. 804 and R.C.M. 805.

(2) *Purpose.* The purpose of post-trial Article 39(a) sessions is to inquire into, and, when appropriate, to resolve any matter that arises after trial that substantially affects the legal sufficiency of any findings of guilty or the sentence.

(3) *Scope.* A military judge at a post-trial Article 39(a) session may reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence. Prior to entering such a finding or findings, the military judge shall give each party an opportunity to be heard on the matter in a post-trial Article 39(a) session. The military judge may *sua sponte*, at any time prior to the entry of judgment, take one or both of the following actions:

(i) enter a finding of not guilty of one or more offenses charged; or

(ii) enter a finding of not guilty of a part of a specification as long as a lesser offense charged is alleged in the remaining portion of the specification.

(b) *Post-trial motions.*

(1) *Matters.* Post-trial motions may be filed by either party or when directed by the military judge to address such matters as—

(A) An allegation of error in the acceptance of a plea of guilty;

(B) A motion to set aside one or more findings because the evidence is legally insufficient;

(C) A motion to correct a computational, technical, or other clear error in the sentence;

(D) An allegation of error in the Statement of Trial Results;

(E) An allegation of error in the post-trial processing of the court-martial; and

(F) An allegation of error in the convening authority's action under R.C.M. 1109 or 1110.

(2) *Timing.*

(A) Except as provided in subparagraphs (B) and (C), post-trial motions shall be filed not later than 14 days after defense counsel receives the Statement of Trial Results. The military judge may extend the time to submit such matters by not more than an additional 30 days for good cause.

(B) A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action. If any post-trial action by the convening authority is incomplete, irregular, or contains error, the military judge shall—

(i) return the action to the convening authority for correction; or

(ii) with the agreement of all parties, correct the action of the convening authority in the entry of judgment.

(C) A motion to correct a clerical or computational error in a judgment entered by the military judge shall be made within five days after a party is provided a copy of the judgment.

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

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

(2) For reconsideration of a finding of not guilty of any charge, unless the record shows a

finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code; or

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

(d) *Procedure.*

(1) *Personnel.* The requirements of R.C.M. 505 and 805 shall apply at post-trial sessions except that, for good cause, a different military judge may be detailed, subject to R.C.M. 502(c) and 902.

(2) *Record.* All post-trial sessions shall be held in open session. The record of the post-trial sessions shall be prepared, certified, and provided in accordance with R.C.M. 1112 and shall be included in the record of the prior proceedings.

Rule 1105. Post-trial hearing for person found not guilty only by reason of lack of mental responsibility

(a) *In general.* The military judge shall conduct a hearing not later than forty days following the finding that an accused is not guilty only by reason of a lack of mental responsibility.

(b) *Psychiatric or psychological examination and report.* Prior to the hearing, the military judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing.

(c) *Post-trial hearing.*

(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.

(2) The military judge is not bound by the rules of evidence except with respect to privileges.

(3) An accused found not guilty only by reason of a lack of mental responsibility of an offense involving bodily injury to another, or serious damage to the property of another, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. With respect to any other offense, the accused has the burden of such proof by a preponderance of the evidence.

(4) If, after the hearing, the military judge finds the accused has satisfied the standard specified in paragraph (3), the military judge shall inform the general court-martial convening authority of this result and the accused shall be released. If, however, the military judge finds after the hearing that the accused has not satisfied the standard specified in paragraph (3), then the military judge shall inform the general court-martial convening authority of this result and that authority may commit the accused to the custody of the Attorney General.

Rule 1106. Matters submitted by the accused

(a) *In general.* After a sentence is announced in a court-martial, the accused may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110.

(b) *Matters submitted by the accused.*

(1) Subject to paragraph (2), the accused may submit to the convening authority any matters

that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110. The convening authority is only required to consider written submissions. Submissions are not subject to the Military Rules of Evidence.

(2) Submissions under this rule may not include matters that relate to the character of a crime victim unless such matters were admitted as evidence at trial.

(c) *Access to court-martial record.* Upon request by the defense, trial counsel shall provide the accused or counsel for the accused a copy of the recording of all open sessions of the court-martial, and copies of, or access to, the evidence admitted at the court-martial, and the appellate exhibits. Such access shall not include sealed or classified court-martial material or recordings unless authorized by a military judge upon a showing of good cause. A military judge shall issue appropriate protective orders when authorizing such access.

(d) *Time periods.*

(1) *General and special courts-martial.* After a trial by general or special court-martial, the accused may submit matters to the convening authority under this rule within ten days after the sentence is announced.

(2) *Summary courts-martial.* After a trial by summary court-martial, the accused may submit matters under this rule within seven days after the sentence is announced.

(3) *Rebuttal.* In a case where a crime victim has submitted matters under R.C.M. 1106A, the accused shall have five days from receipt of those matters to submit any matters in rebuttal. Such a response shall be limited to addressing matters raised in the crime victim's submissions.

(4) *Extension of time.*

(A) If, within the period described in paragraph (1) or (2), the accused shows that additional time is required for the accused to submit matters, the convening authority may, for good cause, extend the period for not more than 20 days.

(B) For purposes of this rule, good cause for an extension ordinarily does not include the need to obtain matters that reasonably could have been presented at the court-martial.

(e) *Waiver.*

(1) *Failure to submit matters.* Failure to submit matters within the time prescribed by this rule waives the right to submit such matters.

(2) *Submission of matters.* Submission of any matters under this rule shall be deemed a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing.

(3) *Written waiver.* The accused may expressly waive, in writing, the right to submit matters under this rule. Once submitted, such a waiver may not be revoked.

(4) *Absence of accused.* If the accused does not submit matters under this rule as a result of an unauthorized absence, the accused shall be deemed to have waived the right to submit matters under this rule.

Rule 1106A. Matters submitted by crime victim

(a) *In general.* In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110.

(b) *Notice to a crime victim.*

(1) *In general.* Subject to such regulations as the Secretary concerned may prescribe, trial counsel, or in the case of a summary court-martial, the summary court-martial officer, shall make reasonable efforts to inform crime victims, through counsel, if applicable, of their rights

under this rule, and shall advise such crime victims on the procedure for making submissions.

(2) *Crime victim defined.* As used in this rule, the term "crime victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority may take action under R.C.M. 1109 or 1110, or the individual's lawful representative or designee appointed by the military judge under these rules.

(c) *Matters submitted by a crime victim.*

(1) Subject to paragraph (2), a crime victim may submit to the convening authority any matters that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110. The convening authority is only required to consider written submissions. Submissions are not subject to the Military Rules of Evidence.

(2) *Limitations on submissions.*

(A) Submissions under this rule may not include matters that relate to the character of the accused unless such matters were admitted as evidence at trial.

(B) The crime victim is entitled to one opportunity to submit matters to the convening authority under this rule.

(3) The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable.

(d) *Access to court-martial record.* Upon request by a crime victim or crime victim's counsel, trial counsel shall provide a copy of the recording of all open sessions of the court-martial, and copies of, or access to, the evidence admitted at the court-martial, and the appellate exhibits. Such access shall not include sealed or classified court-martial material or recordings unless authorized by a military judge upon a showing of good cause. A military judge shall issue appropriate protective orders when authorizing such access.

(e) *Time periods.*

(1) *General and special courts-martial.* After a trial by general or special court-martial, a crime victim may submit matters to the convening authority under this rule within ten days after the sentence is announced.

(2) *Summary courts-martial.* After a trial by summary court-martial, a crime victim may submit matters under this rule within seven days after the sentence is announced.

(3) *Extension of time.*

(A) If, within the period described in paragraph (1) or (2), the crime victim shows that additional time is required for the crime victim to submit matters, the convening authority may, for good cause, extend the period for not more than 20 days.

(B) For purposes of this rule, good cause for an extension ordinarily does not include the need to obtain matters that reasonably could have been obtained prior to the conclusion of the court-martial.

(f) *Waiver.*

(1) *Failure to submit matters.* Failure to submit matters within the time prescribed by this rule waives the right to submit such matters.

(2) *Written waiver.* A crime victim may expressly waive, in writing, the right to submit matters under this rule. Once filed, such a waiver may not be revoked.

Rule 1107. Suspension of execution of sentence; remission

(a) *In general.* Suspension of a sentence grants the accused a probationary period during which the suspended part of a sentence is not executed, and upon the accused's successful completion

of which the suspended part of the sentence shall be remitted. Remission cancels the unexecuted part of a sentence to which it applies. The unexecuted part of a sentence is that part of the sentence that has not been carried out.

(b) *Who may suspend and remit.*

(1) *Suspension when acting on sentence.* The convening authority may suspend the execution of a court-martial sentence as authorized under R.C.M. 1109 or 1110.

(2) *Suspension after entry of judgment.* The commander of the accused who has the authority to convene a court-martial of the type that imposed the sentence on the accused may suspend any part of the unexecuted part of any sentence except a sentence of death, dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months.

(3) *Remission of sentence.* The commander of the accused who has the authority to convene a court-martial of the type that imposed the sentence on the accused may remit any unexecuted part of the sentence, except a sentence of death, dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months.

(4) *Secretarial authority.* The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a sentence of confinement for life without eligibility for parole. The Secretary concerned may, however, suspend or remit the unexecuted part of a sentence of confinement for life without eligibility for parole only after the service of a period of confinement of not less than 20 years.

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

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

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

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

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

(d) *Limitations on suspension.*

(1) A sentence of death may not be suspended.

(2) A sentence of dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months may be suspended only as provided by paragraph (b)(4) and R.C.M. 1109(f).

(3) Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long. The Secretary concerned may further limit by regulation the period for which the execution of a sentence may be suspended. The convening authority shall provide in the action that, unless the suspension is sooner vacated, the expiration of the period of suspension shall remit the suspended portion of the sentence.

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

Rule 1108. Vacation of suspension of sentence

(a) *In general.* Suspension of execution of the sentence of a court-martial may be vacated for

violation of any condition of the suspension as provided in this rule.

(b) *Timeliness.*

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

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

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

(4) *Interruptions to the period of suspension.* Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts and tolls the running of the period of suspension.

(c) *Confinement of probationer pending vacation proceedings.*

(1) *In general.* A probationer under a suspended sentence to confinement may be confined pending action under subsection (e) of this rule, in accordance with the procedures in this subsection.

(2) *Who may order confinement.* Any person who may order pretrial restraint under R.C.M. 304(b) may order confinement of a probationer under a suspended sentence to confinement.

(3) *Basis for confinement.* A probationer under a suspended sentence to confinement may be ordered into confinement upon probable cause to believe the probationer violated any conditions of the suspension.

(4) *Preliminary review of confinement.* Unless vacation proceedings under subsection (d) of this rule are completed within 7 days of imposition of confinement of the probationer (not including any delays requested by probationer), a preliminary review of the confinement shall be conducted by a neutral and detached officer appointed in accordance with regulations of the Secretary concerned.

(A) *Rights of confined probationer.* Before the preliminary review, the probationer shall be notified in writing of:

(i) The time, place, and purpose of the preliminary review, including the alleged violation(s) of the conditions of suspension;

(ii) The right to be present at the preliminary review;

(iii) The right to be represented at the preliminary review by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(iv) The opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the officer conducting the preliminary review determines that this would subject these witnesses to risk or harm. For purposes of this subsection, a witness is not reasonably available if the witness requires reimbursement by the United States for cost incurred in appearing, cannot appear without unduly delaying the proceedings or, if a military witness, cannot be excused from other important duties. Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony.

(B) *Rules of evidence.* Only Mil. R. Evid. 301, 302, 303, 305, 412, and Section V (Privileges) apply to proceedings under this rule, except Mil. R. Evid. 412(b)(1)(C) does not apply. In applying these rules to a preliminary review, the term "military judge," as used in these rules, shall mean the officer conducting the preliminary review, who shall assume the military judge's authority to exclude evidence from the hearing, and who shall, in discharging

this duty, follow the procedures set forth in these rules.

(C) *Decision.* The officer conducting the preliminary review shall determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the officer conducting the preliminary review determines that probable cause is lacking, the officer shall issue a written order directing that the probationer be released from confinement. If the officer determines that there is probable cause to believe that the probationer violated a condition of suspension, the officer shall set forth this determination in a written memorandum that details therein the evidence relied upon and reasons for making the decision. The officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

(d) *Vacation proceedings.*

(1) *In general.* The purpose of the vacation hearing is to determine whether there is probable cause to believe that the probationer violated a condition of the probationer's suspension.

(A) *Sentence of general courts-martial and certain special courts-martial.* In the case of vacation proceedings for a suspended sentence of any general court-martial or a suspended sentence of a special court-martial that adjudged either a bad-conduct discharge or confinement for more than six months, the officer having special court-martial jurisdiction over the probationer shall either personally hold the hearing or detail a judge advocate to preside at the hearing. If there is no officer having special court-martial jurisdiction over the probationer who is subordinate to the officer having general court-martial jurisdiction over the probationer, the officer exercising general court-martial jurisdiction over the probationer shall either personally hold a hearing under this subsection or detail a judge advocate to conduct the hearing.

(B) *Special court-martial wherein a bad-conduct discharge or confinement for more than six months was not adjudged.* In the case of vacation proceedings for a sentence from a special court-martial that did not include a bad-conduct discharge or confinement for more than six months, the officer having special court-martial jurisdiction over the probationer shall either personally hold the hearing or detail a judge advocate to conduct the hearing.

(C) *Sentence of summary court-martial.* In the case of vacation proceedings for a suspended sentence of a summary court-martial, the officer having summary court-martial jurisdiction over the probationer shall either personally hold the hearing or detail a commissioned officer to conduct the hearing.

(2) *Notice to probationer.* Before the hearing, the officer conducting the hearing shall cause the probationer to be notified in writing of:

(A) The time, place, and purpose of the hearing;

(B) The right to be present at the hearing;

(C) The alleged violation(s) of the conditions of suspension and the evidence expected to be relied on;

(D) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(E) The opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the officer conducting the preliminary review determines that this would subject these witnesses to risk or harm.

(3) *Procedure.*

(A) *Generally.* The hearing shall begin with the hearing officer informing the probationer of the probationer's rights. The Government will then present evidence. Upon the conclusion of the Government's presentation of evidence, the probationer may present evidence. The probationer shall have full opportunity to present any matters in defense, extenuation, or mitigation. Both the Government and probationer shall be afforded an opportunity to cross-examine adverse witnesses. The hearing officer may also question witnesses called by the parties.

(B) *Rules of evidence.* The Military Rules of Evidence applicable to vacation proceedings are the same as those set forth in subparagraph (c)(4)(B) of this rule.

(C) *Production of witnesses and other evidence.* The procedure for the production of witnesses and other evidence shall follow that prescribed in R.C.M. 405(h), except that R.C.M. 405(h)(3)(B) shall not apply. The hearing officer shall only consider testimony and other evidence that is relevant to the limited purpose of the hearing.

(D) *Presentation of testimony.* Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the probationer may make an unsworn statement.

(E) *Other evidence.* If relevant to the limited purpose of the hearing, and not cumulative, a hearing officer may consider other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, offered by either side, that the hearing officer determines is reliable. This other evidence need not be sworn.

(F) *Protective order for release of privileged information.* If the Government agrees to disclose to the probationer information to which the protections afforded by Mil. R. Evid. 505 or 506 may apply, the convening authority, or other person designated by regulation of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the probationer. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority.

(G) *Presence of probationer.* The taking of evidence shall not be prevented and the probationer shall be considered to have waived the right to be present whenever the probationer:

(i) After being notified of the time and place of the proceeding is voluntarily absent; or

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

(H) *Objections.* Any objection alleging failure to comply with these rules shall be made to the convening authority via the hearing officer. The hearing officer shall include a record of all objections in the written recommendations to the convening authority.

(I) *Access by spectators.* The procedures for access by spectators shall follow those prescribed in R.C.M. 405(j)(3).

(J) *Victims' rights.* Any victim of the underlying offense for which the probationer received the suspended sentence, or any victim of the alleged offense that is the subject of the vacation hearing, has the right to reasonable, accurate, and timely notice of the vacation hearing.

(4) *Record and recommendation.* The officer conducting the hearing shall make a summarized record of the hearing. If the hearing is not personally conducted by the officer having the authority to take action under subsection (e) of this rule, the officer who conducted the hearing shall forward the record and that officer's written recommendation concerning vacation to such authority. The record shall include the recommendation, the evidence relied upon, and the rationale supporting the recommendation.

(5) *Release from confinement.* If the hearing is not personally conducted by the officer having the authority to take action under subsection (e) of this rule and the officer conducting the hearing finds there is not probable cause to believe that the probationer violated any condition of the suspension, the officer shall order the release of the probationer from any confinement ordered under subsection (c) of this rule, and forward the record and recommendation to the officer having the authority to take action under subsection (e) of this rule.

(e) *Action.*

(1) *General courts-martial and certain special courts-martial.* In a case of a suspended sentence from any general court-martial or a suspended sentence from a special court-martial that adjudged either a bad-conduct discharge or confinement for more than six months, unless the officer exercising general court-martial jurisdiction over the probationer personally conducted the hearing, the officer exercising general court-martial jurisdiction over the probationer shall review the record and the recommendation produced by the officer who conducted the hearing on the alleged violation of the conditions of suspension, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence.

(2) *Special courts-martial wherein a bad-conduct discharge and confinement for more than six months was not adjudged.* In a case of a suspended sentence from a special court-martial that did not include a bad-conduct discharge or confinement for more than six months, unless the officer having special court-martial jurisdiction over the probationer personally conducted the hearing, the officer having special court-martial jurisdiction over the probationer shall review the record and the recommendation produced by the officer who conducted the hearing, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising special court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence. The authority holding the same or higher court-martial authority as the officer who originally suspended the probationer's sentence may withhold the authority to take action under this paragraph to that officer.

(3) *Vacation of a suspended sentence from a summary court-martial.* In a case of a suspended sentence from a summary court-martial, unless the officer having summary court-martial jurisdiction over the probationer personally conducted the hearing, the officer having summary court-martial jurisdiction over the probationer shall review the record and the recommendation produced by the officer who conducted the hearing, and decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising summary court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence. The authority holding the same or higher court-martial authority as the officer who originally suspended the probationer's sentence may withhold the authority to take action under this paragraph to that officer.

(4) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this subsection shall be executed.

Rule 1109. Reduction of sentence, general and special courts-martial

(a) *In general.* This rule applies to the post-trial actions of the convening authority in any general or special court-martial in which—

(1) The court-martial found the accused guilty of—

(A) An offense for which the maximum authorized sentence to confinement is more than two years, without considering the jurisdictional maximum of the court;

(B) A violation of Article 120(a) or (b);

(C) A violation of Article 120b; or

(D) A violation of such other offense as the Secretary of Defense has specified by regulation; or

(2) The sentence of the court-martial includes—

(A) A bad-conduct discharge, dishonorable discharge, or dismissal;

(B) A term of confinement, or terms of confinement running consecutively, more than six months; or

(C) Death.

(b) *Limitation of authority on findings.* For any court-martial described under subsection (a), the convening authority may not set aside, disapprove, or take any other action on the findings of the court-martial.

(c) *Limited authority to act on sentence.* For any court-martial described under subsection (a), the convening authority may—

(1) Modify a bad-conduct discharge, dishonorable discharge, or dismissal only as provided in subsections (e) and (f);

(2) Modify a term of confinement of more than six months, or terms of confinement that running consecutively are more than six months, only as provided in subsections (e) and (f);

(3) Reduce or commute a punishment of death only as provided in subsection (e);

(4) Reduce, commute, or suspend, in whole or in part, any punishment adjudged for an offense tried under the law of war other than the punishments specified in paragraphs (1), (2), and (3);

(5) Reduce, commute, or suspend, in whole or in part, the following punishments:

(A) The confinement portion of a sentence if the confinement portion of the sentence is six months or less, to include terms of confinement that running consecutively total six months or less;

(B) A reprimand;

(C) Forfeiture of pay or allowances;

(D) A fine;

(E) Reduction in pay grade;

(F) Restriction to specified limits; and

(G) Hard labor without confinement.

(d) *General Considerations.*

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

(2) *Legal advice*. In determining whether to take action, or to decline taking action under this rule, the convening authority shall consult with the staff judge advocate or legal advisor.

(3) *Consideration of matters.*

(A) *Matters submitted by accused and crime victim.* Before taking or declining to take any action on the sentence under this rule, the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim.

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

(i) The Statement of Trial Results;

(ii) The evidence introduced at the court-martial, any appellate exhibits, and the recording or transcription of the proceedings, subject to the provisions of R.C.M. 1113 and subparagraph (C);

(iii) The personnel records of the accused; and

(iv) Such other matters as the convening authority deems appropriate.

(C) *Prohibited matters.*

(i) *Accused.* The convening authority may not consider matters adverse to the accused that were not admitted at the court-martial, with knowledge of which the accused is not chargeable, unless the accused is first notified and given an opportunity to rebut.

(ii) *Crime victim.* The convening authority shall not consider any matters that relate to the character of a crime victim unless such matters were presented as evidence at trial and not excluded at trial.

(3) *Timing.* Except as provided in subsection (e), any action taken by the convening authority under this rule shall be taken prior to entry of judgment. If the convening authority decides to take no action, that decision shall be transmitted promptly to the military judge as provided under subsection (g).

(e) *Reduction of sentence for substantial assistance by accused.*

(1) *In general.* A convening authority may reduce, commute, or suspend the sentence of an accused, in whole or in part, if the accused has provided substantial assistance in the criminal investigation or prosecution of another person.

(2) *Trial counsel.* A convening authority may reduce the sentence of an accused under this subsection only upon the recommendation of trial counsel who prosecuted the accused. If the person who served as trial counsel is no longer serving in that position, or is not reasonably available, the attorney who is primarily responsible for the investigation or prosecution in which the accused has provided substantial assistance, and who represents the United States, is trial counsel for the purposes of this subsection. The recommendation of trial counsel is the decision of trial counsel alone. No person may direct trial counsel to make or not make such a recommendation.

(3) *Who may act.*

(A) Before entry of judgment, the convening authority may act on the recommendation of trial counsel under paragraph (2).

(B) After entry of judgment, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned may act on the recommendation of trial counsel under paragraph (2).

(4) *Scope of authority.* A convening authority authorized to act under paragraph (3) may accept the recommendation of trial counsel under paragraph (2) of this subsection, and may reduce, commute, or suspend a sentence in whole or in part, including any mandatory minimum sentence.

(5) *Limitations.*

(A) A sentence of death may not be suspended under this subsection.

(B) In the case of a recommendation by trial counsel under paragraph (2) of this subsection

made more than one year after entry of judgment, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned may reduce a sentence only if the substantial assistance of the accused involved—

(i) Information not known to the accused until one year or more after sentencing;

(ii) Information the usefulness of which could not reasonably have been anticipated by the accused until more than one year after sentencing and which was promptly provided to the Government after its usefulness was reasonably apparent to the accused; or

(iii) Information provided by the accused to the Government within one year of sentencing, but which did not become useful to the Government until more than one year after sentencing.

(6) *Evaluating substantial assistance.* In evaluating whether the accused has provided substantial assistance, the trial counsel and convening authority may consider the presentence assistance of the accused.

(7) *Action after entry of judgment.* If the officer exercising general court-martial jurisdiction over the command to which the accused is assigned acts on the sentence of an accused after entry of judgment, the convening authority's action shall be forwarded to the chief trial judge. The chief trial judge, or a military judge detailed by the chief trial judge, shall modify the judgment of the court-martial to reflect the action by the convening authority. The action by the convening authority and the modified judgment shall be forwarded to the Judge Advocate General and shall be included in the original record of trial. A sentence which is reduced under this rule shall not abridge any right of the accused to appellate review.

(f) *Suspension.*

(1) The convening authority may suspend a sentence of a dishonorable discharge, bad-conduct discharge, dismissal, or confinement in excess of six months, if—

(A) The Statement of Trial Results filed under R.C.M. 1101 includes a recommendation by the military judge that the convening authority suspend the sentence, in whole or in part; and

(B) The military judge includes a statement explaining the basis for the suspension recommendation.

(2) If the convening authority suspends a sentence under this subsection—

(A) The portion of the sentence that is to be suspended may not exceed the portion of the sentence that the military judge recommended be suspended;

(B) The duration of the suspension may not be less than that recommended by the military judge; and

(C) The suspended portion of the sentence may be terminated by remission only as provided in R.C.M. 1107(e).

(3) A sentence that is suspended under this rule shall comply with the procedures prescribed in R.C.M. 1107(c), (d), and (e).

(g) *Decision; forwarding of decision and related matters.*

(1) *No action.* If the convening authority decides to take no action on the sentence under this rule, the staff judge advocate or legal advisor shall notify the military judge of this decision.

(2) *Action on sentence.* If the convening authority decides to act on the sentence under this rule, such action shall be in writing and shall include a written statement explaining the action. If any part of the sentence is disapproved, the action shall clearly state which part or parts are disapproved. The convening authority's staff judge advocate or legal advisor shall forward the action with the written explanation to the military judge to be attached to the record of trial.

(h) *Service on accused and crime victim.* If the convening authority took any action on the sentence under this rule, a copy of such action shall be served on the accused, crime victim, or on their respective counsel. If the action is served on counsel, counsel shall, by expeditious means, provide the accused or crime victim with a copy. If the judgment is entered expeditiously, service of the judgment will satisfy the requirements of this subsection.

Rule 1110. Action by convening authority in certain general and special courts-martial

(a) *In general.* This rule applies to the post-trial actions of the convening authority in any general or special court-martial not specified in R.C.M. 1109(a).

(b) *Action on findings.* In any court-martial subject to this rule, action on findings is not required; however, the convening authority may—

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

(2) Set aside any finding of guilty and—

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

(B) Order a rehearing in accordance with the procedures set forth in R.C.M. 810.

A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(c) *Action on sentence.*

(1) In any court-martial subject to this rule, action on the sentence is not required; however, the convening authority may disapprove, reduce, commute, or suspend, in whole or in part, the court-martial sentence. If the sentence is disapproved, the convening authority may order a rehearing on the sentence.

(2) In any court-martial subject to this rule, the convening authority, after entry of judgment, may reduce a sentence for substantial assistance in accordance with the procedures under R.C.M. 1109(e).

(d) *Procedures.* The convening authority shall use the same procedures as in subsections (d) and (h) of R.C.M. 1109 for any post-trial action on findings and sentence under this rule.

(e) *Decision; forwarding of decision and related matters.*

(1) *No action.* If the convening authority decides to take no action on the findings or sentence under this rule, the convening authority's staff judge advocate or legal advisor shall notify the military judge of the decision.

(2) *Action on findings.* If the convening authority decides to act on the findings under this rule, the action of the convening authority shall be in writing and shall include a written statement explaining the reasons for the action. If a rehearing is not ordered, the affected charges and specifications shall be dismissed by the convening authority in the action. The convening authority's staff judge advocate or legal advisor shall forward the action with the written explanation to the military judge to be attached to the record of trial.

(3) *Action on sentence.* If the convening authority decides to act on the sentence under this rule, the action of the convening authority on the sentence shall be in writing and shall include a written statement explaining the reasons for the action. If any part of the sentence is disapproved, the action shall clearly state which part or parts are disapproved. The convening authority's staff judge advocate or legal advisor shall forward the action with the written

explanation to the military judge to be attached to the record of trial.

Rule 1111. Entry of judgment

(a) *In general.*

(1) *Scope.* Under regulations prescribed by the Secretary concerned, the military judge of a general or special court-martial shall enter into the record of trial the judgment of the court. If the Chief Trial Judge determines that the military judge is not reasonably available, the Chief Trial Judge may detail another military judge to enter the judgment.

(2) *Purpose.* The judgment reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders. The entry of judgment terminates the trial proceedings and initiates the appellate process.

(3) *Summary courts-martial.* In a summary court-martial, the findings and sentence of the court-martial, as modified or approved by the convening authority, constitute the judgment of the court-martial. A separate document need not be issued.

(b) *Contents.* The judgment of the court shall be signed and dated by the military judge and shall consist of—

(1) *Findings.* For each charge and specification referred to trial—

(A) a summary of each charge and specification;

(B) the plea of the accused; and

(C) the findings or other disposition of each charge and specification accounting for any modifications made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge;

(2) *Sentence.* The sentence, accounting for any modifications made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge, as well as the total amount of sentence credit, if any, to be applied to the accused's sentence to confinement. If the accused was convicted of more than one specification and any part of the sentence was determined by a military judge, the judgment shall also specify—

(A) the confinement and fine for each specification, if any;

(B) whether any term of confinement shall run consecutively or concurrently with any other term(s) of confinement; and

(C) the total amount of any fine(s) and the total duration of confinement to be served, after accounting for the following—

(i) any terms of confinement that are to run consecutively or concurrently; and

(ii) any modifications to the sentence made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge.

(3) *Additional information.*

(A) *Deferment.* If the accused requested that any portion of the sentence be deferred, the judgment shall specify the nature of the request, the convening authority's action, the effective date if approved, and, if the deferment ended prior to the entry of judgment, the date the deferment ended.

(B) *Waiver of automatic forfeitures.* If the accused requested that automatic forfeitures be waived by the convening authority under Article 58b, the judgment shall specify the nature of the request, the convening authority's action, and the effective date and length, if approved.

(C) *Suspension.* If the Statement of Trial Results included a recommendation by the military judge that a portion of the sentence be suspended, the judgment shall specify the action of the convening authority on the recommendation.

(D) *Reprimand.* If the sentence included a reprimand, the judgment shall contain the reprimand issued by the convening authority.

(E) *Rehearing.* If the judgment is entered after a rehearing, new trial or other trial, the judgment shall specify any sentence limitation applicable by operation of Article 63.

(F) *Other information.* Any additional information that the Secretary concerned may require by regulation.

(4) *Statement of Trial Results.* The Statement of Trial Results shall be included in the judgment in accordance with regulations prescribed by the Secretary concerned.

(c) *Modification of judgment.* The judgment may be modified as follows—

(1) The military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered.

(2) The Judge Advocate General, the Court of Criminal Appeals, and the Court of Appeals for the Armed Forces may modify a judgment in the performance of their duties and responsibilities.

(3) If a case is remanded to a military judge, the military judge may modify the judgment consistent with the purposes of the remand.

(4) Any modification to the judgment of a court-martial must be included in the record of trial.

(d) *Rehearings, new trials, and other trials.* In the case of a rehearing, new trial, or other trial, the military judge shall enter a new judgment into the record of trial to reflect the results of the rehearing, new trial, or other trial.

(e) *When judgment is entered.*

(1) *Courts-martial without a finding of guilty.* When a court-martial results in a full acquittal or when a court-martial terminates before findings, the judgment shall be entered as soon as practicable. When a court-martial results in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, the judgment shall be entered as soon as practicable after a hearing is conducted under R.C.M. 1105.

(2) *Courts-martial with a finding of guilty.* If a court-martial includes a finding of guilty to any specification or charge, the judgment shall be entered as soon as practicable after the staff judge advocate or legal advisor notifies the military judge of the convening authority's post-trial action or decision to take no action under R.C.M. 1109 or 1110, as applicable.

(f) *Publication.*

(1) The judgment shall be entered into the record of trial.

(2) A copy of the judgment shall be provided to the accused or to the accused's defense counsel. If the judgment is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

(3) A copy of the judgment shall be provided upon request to any crime victim or crime victim's counsel in the case, without regard to whether the accused was convicted or acquitted of any offense.

(4) The commander of the accused or the convening authority may publish the judgment of the court-martial to their respective commands.

(5) Under regulations prescribed by the Secretary of Defense, court-martial judgments shall be made available to the public.

Rule 1112. Certification of record of trial; general and special courts-martial

(a) *In general.* Each general and special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be independent of any other document and shall include a recording of the court-martial. Court-martial proceedings may be recorded by videotape, audiotape, or other technology from which sound images may be reproduced to accurately depict the court-martial.

(b) *Contents of the record of trial.* The record of trial contains the court-martial proceedings, and includes any evidence or exhibits considered by the court-martial in determining the findings or sentence. The record of trial in every general and special court-martial shall include:

(1) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting;

(2) The original charge sheet or a duplicate;

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

(4) The request, if any, for trial by military judge alone; the accused's election, if any, of members under R.C.M. 903; and, when applicable, any statement by the convening authority required under R.C.M. 503(a)(2);

(5) The election, if any, for sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b);

(6) Exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits;

(7) The Statement of Trial Results;

(8) Any action by the convening authority under R.C.M. 1109 or 1110; and

(9) The judgment entered into the record by the military judge.

(c) *Certification.* A court reporter shall prepare and certify that the record of trial includes all items required under subsection (b). If the court reporter cannot certify the record of trial because of the court reporter's death, disability, or absence, the military judge shall certify the record of trial.

(1) *Timing of certification.* The record of trial shall be certified as soon as practicable after the judgment has been entered into the record.

(2) *Additional proceedings.* If additional proceedings are held after the court reporter certifies the record, a record of those proceedings shall be included in the record of trial, and a court reporter shall prepare a supplemental certification.

(d) *Loss of record, incomplete record, and correction of record.*

(1) If the certified record of trial is lost or destroyed, a court reporter shall, if practicable, certify another record of trial.

(2) A record of trial is complete if it complies with the requirements of subsection (b). If the record is incomplete or defective, a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction. All parties shall be given reasonable access to any court reporter notes or recordings of the proceedings.

(3) The military judge may take corrective action by any of the following means—

(A) reconstructing the portion of the record affected;

(B) dismissing affected specifications;

(C) reducing the sentence of the accused; or

(D) if the error was raised by motion or on appeal by the defense, declaring a mistrial as to the affected specifications.

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

(1) *Accused and victim.* Any victim entitled to a copy of the certified record of trial shall be notified of the opportunity to receive a copy of the certified record of trial. Following certification of the record of trial under subsection (c), in every general and special court-martial, subject to paragraphs (3) and (4), a court reporter shall, in accordance with regulations issued by the Secretary concerned, provide a copy of the certified record of trial free of charge to—

(A) The accused;

(B) The victim of an offense of which the accused was charged if the victim testified during the proceedings; and

(C) Any victim named in a specification of which the accused was charged, upon request, without regard to the findings of the court-martial.

(2) *Providing copy impracticable.* If it is impracticable to provide the record of trial to an individual entitled to receive a copy under paragraph (1) because of the unauthorized absence of the individual, or military exigency, or if the individual so requests on the record at the court-martial or in writing, the individual's copy of the record shall be forwarded to the individual's counsel, if any.

(3) *Sealed exhibits; classified information; closed sessions.* Any copy of the record of trial provided to an individual under paragraph (1) shall not contain classified information, information under seal, or recordings of closed sessions of the court-martial, and shall be handled as follows:

(A) *Classified information.*

(i) *Forwarding to convening authority.* If the copy of the record of trial prepared for an individual under this rule contains classified information, trial counsel, unless directed otherwise by the convening authority, shall forward the individual's copy to the convening authority, before it is provided to the individual.

(ii) *Responsibility of the convening authority.* The convening authority shall:

(I) cause any classified information to be deleted or withdrawn from the individual's copy of the record of trial;

(II) cause a certificate indicating that classified information has been deleted or withdrawn to be attached to the record of trial; and

(III) cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be provided to the individual as provided in subparagraphs (1)(A), (B), and (C).

(iii) *Contents of certificate.* The certificate regarding deleted or withdrawn classified information shall indicate:

(I) that the original record of trial may be inspected in the Office of the Judge Advocate General under such regulations as the Secretary concerned may prescribe;

(II) the locations in the record of trial from which matter has been deleted;

(III) the locations in the record of trial which have been entirely deleted; and

(IV) the exhibits which have been withdrawn.

(B) *Sealed exhibits and closed sessions.* The court reporter shall delete or withdraw from an individual's copy of the record of trial—

(i) any matter ordered sealed by the military judge under R.C.M. 1113; and

(ii) any recording or transcript of a session that was ordered closed by the military judge, to include closed sessions held pursuant to Mil. R. Evid. 412, 513, and 514.

(4) *Portions of the record protected by the Privacy Act.* Any copy of the record of trial provided to a victim under paragraph (1) shall not contain any portion of the record the release of which would unlawfully violate the privacy interests of any person other than that victim, to include those privacy interests recognized by 5 U.S.C. § 552a, the Privacy Act of 1974.

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

(f) *Attachments for appellate review.* In accordance with regulations prescribed by the Secretary concerned, a court reporter shall attach the following matters to the record before the certified record of trial is forwarded to the office of the Judge Advocate General for appellate review:

(1) If not used as exhibits—

(A) The preliminary hearing report under Article 32, if any;

(B) The pretrial advice under Article 34, if any;

(C) If the trial was a rehearing or new or other trial of the case, the record of any former hearings; and

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

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

(3) Any matter filed by the accused or victim under R.C.M. 1106 or 1106A, or any written waiver of the right to submit such matters;

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

(5) Conditions of suspension, if any, and proof of service on probationer under R.C.M. 1107;

(6) Any waiver or withdrawal of appellate review under R.C.M. 1115;

(7) Records of any proceedings in connection with a vacation of suspension of the sentence under R.C.M. 1108;

(8) Any transcription of the court-martial proceedings created pursuant to R.C.M. 1114; and

(9) Any redacted materials.

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

Rule 1113. Sealed exhibits, proceedings, and other materials

(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other materials ordered sealed by the preliminary hearing officer or military judge, counsel for the Government, the court reporter, or trial counsel shall cause such materials to be sealed so as to prevent unauthorized examination or disclosure. Counsel for the Government, the court reporter, or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that materials were sealed by order of the preliminary hearing officer or military

judge and have been inserted in the report of preliminary hearing or record of trial. This rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

(b) *Examination and disclosure of sealed materials.* Except as provided in this rule, sealed materials may not be examined or disclosed.

(1) *Prior to referral.* Prior to referral of charges, the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; a military judge detailed to an Article 30a proceeding; and the general court-martial convening authority.

(2) *Referral through certification.* After referral of charges and prior to certification of the record under R.C.M. 1112(c), sealed materials may not be examined or disclosed in the absence of an order from the military judge based upon good cause.

(3) *Reviewing and appellate authorities; appellate counsel.*

(A) *Examination by reviewing and appellate authorities.* Reviewing and appellate authorities may examine sealed matters when those authorities determine that examination is reasonably necessary to a proper fulfillment of their responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct.

(B) *Examination by appellate counsel.* Appellate counsel may examine sealed materials subject to the following procedures.

(i) *Sealed materials released to trial counsel or defense counsel.* Materials presented or reviewed at trial and sealed, as well as materials reviewed in camera, released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct.

(ii) *Sealed materials reviewed in camera but not released to trial counsel or defense counsel.* Materials reviewed in camera by a military judge, not released to trial counsel or defense counsel, and sealed may be examined by reviewing or appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause.

(C) *Disclosure.* Appellate counsel shall not disclose sealed materials in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under R.C.M. 1201and 1210; or

(ii) Prior authorization of the appellate court before which a case is pending review under R.C.M. 1203 and 1204.

(D) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to R.C.M. 1307;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to R.C.M. 1201 and 1210;

(iii) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(iv) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(v) The Justices of the United States Supreme Court and their professional staffs; and

(vi) Any other court of competent jurisdiction.

(4) *Examination of sealed materials.* For purposes of this rule, "examination" includes reading, inspecting, and viewing.

(5) *Disclosure of sealed materials.* For purposes of this rule, "disclosure" includes photocopying, photographing, disseminating, releasing, manipulating, or communicating the contents of sealed materials in any way.

(6) Notwithstanding any other provision of this rule, in those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.

Rule 1114. Transcription of proceedings

(a) *Transcription of complete record.* A certified verbatim transcript of the record of trial shall be prepared—

(1) When the judgment entered into the record includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable or bad-conduct discharge, or confinement for more than six months; or

(2) As otherwise required by court rule, court order, or under regulations prescribed by the Secretary concerned.

(b) *Transcription of portions of the record.* A certified verbatim transcript of relevant portions of the record of trial shall be prepared—

(1) Upon application of a party as approved by the military judge, any court, or the Judge Advocate General; or

(2) As otherwise required under regulations prescribed by the Secretary concerned.

(c) *Cost.* Any certified transcript required by this rule shall be prepared without cost to the accused.

(d) *Inclusion in the record of trial.* If a certified transcript is made under this rule, it shall be attached to the record of trial.

(e) *Authority.* The Secretary concerned shall prescribe by regulation the procedure for preparing and certifying a transcript under this rule.

Rule 1115. Waiver or withdrawal of appellate review

(a) *In general.* After any general court-martial, except one in which the judgment entered into the record includes a sentence of death, and after any special court-martial in which the judgment entered into the record includes a bad-conduct discharge or confinement for more than six months, the accused may waive or withdraw the right to appellate review by a Court of Criminal Appeals. The accused may sign a waiver of the right to appeal at any time after entry of judgment and may withdraw an appeal at any time before such review is completed.

(b) *Right to counsel.*

(1) *In general.* The accused shall have the right to consult with qualified counsel before submitting a waiver or withdrawal of appellate review.

(2) *Waiver.*

(A) *Counsel who represented the accused at the court-martial.* The accused shall have the right to consult with any civilian, individual military, or detailed counsel who represented the

accused at the court-martial concerning whether to waive appellate review unless such counsel has been excused under R.C.M. 505(d)(2)(B).

(B) *Associate counsel.* If counsel who represented the accused at the court-martial has not been excused but is not immediately available to consult with the accused because of physical separation or other reasons, associate defense counsel shall be detailed to the accused upon request by the accused. Such counsel shall communicate with the counsel who represented the accused at the court-martial, and shall advise the accused concerning whether to waive appellate review.

(C) *Substitute counsel.* If counsel who represented the accused at the court-martial has been excused under R.C.M. 505(d)(2)(B), substitute defense counsel shall be detailed to advise the accused concerning waiver of appellate rights.

(3) *Withdrawal.*

(A) *Appellate defense counsel.* If the accused is represented by appellate defense counsel, the accused shall have the right to consult with such counsel concerning whether to withdraw an appeal.

(B) *Associate defense counsel.* If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused because of physical separation or other reasons, associate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with appellate defense counsel and shall advise the accused whether to withdraw an appeal.

(C) *No counsel.* If appellate defense counsel has not been assigned to the accused, defense counsel shall be detailed for the accused. Such counsel shall advise the accused concerning whether to withdraw an appeal.

(4) *Civilian counsel.* Whether or not the accused was represented by civilian counsel at the court-martial, the accused may consult with civilian counsel, at no expense to the United States, concerning whether to waive or withdraw appellate review.

(5) *Record of trial.* Any defense counsel with whom the accused consults under this rule shall be given reasonable opportunity to examine the record of trial and any attachments.

(6) *Right to consult.* The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

(c) *Compulsion, coercion, and inducement prohibited.* No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

(d) *Form of waiver or withdrawal.* A waiver or withdrawal of appellate review shall:

(1) Be written;

(2) State that the accused and defense counsel have discussed the accused's rights to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

(3) State that the waiver or withdrawal is submitted voluntarily; and

(4) Be signed by the accused and by defense counsel.

(e) *To whom submitted.*

(1) *Waiver.* A waiver of appellate review shall be filed with the convening authority or the Judge Advocate General. The waiver shall be attached to the record of trial.

(2) *Withdrawal.* A withdrawal of appellate review may be filed with the authority exercising general court-martial jurisdiction over the accused, who shall promptly forward it to the Judge Advocate General, or directly with the Judge Advocate General. The withdrawal shall be attached to the record of trial.

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

(1) *In general.* A valid waiver or withdrawal of appellate review under this rule shall bar review by the Court of Criminal Appeals. Once submitted, a waiver or withdrawal in compliance with this rule may not be revoked.

(2) *Waiver.* If the accused files a waiver of appellate review in accordance with this rule, the record of trial and attachments shall be forwarded for review by a judge advocate under R.C.M. 1201.

(3) *Withdrawal.* Action on a withdrawal of appellate review shall be carried out in accordance with procedures established by the Judge Advocate General, or if the case is pending before a Court of Criminal Appeals, in accordance with the rules of such court. If the appeal is withdrawn, the record of trial and attachments shall be forwarded for review in accordance with R.C.M. 1201.

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

Rule 1116. Transmittal of records of trial for general and special courts-martial

(a) *Cases forwarded to the Judge Advocate General.* In all general and special courts-martial in which the judgment includes a finding of guilty, the certified record of trial and attachments required under R.C.M. 1112(f) shall be sent directly to the Judge Advocate General concerned. Forwarding an electronic copy of the certified record of trial and attachments satisfies the requirements under this rule. The records of trial in general and special courts-martial without a finding of guilty shall be disposed of in accordance with the regulations of the Secretary concerned.

(b) *Transmittal of records for cases eligible for appellate review by a Court of Criminal Appeals.*

(1) *Automatic review.* Except when the accused has waived or withdrawn the right to appellate review, if the court-martial judgment includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable or bad-conduct discharge, or confinement for 2 years or more, the Judge Advocate General shall forward the certified record of trial and attachments required under R.C.M. 1112(f) to the Court of Criminal Appeals for automatic review under Article 66(b)(3).

(A) A copy of the record of trial and attachments shall be forwarded to appellate defense counsel in accordance with rules prescribed by the Secretary concerned. If the record forwarded does not include a written transcript of the proceedings, the Government shall provide appellate defense counsel with appropriate equipment for playback of the recording and with either—

(i) the means to transform the recording into a text format through voice recognition software or similar means; or

(ii) a transcription of the record in either printed or digital format.

(B) Upon written request of the accused, a copy of the record and attachments shall be forwarded to a civilian counsel provided by the accused.

(C) Copies of the record provided under subparagraph (b)(1)(A) of this rule shall not include sealed exhibits, recordings or transcriptions of closed sessions, or classified matters.

(2) *Cases eligible for direct appeal by the accused.* Except when the accused has waived or withdrawn the right to appeal under Article 61, if a general and special court-martial is not subject to automatic review under Article 66(b)(3) but is eligible for review under Article 66(b)(1), the Judge Advocate General shall provide notice to the accused of the right to file an

appeal either by depositing the notice in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused, or, if the accused has not provided an address, to the latest address listed for the accused in the official service record of the accused. Proof of service shall be attached to the record of trial.

(A) The Judge Advocate General shall forward a copy of the record of trial and attachments required under R.C.M. 1112(f) to an appellate defense counsel who shall be detailed to review the case, and upon request of the accused, to represent the accused before the Court of Criminal Appeals.

(B) The record of trial and attachments required under R.C.M. 1112(f) shall be forwarded in accordance with the procedures set forth in subparagraphs (b)(1)(A)–(C) of this rule.

(c) *Review of cases not eligible for appellate review by a Court of Criminal Appeals.* General and special courts-martial not eligible for appellate review under Article 66(b)(1) or (3) shall be reviewed under Article 65(d)(2).

(d) *Review when appellate review by a Court of Criminal Appeals is waived, withdrawn, or not filed.* In a general or special court-martial in which the accused waives the right to appellate review or withdraws an appeal under Article 61, or fails to file a timely appeal in a case eligible for review by the Court of Criminal Appeals under Article 66(b)(1), the case shall be reviewed under Article 65(d)(3).

Rule 1117. Appeal of sentence by the United States

(a) *In general.* With the approval of the Judge Advocate General concerned, the Government may appeal a sentence announced under R.C.M. 1007 to the Court of Criminal Appeals on the grounds that –

(1) the sentence violates the law; or

(2) the sentence is plainly unreasonable.

(b) *Timing.*

(1) An appeal under this rule must be filed within 60 days after the date on which the judgment of the court-martial is entered into the record under R.C.M. 1111.

(2) Any request for approval must be submitted in sufficient time to obtain and consider submissions under paragraph (c)(4) of this rule.

(c) *Approval process.*

(1) A request from the Government to the Judge Advocate General for approval of an appeal under this rule shall include a statement of reasons in support of an appeal under paragraph (a)(1) or (a)(2), as applicable, based upon the information contained in the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.

(2) A statement of reasons in support of an appeal under paragraph (a)(1) shall identify the specific provisions of law at issue and the facts in the record demonstrating a violation of the law in the announced sentence under R.C.M. 1007.

(3) A statement of reasons in support of an appeal under paragraph (a)(2) shall identify the facts in the record that demonstrate by clear and convincing evidence that the sentence announced under R.C.M. 1007 was plainly unreasonable because no reasonable sentencing authority would adjudge such a sentence in view of the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.

(4) Prior to acting on a request from the Government, the Judge Advocate General shall transmit the request to the military judge who presided over the presentencing proceeding for purposes of providing the military judge, the parties, and any person who, at the time of

sentencing, was a crime victim as defined by R.C.M. 1001(c)(2)(A), with an opportunity to make a submission addressing the statement of reasons in the Government's request.

(A) The military judge shall establish the time for the parties and crime victims to provide such a submission to the military judge, and for the military judge to forward all submissions to the Judge Advocate General. The military judge shall ensure that the parties have not less than 7 days to prepare, review, and transmit such submissions.

(B) Submissions under this paragraph shall not include facts beyond the record established at the time the sentence was announced under R.C.M. 1007.

(5) The decision of the Judge Advocate General as to whether to approve a request shall be based on the information developed under this rule.

(6) If an appeal is approved by the Judge Advocate General and submitted to the Court of Criminal Appeals under this rule, the following shall be included with the appeal: the statement of approval, the Government's request and statement of reasons under paragraph (c)(2) or (3), and any submissions under paragraph (c)(4).

(d) *Contents of the record of trial.* Unless the record has been forwarded to the Court of Criminal Appeals for review under R.C.M. 1116(b), the record of trial for an appeal under this rule shall consist of—

(1) any portion of the record in the case that is designated as pertinent by either of the parties;

(2) the information submitted during the presentencing proceeding; and

(3) any information required by rule or order of the Court of Criminal Appeals.

(e) *Standard.* A sentence is plainly unreasonable if no reasonable sentencing authority would determine such a sentence in view of the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.

Rule 1201. Review by the Judge Advocate General

(a) *Review of certain general and special courts-martial.* Except as provided in subsection (b), an attorney designated by the Judge Advocate General shall review:

(1) Each general and special court-martial case that is not eligible for appellate review by a Court of Criminal Appeals under Article 66(b)(1) or (3); and

(2) Each general or special court-martial eligible for appellate review by a Court of Criminal Appeals in which the Court of Criminal Appeals does not review the case because:

(A) In a case under Article 66(b)(3), other than one in which the sentence includes death, the accused withdraws direct appeal or waives the right to appellate review.

(B) In a case under Article 66(b)(1), the accused does not file a timely appeal, or files a timely appeal and then withdraws it.

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

(c) *By whom.*

(1) A review conducted under this rule may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated by the Judge Advocate General under regulations prescribed by the Secretary concerned.

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

(d) *Form and content for review of cases not eligible for appellate review at the Court of Criminal Appeals.* The review referred to in paragraph (a)(1) shall include a written conclusion as to each of the following:

(1) Whether the court had jurisdiction over the accused and the offense;

(2) Whether each charge and specification stated an offense;

(3) Whether the sentence was within the limits prescribed as a matter of law; and

(4) When applicable, a response to each allegation of error made in writing by the accused.

(e) *Form and content for review of cases in which the accused has waived or withdrawn appellate review or failed to file an appeal.* The review referred to in paragraph (a)(2) shall include a written conclusion as to each of the following:

(1) Whether the court had jurisdiction over the accused and the offense;

(2) Whether each charge and specification stated an offense; and

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

(f) *Remedies.*

(1) If the attorney conducting the review under subsection (a) believes corrective action is required, the attorney shall forward the matter to the Judge Advocate General, who may modify or set aside the findings or sentence, in whole or in part.

(2) In setting aside the findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered where the evidence was legally insufficient at the trial to support the findings.

(3) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(4) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

(g) *Notification.* After a case is reviewed under subsection (a), the accused shall be notified of the results of the review and any action taken by the Judge Advocate General or convening authority by means of depositing a copy of the review and any modified judgment in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record. Proof of service shall be attached to the record of trial.

(h) *Application for relief to the Judge Advocate General after final review.*

(1) *In general.* Notwithstanding R.C.M. 1209, the Judge Advocate General may, upon application of the accused or a person with authority to act for the accused, modify or set aside the findings or sentence, in whole or in part, of—

(A) A summary court-martial previously reviewed under R.C.M. 1307; or

(B) A general or special court-martial previously reviewed under paragraph (a)(1) or (2).

(2) *Timing.* In order to qualify for review under this subsection, an accused must submit an application for review not later than one year after—

(A) In the case of a summary court-martial, the date of completion of review under R.C.M. 1307; or

(B) In the case of a general or special court-martial reviewed under paragraph (a)(1) or (a)(2), the later of—

(i) the date on which the accused is notified of the decision of the Judge Advocate General under subsection (g); or

(ii) the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails under subsection (g).

(3) *Extension.* The Judge Advocate General may, for good cause shown, extend the period for submission of an application under paragraph (h)(2) for a time period not to exceed two additional years.

(4) *Scope.*

(A) In a case previously reviewed under R.C.M. 1307 or paragraph (a)(1), the Judge Advocate General may act on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(B) In a case previously reviewed under paragraph (a)(2), the Judge Advocate General's review is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law.

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

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

(j) *Mandatory review of summary courts-martial forwarded under R.C.M. 1307.* The Judge Advocate General shall review summary courts-martial if the record of trial and the action thereon are forwarded under R.C.M. 1307(g). On such review, the Judge Advocate General may vacate or modify, in whole or in part, the findings or sentence, or both, of the court-martial on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(k) *Cases referred or submitted to the Court of Criminal Appeals.*

(1) *In general.* Action taken by the Judge Advocate General under subsections (h) or (j) may be reviewed by the Court of Criminal Appeals under Article 69(d) as follows:

(A) The Judge Advocate General may forward a case to the Court of Criminal Appeals. If the case is forwarded to a Court of Criminal Appeals, the accused shall be informed and shall have the rights to appellate defense counsel afforded under R.C.M. 1202(b)(2).

(B) The accused may submit an application for review to the Court of Criminal Appeals. The Court of Criminal Appeals may grant such an application only if the application demonstrates a substantial basis for concluding that the Judge Advocate General's action under this rule constituted prejudicial error, and the application is filed not later than the earlier of—

(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record. Proof of service shall be attached to the record of trial.

(2) The submission of an application for review under subparagraph (k)(1)(B) does not constitute a proceeding before the Court of Criminal Appeals for purposes of representation by

appellate defense counsel under Article 70(c)(1).

(3) In any case reviewed by a Court of Criminal Appeals under this subsection, the Court may take action only with respect to matters of law.

Rule 1202. Appellate counsel

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

(b) *Duties.*

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

(2) *Appellate defense counsel.*

(A) In every general and special court-martial eligible for review by a Court of Criminal Appeals under Article 66(b)(1), an appellate defense counsel shall be detailed to review the case, unless the accused has waived the right to appeal under Article 61 or submits a written statement declining representation. Upon request, the detailed appellate defense counsel shall represent the accused in accordance with subparagraph (B).

(B) Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court when the accused is a party in the case before such court and:

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

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

(iii) The Judge Advocate General has sent the case to the United States Court of Appeals for the Armed Forces. Appellate defense counsel is authorized to communicate directly with the accused. The accused is a party in the case when named as a party in pleadings before the court or, even if not so named, when the military judge is named as respondent in a petition by the Government for extraordinary relief from a ruling in favor of the accused at trial.

(c) *Counsel in capital cases.* To the greatest extent practicable, in any case in which the death penalty is adjudged, at least one appellate defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to capital cases. Such counsel may, if necessary, be a civilian, and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

Rule 1203. Review by a Court of Criminal Appeals

(a) *In general.* Each Judge Advocate General shall establish a Court of Criminal Appeals composed of appellate military judges who shall serve for a tour of not less than three years, subject to such provision for reassignment as may be prescribed in regulations issued by the Secretary concerned.

(b) *Cases reviewed by a Court of Criminal Appeals—Automatic Review.* A Court of Criminal Appeals shall review cases forwarded to it by the Judge Advocate General under Article 65(b)(1).

(c) *Cases eligible for review by a Court of Criminal Appeals—Appeal by the accused.* A Court of Criminal Appeals shall review a timely appeal from the judgment of the court-martial in

accordance with the standards set forth in Article 66(b)(1) and the rules prescribed under Article 66(h).

(d) *Timeliness.* In order for an appeal under subsection (c) to be timely, it must be filed in accordance with Article 66(c) and the rules prescribed under Article 66(h).

(e) *Action on cases reviewed by a Court of Criminal Appeals.*

(1) *Forwarding by the Judge Advocate General to the Court of Appeals for the Armed Forces.* The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals and the order forwarding the case to be served on the accused and on appellate defense counsel. While a review of a forwarded case is pending, the Secretary concerned may defer further service of a sentence to confinement that has been ordered executed in such a case.

(2) *Action when sentence is set aside.* In a case reviewed by it under this rule in which the Court of Criminal Appeals has set aside the sentence and which is not forwarded to the Court of Appeals for the Armed Forces under paragraph (e)(1), the Judge Advocate General shall instruct an appropriate authority to modify the judgment in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing on sentence, the record shall be sent to an appropriate convening authority. If that convening authority finds a rehearing impracticable that convening authority may order that a sentence of no punishment be imposed.

(3) *Action when sentence is affirmed in whole or part.*

(A) *Sentence requiring approval by the President.* If the Court of Criminal Appeals affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Criminal Appeals directly to the Court of Appeals for the Armed Forces when any period for reconsideration provided by the rules of the Courts of Criminal Appeals has expired.

(B) *Other cases.* If the Court of Criminal Appeals affirms any sentence other than one which includes death, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals to be served on the accused in accordance with subsection (f).

(4) *Remission or suspension.* If the Judge Advocate General believes that a sentence as affirmed by the Court of Criminal Appeals, other than one which includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under paragraphs (e)(1) or (3), transmit the record of trial and the decision of the Court of Criminal Appeals to the Secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

(5) *Action when accused lacks mental capacity.* In a review conducted under subsection (b) or (c), the Court of Criminal Appeals may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the Court of Criminal Appeals may direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The Court may further order a remand under R.C.M. 810(f) as may be necessary. If the record is thereafter returned to the Court of

Criminal Appeals, the Court of Criminal Appeals may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. If the accused does not have the requisite mental capacity, the Court of Criminal Appeals shall stay the proceedings until the accused regains appropriate capacity, or take other appropriate action. Nothing in this subsection shall prohibit the Court of Criminal Appeals from making a determination in favor of the accused which will result in the setting aside of a conviction.

(f) *Notification to accused.*

(1) *Notification of decision.* The accused shall be notified of the decision of the Court of Criminal Appeals in accordance with regulations of the Secretary concerned.

(2) *Notification of right to petition the Court of Appeals for the Armed Forces for review.* If the accused has the right to petition the Court of Appeals for the Armed Forces for review, the accused shall be provided with a copy of the decision of the Court of Criminal Appeals bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 60 days from the time the accused was in fact notified of the decision of the Court of Criminal Appeals or the mailed copy of the decision was postmarked, whichever is earlier; and

(B) May be forwarded through the officer immediately exercising general court-martial jurisdiction over the accused and through the appropriate Judge Advocate General or filed directly with the Court of Appeals for the Armed Forces.

(3) *Receipt by the accused disposition.* When the accused has the right to petition the Court of Appeals for the Armed Forces for review, the receipt of the accused for the copy of the decision of the Court of Criminal Appeals, a certificate of service on the accused, or the postal receipt for delivery of certified mail shall be transmitted in duplicate by expeditious means to the appropriate Judge Advocate General. If the accused is personally served, the receipt or certificate of service shall show the date of service. The Judge Advocate General shall forward one copy of the receipt, certificate, or postal receipt to the clerk of the Court of Appeals for the Armed Forces when required by the court.

(g) *Cases not reviewed by the Court of Appeals for the Armed Forces.* If the decision of the Court of Criminal Appeals is not subject to review by the Court of Appeals for the Armed Forces, or if the Judge Advocate General has not forwarded the case to the Court of Appeals for the Armed Forces and the accused has not filed or the Court of Appeals for the Armed Forces has denied a petition for review, then either:

(1) The Judge Advocate General shall, if the sentence affirmed by the Court of Criminal Appeals includes a dismissal, transmit the record, the decision of the Court of Criminal Appeals, and the Judge Advocate General's recommendation to the Secretary concerned for action under R.C.M. 1206; or

(2) If the sentence affirmed by the Court of Criminal Appeals does not include a dismissal, the unexecuted portion of the sentence affirmed by the Court of Criminal Appeals shall be executed in accordance with R.C.M. 1102.

Rule 1204. Review by the Court of Appeals for the Armed Forces

(a) *Cases reviewed by the Court of Appeals for the Armed Forces.* Under such rules as it may prescribe, the Court of Appeals for the Armed Forces shall review the record in all cases:

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

(2) reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and

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

(b) *Petition by the accused for review by the Court of Appeals for the Armed Forces.*

(1) *Counsel.* When the accused is notified of the right to forward a petition for review by the Court of Appeals for the Armed Forces, if requested by the accused, associate counsel qualified under R.C.M. 502(d)(2) shall be detailed to advise and assist the accused in connection with preparing a petition for further appellate review.

(2) *Forwarding petition.* The accused shall file any petition for review by the Court of Appeals for the Armed Forces under paragraph (a)(3) of this rule directly with the Court of Appeals for the Armed Forces.

(c) *Action on decision by the Court of Appeals for the Armed Forces.*

(1) *In general.* After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further proceedings in accordance with the decision of the court. Otherwise, unless the decision is subject to review by the Supreme Court, or there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the appropriate authority to take action in accordance with that decision. If the Court has ordered a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority may dismiss the charges.

(2) *Sentence requiring approval of the President.*

(A) If the Court of Appeals for the Armed Forces has affirmed a sentence that must be approved by the President before it may be executed, the Judge Advocate General shall transmit the record of trial, the decision of the Court of Criminal Appeals, the decision of the Court of Appeals for the Armed Forces, and the recommendation of the Judge Advocate General to the Secretary concerned.

(B) If the Secretary concerned is the Secretary of a military department, the Secretary concerned shall forward the material received under subparagraph (A) to the Secretary of Defense, together with the recommendation of the Secretary concerned. The Secretary of Defense shall forward the material, with the recommendation of the Secretary concerned and the recommendation of the Secretary of Defense, to the President for the action of the President.

(C) If the Secretary concerned is the Secretary of Homeland Security, the Secretary concerned shall forward the material received under subparagraph (A) to the President, together with the recommendation of the Secretary concerned, for action of the President.

(3) *Sentence requiring approval of the Secretary concerned.* If the Court of Appeals for the Armed Forces has affirmed a sentence which requires approval of the Secretary concerned before it may be executed, the Judge Advocate General shall follow the procedure in R.C.M. 1203(e)(3).

(4) *Decisions subject to review by the Supreme Court.* If the decision of the Court of Appeals for the Armed Forces is subject to review by the Supreme Court, the Judge Advocate General shall take no action under paragraphs (c)(1), (2), or (3) of this rule until: (A) the time for filing a petition for a writ of certiorari with the Supreme Court has expired; or (B) the Supreme Court has denied any petitions for writ of certiorari filed in the case. After (A) or (B) has occurred, the

Judge Advocate General shall take action under paragraphs (c)(1), (2), or (3). If the Supreme Court grants a writ of certiorari, the Judge Advocate General shall take action under R.C.M. 1205(b).

Rule 1205. Review by the Supreme Court

(a) *Cases subject to review by the Supreme Court.* Under 28 U.S.C. § 1259 and Article 67a, decisions of the Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under Article 67(a)(1);

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under Article 67(a)(2);

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under Article 67(a)(3); and

(4) Cases other than those described in paragraphs (a)(1), (2), and (3) of this rule in which the Court of Appeals for the Armed Forces granted relief.

The Supreme Court may not review by writ of certiorari any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) *Action by the Supreme Court.* After the Supreme Court has taken action, other than denial of a petition for writ of certiorari, in any case, the Judge Advocate General shall, unless the case is returned to the Court of Appeals for the Armed Forces for further proceedings, forward the case to the President or the Secretary concerned in accordance with R.C.M. 1204(c)(2) or (3) when appropriate, or take action in accordance with the decision.

Rule 1206. Powers and responsibilities of the Secretary

(a) *Sentences requiring approval by the Secretary.* No part of a sentence extending to dismissal of a commissioned officer, cadet, or midshipman may be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary.

(b) *Remission and suspension.*

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

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

(3) *Sentence commuted by the President.* When the President has commuted a death sentence to a lesser punishment, the Secretary concerned may remit or suspend any remaining part or amount of the unexecuted portion of the sentence of a person convicted by a military tribunal under the Secretary's jurisdiction.

Rule 1207. Sentences requiring approval by the President

No part of a court-martial sentence extending to death may be executed until approved by the President.

Rule 1208. Restoration

(a) *New trial.* All rights, privileges, and property affected by an executed portion of a court-

martial sentence—except an executed dismissal or discharge—which has not again been adjudged upon a new trial or which, after the new trial, has not been sustained upon the action of any reviewing authority, shall be restored. So much of the findings and so much of the sentence adjudged at the earlier trial shall be set aside as may be required by the findings and sentence at the new trial. Ordinarily, action taken under this subsection shall be reflected in the new judgment entered in the case.

(b) *Other cases.* In cases other than those in subsection (a), all rights, privileges, and property affected by an executed part of a court-martial sentence that has been set aside or disapproved by any competent authority shall be restored unless a new trial, other trial, or rehearing is ordered and such executed part is included in a sentence imposed at the new trial, other trial, or rehearing. Ordinarily, any restoration shall be reflected in the new judgment entered in the case. In accordance with regulations established by the Secretary concerned, for the period after the date on which an executed part of a court-martial sentence is set aside, an accused who is pending a rehearing, new trial, or other trial shall receive the pay and allowances due at the restored grade.

Rule 1209. Finality of courts-martial

(a) *When a conviction is final.*

(1) *General and special courts-martial.* A conviction in a general or special court-martial is final when—

(A) Review is completed under R.C.M. 1201(a) (Article 65);

(B) Review is completed by a Court of Criminal Appeals and—

(i) The accused does not file a timely petition for review by the Court of Appeals for the Armed Forces and the case is not otherwise under review by that court;

(ii) A petition for review is denied or otherwise rejected by the Court of Appeals for the Armed Forces; or

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

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

(II) A petition for writ of certiorari is denied or otherwise rejected by the Supreme Court; or

(III) Review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) *Summary courts-martial.* A conviction in a summary court-martial is final when a judge advocate completes review under R.C.M. 1307(d) and no further action is required under R.C.M. 1307(e).

(b) *Effect of finality.* The appellate review of records of trial provided by the UCMJ, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the UCMJ, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by the UCMJ, are final and conclusive. The judgment of a court-martial and orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial under Article 73, to action under Article 69, to action by the Secretary concerned as provided in Article 74, and the authority of the President.

Rule 1210. New trial

(a) *In general.* At any time within three years after the date of entry of judgment, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court-martial. A petition may not be submitted after the death of the accused. A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.

(b) *Who may petition.* A petition for a new trial may be submitted by the accused personally, or by accused's counsel, regardless whether the accused has been separated from the Service.

(c) *Form of petition.* A petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

(1) The name, service number, and current address of the accused;

(2) The date and location of the trial;

(3) The type of court-martial and the title or position of the convening authority;

(4) The request for the new trial;

(5) The sentence or a description thereof as reflected in the judgment of the case, with any later reduction thereof by clemency or otherwise;

(6) A brief description of any finding or sentence believed to be unjust;

(7) A full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought;

(8) Affidavits pertinent to the matters in paragraph (c)(7) of this rule; and

(9) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.

(d) *Effect of petition.* The submission of a petition for a new trial does not stay the execution of a sentence.

(e) *Who may act on petition.* If the accused's case is pending before a Court of Criminal Appeals or the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise, the Judge Advocate General of the armed force which reviewed the previous trial shall act on the petition, except that petitions submitted by persons who, at the time of trial and sentence from which the petitioner seeks relief, were members of the Coast Guard, and who were members of the Coast Guard at the time the petition is submitted, shall be acted on in the Department in which the Coast Guard is serving at the time the petition is so submitted.

(f) *Grounds for new trial.*

(1) *In general.* A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.

(2) *Newly discovered evidence.* A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

(A) The evidence was discovered after the trial;

(B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) *Fraud on court-martial.* No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

(g) *Action on petition.*

(1) *In general.* The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in its discretion, the authority considering the petition may permit oral argument on the matter.

(2) *Courts of Criminal Appeals; Court of Appeals for the Armed Forces.* The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall act on a petition for a new trial in accordance with their respective rules.

(3) *The Judge Advocates General.* When a petition is considered by the Judge Advocate General, any hearing may be before the Judge Advocate General or before an officer or officers designated by the Judge Advocate General. If the Judge Advocate General believes meritorious grounds for relief under Article 74 have been established but that a new trial is not appropriate, the Judge Advocate General may act under Article 74 if authorized to do so, or transmit the petition and related papers to the Secretary concerned with a recommendation. The Judge Advocate General may also, in cases which have been finally reviewed but have not been reviewed by a Court of Criminal Appeals, act under Article 69.

(h) *Action when new trial is granted.*

(1) *Forwarding to convening authority.* When a petition for a new trial is granted, the Judge Advocate General shall select and forward the case to a convening authority for disposition.

(2) *Charges at new trial.* At a new trial, the accused may not be tried for any offense of which the accused was found not guilty or upon which the accused was not tried at the earlier court-martial.

(3) *Action by convening authority.* The convening authority's action on the record of a new trial is the same as in other courts-martial.

(4) *Disposition of record.* The disposition of the record of a new trial is the same as for other courts-martial.

(5) *Judgment.* After a new trial, a new judgment shall be entered in accordance with R.C.M. 1111.

(6) *Action by persons charged with execution of the sentence.* Persons charged with the administrative duty of executing a sentence adjudged upon a new trial shall credit the accused with any executed portion or amount of the original sentence included in the new sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence.

Rule 1301. Summary courts-martial

(a) *Composition.* A summary court-martial is composed of one commissioned officer on active duty. Unless otherwise prescribed by the Secretary concerned a summary court-martial shall be of the same armed force as the accused. Summary courts-martial shall be conducted in accordance with the regulations of the military Service to which the accused belongs. Whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps. When only one commissioned officer is present with a command or detachment, that officer

shall be the summary court-martial of that command or detachment. When more than one commissioned officer is present with a command or detachment, the convening authority may not be the summary court-martial of that command or detachment.

(b) *Function.* The function of the summary court-martial is to promptly adjudicate minor offenses under a simple disciplinary proceeding. A finding of guilt by the summary court-martial does not constitute a criminal conviction as it is not a criminal forum. However, a summary court-martial shall constitute a trial for purposes of determining former jeopardy under Article 44. The summary court-martial shall thoroughly and impartially inquire into both sides of the matter and shall ensure that the interests of both the Government and the accused are safeguarded and that justice is done. A summary court-martial may seek advice from a judge advocate or legal officer on questions of law, but the summary court-martial may not seek advice from any person on factual conclusions that should be drawn from evidence or the sentence that should be imposed, as the summary court-martial has the independent duty to make these determinations.

(c) *Jurisdiction.*

[Note: R.C.M. 1301(c) applies to offenses committed on or after 24 June 2014.]

(1) Subject to Chapter II, summary courts-martial have the power to try persons subject to the UCMJ, except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any non-capital offense made punishable by the UCMJ.

(2) Notwithstanding paragraph (c)(1), summary courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), 120b(b), and attempts thereof under Article 80. Such offenses shall not be referred to a summary court-martial.

(d) *Punishments.*

(1) *Limitations amount.* Subject to R.C.M. 1003, summary courts-martial may impose any punishment not forbidden by the UCMJ except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than 1 month, hard labor without confinement for more than 45 days, restriction to specified limits for more than 2 months, or forfeiture of more than two-thirds of 1 month's pay.

(2) *Limitations—pay grade.* In the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade.

(e) *Counsel.* The accused at a summary court-martial does not have the right to counsel. If the accused has counsel qualified under R.C.M. 502(d)(2), that counsel may be permitted to represent the accused at the summary court-martial if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

(f) *Power to obtain witnesses and evidence.* A summary court-martial may obtain evidence pursuant to R.C.M. 703.

(g) *Secretarial limitations.* The Secretary concerned may prescribe procedural or other rules for summary courts-martial not inconsistent with this Manual or the UCMJ.

Rule 1302. Convening a summary court-martial

(a) *Who may convene summary courts-martial.* Unless limited by competent authority summary courts-martial may be convened by:

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

(2) The commander of a detached company or other detachment of the Army;

(3) The commander of a detached squadron or other detachment of the Air Force;

(4) The commander or officer in charge of any other command when empowered by the Secretary concerned; or

(5) A superior competent authority to any of the above.

(b) *When convening authority is accuser.* If the convening authority or the summary court-martial is the accuser, it is discretionary with the convening authority whether to forward the charges to a superior authority with a recommendation to convene the summary court-martial. If the convening authority or the summary court-martial is the accuser, the jurisdiction of the summary court-martial is not affected.

(c) *Procedure.* After the requirements of Chapters III and IV of this Part have been satisfied, summary courts-martial shall be convened in accordance with R.C.M. 504(d)(2). The convening order may be by notation signed by the convening authority on the charge sheet. Charges shall be referred to summary courts-martial in accordance with R.C.M. 601.

Rule 1303. Right to object to trial by summary court-martial

No person who objects thereto before arraignment may be tried by summary court-martial even if that person also refused punishment under Article 15 and demanded trial by court-martial for the same offenses.

Rule 1304. Trial procedure

(a) *Pretrial duties.*

(1) *Examination of file.* The summary court-martial shall carefully examine the charge sheet, allied papers, and immediately available personnel records of the accused before trial.

(2) *Report of irregularity.* The summary court-martial shall report to the convening authority any substantial irregularity in the charge sheet, allied papers, or personnel records.

(3) *Correction and amendment.* The summary court-martial may, subject to R.C.M. 603, correct errors on the charge sheet and amend charges and specifications. Any such corrections or amendments shall be initialed.

(4) *Rights of victims at summary courts-martial.* Pursuant to Article 6b, a victim at summary court-martial is entitled to the following rights:

(A) To be reasonably protected from the accused;

(B) To reasonable, accurate, and timely notice of the summary court-martial;

(C) To not be excluded from the summary court-martial unless the summary court-martial officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at the summary court-martial;

(D) To be reasonably heard during sentencing in accordance with R.C.M. 1001(c); and

(E) The reasonable right to confer with the representative of the command and counsel for the government, if any.

(b) *Summary court-martial procedure.*

(1) *Preliminary proceeding.* After complying with R.C.M. 1304(a), the summary court-martial shall hold a preliminary proceeding during which the accused shall be given a copy of the charge sheet and informed of the following:

(A) The general nature of the charges;

(B) The fact that the charges have been referred to a summary court-martial for trial and the date of referral;

(C) The identity of the convening authority;

(D) The name(s) of the accuser(s);

(E) The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expects to introduce into evidence;

(F) The accused's right to inspect the allied papers and immediately available personnel records;

(G) That during the trial the summary court-martial will not consider any matters, including statements previously made by the accused to the officer detailed as summary court-martial unless admitted in accordance with the Military Rules of Evidence;

(H) The accused's right to plead not guilty or guilty;

(I) The accused's right to cross-examine witnesses and have the summary court-martial cross-examine witnesses on behalf of the accused;

(J) The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial as necessary;

(K) The accused's right to testify on the merits, or to remain silent with the assurance that no adverse inference will be drawn by the summary court-martial from such silence;

(L) If any findings of guilty are announced, the accused's rights to remain silent, to make an unsworn statement, oral or written or both, and to testify, and to introduce evidence in extenuation or mitigation;

(M) The maximum sentence which the summary court-martial may adjudge if the accused is found guilty of the offense or offenses alleged; and

(N) The accused's right to object to trial by summary court-martial.

(2) *Trial proceeding.*

(A) *Objection to trial.* The summary court-martial shall give the accused a reasonable period of time to decide whether to object to trial by summary court-martial. The summary court-martial shall thereafter record the response. If the accused objects to trial by summary court-martial, the summary court-martial shall return the charge sheet, allied papers, and personnel records to the convening authority. If the accused fails to object to trial by summary court-martial, trial shall proceed.

(B) *Arraignment.* After complying with R.C.M. 1304(b)(1) and (2)(A), the summary court-martial shall read and show the charges and specifications to the accused and, if necessary, explain them. The accused may waive the reading of the charges. The summary court-martial shall then ask the accused to plead to each specification and charge.

(C) *Motions.* Before receiving pleas the summary court-martial shall allow the accused to make motions to dismiss or for other relief. The summary court-martial shall take action on behalf of the accused, if requested by the accused, or if it appears necessary in the interests of justice.

(D) *Pleas.*

(i) *Not guilty pleas.* When a not guilty plea is entered, the summary court-martial shall proceed to trial.

(ii) *Guilty pleas.* If the accused pleads guilty to any offense, the summary court-martial shall comply with R.C.M. 910.

(iii) *Rejected guilty pleas.* If the summary court-martial is in doubt that the accused's pleas of guilty are voluntarily and understandingly made, or if at any time during the trial any matter inconsistent with pleas of guilty arises, which inconsistency cannot be resolved, the summary court-martial shall enter not guilty pleas as to the affected charges and specifications.

(iv) *No plea.* If the accused refuses to plead, the summary court-martial shall enter not guilty pleas.

(v) *Changed pleas.* The accused may change any plea at any time before findings are announced. The accused may change pleas from guilty to not guilty after findings are announced only for good cause.

(E) *Presentation of evidence.*

(i) The Military Rules of Evidence (Part III) apply to summary courts-martial.

(ii) The summary court-martial shall arrange for the attendance of necessary witnesses for the prosecution and defense, including those requested by the accused.

(iii) Witnesses for the prosecution shall be called first and examined under oath. The accused shall be permitted to cross-examine these witnesses. The summary court-martial shall aid the accused in cross-examination if such assistance is requested or appears necessary in the interests of justice. The witnesses for the accused shall then be called and similarly examined under oath.

(iv) The summary court-martial shall obtain evidence which tends to disprove the accused's guilt or establishes extenuating circumstances.

(F) *Findings and sentence.*

(i) The summary court-martial shall apply the principles in R.C.M. 918 in determining the findings. The summary court-martial shall announce the findings to the accused in open session.

(ii) The summary court-martial shall follow the procedures in R.C.M. 1001 and 1002 and apply the principles in the remainder of Chapter X in determining a sentence, except as follows:

(I) If an accused is found guilty of more than one offense, a summary court-martial shall determine the appropriate confinement and fine, if any, for all offenses of which the accused was found guilty. The summary court-martial shall not determine or announce separate terms of confinement or fines for each offense; and

(II) The summary court-martial shall announce the sentence to the accused in open session.

(iii) If the sentence includes confinement, the summary court-martial shall advise the accused of the right to apply to the convening authority for deferment of the service of the confinement.

(iv) If the accused is found guilty, the summary court-martial shall advise the accused of the rights under R.C.M. 1306(a) and (h) and R.C.M. 1307(h) after the sentence is announced.

(v) The summary court-martial shall, as soon as practicable, inform the convening authority of the findings, sentence, recommendations, if any, for suspension of the sentence, and any deferment request.

(vi) If the sentence includes confinement, the summary court-martial shall cause the delivery of the accused to the accused's commanding officer or the commanding officer's designee.

Rule 1305. Record of trial

(a) *In general.* The record of trial of a summary court-martial shall be prepared as prescribed in subsection (b) of this rule. The convening or higher authority may prescribe additional requirements for the record of trial.

(b) *Contents.* The summary court-martial shall prepare a written record of trial, which shall include:

(1) The pleas, findings, and sentence, and if the accused was represented by counsel at the summary court-martial, a notation to that effect;

(2) The fact that the accused was advised of the matters set forth in R.C.M. 1304(b)(1);

(3) If the summary court-martial is the convening authority, a notation to that effect.

(c) *Certification.* The summary court-martial shall certify the record by signing the record of trial. An electronic record of trial may be certified with the electronic signature of the summary court-martial.

(d) *Forwarding copies of the record.*

(1) *Accused's copy.*

(A) *Service.* The summary court-martial shall cause a copy of the record of trial to be served on the accused as soon as it is certified. Service of a certified electronic copy of the record of trial with a means to review the record of trial satisfies the requirement of service under this rule.

(B) *Receipt.* The summary court-martial shall cause the accused's receipt for the copy of the record of trial to be obtained and attached to the original record of trial or shall attach to the original record of trial a certificate that the accused was served a copy of the record. If the record of trial was not served on the accused personally, the summary court-martial shall attach a statement explaining how and when such service was accomplished. If the accused was represented by counsel, such counsel may be served with the record of trial.

(C) *Classified information.* If classified information is included in the record of trial of a summary court-martial, R.C.M. 1112(e)(3)(A) shall apply.

(2) *Forwarding to the convening authority.* The original and one copy of the record of trial shall be forwarded to the convening authority after compliance with paragraph (d)(1) of this rule.

(3) *Further disposition.* After compliance with R.C.M. 1306(b) and (h) and R.C.M. 1307(h), if applicable, the record of trial shall be disposed of under regulations prescribed by the Secretary concerned.

(e) *Loss of record; defective record; correction of record.*

(1) *Loss of record.* If the certified record of trial is lost or destroyed, the summary court-martial shall, if practicable, cause another record of trial to be prepared for certification. The new record of trial shall become the record of trial in the case if the requirements of this rule are met.

(2) *Defective record.* A record of trial found to be defective after certification may be returned to the summary court-martial to be corrected. The summary court-martial shall give notice of the proposed correction to the parties and permit them to examine and respond to the proposed correction before issuing a certificate of correction. The parties shall be given reasonable access to any recording of the proceedings.

(3) *Certificate of correction; service on the accused.* The certificate of correction shall be certified as provided in subsection (c) of this rule and a copy served on the accused as provided in paragraph (d)(1) of this rule. The certificate of correction and the accused's receipt for the certificate of correction shall be attached to each copy of the record of trial required to be prepared under this rule.

Rule 1306. Post-trial procedure, summary court-martial

(a) *Matters submitted.* After a sentence is adjudged by a summary court-martial, the accused and any crime victim may submit matters to the convening authority in accordance with R.C.M.

1106 and R.C.M. 1106A.

(b) *Convening authority's action.*

(1) *In general.* The convening authority shall take action on the sentence of a summary court-martial and, in the discretion of the convening authority, the findings of a summary court-martial.

(2) *Action on findings.* Action on the findings is not required. With respect to findings, the convening authority may:

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

(B) set aside any finding of guilty and:

(i) dismiss the specification and, if appropriate, the charge; or

(ii) direct a rehearing in accordance with R.C.M. 810 and subsection (e).

(3) *Action on sentence.* The convening authority shall take action on the sentence. The convening authority may disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence. The convening authority shall approve the sentence that is warranted by the circumstances of the offense and appropriate for the accused.

(4) *When proceedings resulted in finding of not guilty.* The convening authority shall not take action disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty. When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority, however, shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1105.

(5) *Action when accused lacks mental capacity.* The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If, before the convening authority takes action, a substantial question is raised as to the requisite mental capacity of the accused, the convening authority shall either—

(A) direct an examination of the accused in accordance with R.C.M. 706 to determine the accused's present capacity to understand and cooperate in the post-trial proceedings; or

(B) disapprove the findings and sentence.

(c) *Ordering rehearing or other trial.* The convening authority may, in the convening authority's discretion, order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only. A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(d) *Contents of action and related matters.*

(1) *In general.* The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, whether any charges or specifications are changed or dismissed and an explanation for such action, and any orders as to further disposition. The action shall be signed by the convening authority. The convening authority's authority to sign shall appear below the signature. The convening authority may recall and modify any action taken by that convening

authority at any time before it has been published, or, if the action is favorable to the accused, at any time prior to forwarding the record for review or before the accused has been officially notified.

(2) *Sentence.* The action shall state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

(3) *Suspension.* The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(4) *Deferment of service of sentence to confinement.* Whenever the service of the sentence to confinement is deferred by the convening authority under R.C.M. 1103 before or concurrently with the initial action in the case, the action shall include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

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

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

(g) *Subsequent action.* Any action taken on a summary court-martial after the initial action by the convening authority shall be in writing, signed by the authority taking the action, and promulgated in appropriate orders.

(h) *Review by a judge advocate.* A judge advocate shall review each summary court-martial in which there is a finding of guilty pursuant to R.C.M. 1307.

Rule 1307. Review of summary courts-martial by a judge advocate

(a) *In general.* Except as provided in subsection (b) of this rule, under regulations of the Secretary concerned, a judge advocate shall review each summary court-martial in which there is a finding of guilty.

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

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

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

(1) Conclusions as to whether—

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

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

(C) the sentence was legal.

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

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

A copy of the judge advocate's review under this rule shall be attached to the record of trial. A copy of the review shall also be forwarded to the accused.

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

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

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

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

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

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

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

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

(D) Dismiss the charges.

(2) *Rehearing.* If the officer exercising general court-martial jurisdiction orders a rehearing, but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.

(3) *Notification.* After the officer exercising general court-martial jurisdiction has taken action, the accused shall be notified of the action and the accused shall be provided with a copy of the action.

(g) *Records forwarded to the Judge Advocate General.* If the judge advocate who reviews the case under this rule states that corrective action is required as a matter of law, and the officer exercising general court-martial jurisdiction does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and the action thereon shall be forwarded to the Judge Advocate General for review under R.C.M. 1201(j).

(h) *Application for post-final review by the Judge Advocate General.* Not later than one year after completion of the judge advocate's review of the case under this rule, the accused may apply for review by the Judge Advocate General under R.C.M. 1201(h) on the grounds of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(i) *Review by a Court of Criminal Appeals.* After the Judge Advocate General reviews a summary court-martial under R.C.M. 1201(h) or (j), the case may be sent to the Court of Criminal Appeals by order of the Judge Advocate General, or the accused may submit an application for review to the Court of Criminal Appeals in accordance with R.C.M. 1201(k).

(j) *Other records.* Records reviewed under this rule that are not forwarded under subsection (g) shall be disposed of as prescribed by the Secretary concerned.

Sec. 3. Part III of the Manual for Courts-Martial, United States is amended to read as follows:

SECTION I
GENERAL PROVISIONS

Rule 101. Scope

(a) *Scope.* These rules apply to courts-martial proceedings to the extent and with the exceptions stated in Mil. R. Evid. 1101.

(b) *Sources of Law.* In the absence of guidance in this Manual or these rules, courts-martial will apply:

(1) First, the Federal Rules of Evidence and the case law interpreting them; and

(2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

(c) *Rule of Construction*

(1) Except as otherwise provided in these rules, the term "military judge" includes:

(A) a military magistrate designated to preside at a special court-martial or pre-referral judicial proceeding; and

(B) a summary court-martial officer.

(2) A reference in these rules to any kind of written material or any other medium includes electronically stored information.

Rule 102. Purpose

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Rule 103. Rulings on evidence

(a) *Preserving a Claim of Error.* A party may claim error in a ruling to admit or exclude evidence only if the error materially prejudices a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the military judge of its substance by an offer of proof, unless the substance was apparent from the context.

(b) *Not Needing to Renew an Objection or Offer of Proof.* Once the military judge rules definitively on the record admitting or excluding evidence, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) *Review of Constitutional Error.* The standard provided in subdivision (a)(2) does not apply to errors implicating the United States Constitution as it applies to members of the Armed Forces, unless the error arises under these rules and subdivision (a)(2) provides a standard that is more advantageous to the accused than the constitutional standard.

(d) *Military Judge's Statement about the Ruling; Directing an Offer of Proof.* The military judge may make any statement about the character or form of the evidence, the objection made, and the ruling. The military judge may direct that an offer of proof be made in question-and-answer form.

(e) *Preventing the Members from Hearing Inadmissible Evidence.* In a court-martial composed of a military judge and members, to the extent practicable, the military judge must conduct a trial so that inadmissible evidence is not suggested to the members by any means.
(f) *Taking Notice of Plain Error.* A military judge may take notice of a plain error that materially prejudices a substantial right, even if the claim of error was not properly preserved.

Rule 104. Preliminary questions
(a) In general. The military judge must decide any preliminary question about whether a witness is available or qualified, a privilege exists, a continuance should be granted, or evidence is admissible. In so deciding, the military judge is not bound by evidence rules, except those on privilege.
(b) *Relevance that Depends on a Fact.* When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The military judge may admit the proposed evidence on the condition that the proof be introduced later. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary.
(c) *Conducting a Hearing so that the Members Cannot Hear It.* The military judge must conduct any hearing on a preliminary question so that the members cannot hear it if:
(1) the hearing involves the admissibility of a statement of the accused under Mil. R. Evid. 301-306;
(2) the accused is a witness and so requests; or
(3) justice so requires.
(d) *Cross-Examining the Accused.* By testifying on a preliminary question, the accused does not become subject to cross-examination on other issues in the case.
(e) *Evidence Relevant to Weight and Credibility.* This rule does not limit a party's right to introduce before the members evidence that is relevant to the weight or credibility of other evidence.

Rule 105. Limiting evidence that is not admissible against other parties or for other purposes
If the military judge admits evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - the military judge, on timely request, must restrict the evidence to its proper scope and instruct the members accordingly.

Rule 106. Remainder of or related writings or recorded statements
If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time.

SECTION II
JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts
(a) *Scope.* This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) *Kinds of Facts that May Be Judicially Noticed.* The military judge may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known universally, locally, or in the area pertinent to the event; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) *Taking Notice.* The military judge:

(1) may take judicial notice whether requested or not; or

(2) must take judicial notice if a party requests it and the military judge is supplied with the necessary information.

The military judge must inform the parties in open court when, without being requested, he or she takes judicial notice of an adjudicative fact essential to establishing an element of the case.

(d) *Timing.* The military judge may take judicial notice at any stage of the proceeding.

(e) *Opportunity to Be Heard.* On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the military judge takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) *Instructing the Members.* The military judge must instruct the members that they may or may not accept the noticed fact as conclusive.

Rule 202. Judicial notice of law

(a) *Domestic Law.* The military judge may take judicial notice of domestic law. If a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. R. Evid. 201—except Rule 201(f)—apply.

(b) *Foreign Law.* A party who intends to raise an issue concerning the law of a foreign country must give reasonable written notice. The military judge, in determining foreign law, may consider any relevant material or source, in accordance with Mil. R. Evid. 104. Such a determination is a ruling on a question of law.

SECTION III
EXCLUSIONARY RULES AND RELATED MATTERS CONCERNING SELF-INCRIMINATION, SEARCH AND SEIZURE, AND EYEWITNESS IDENTIFICATION

Rule 301. Privilege concerning compulsory self-incrimination

(a) *General Rule.* An individual may claim the most favorable privilege provided by the Fifth Amendment to the United States Constitution, Article 31, or these rules. The privileges against self-incrimination are applicable only to evidence of a testimonial or communicative nature.

(b) *Standing.* The privilege of a witness to refuse to respond to a question that may tend to incriminate the witness is a personal one that the witness may exercise or waive at his or her discretion.

(c) *Limited Waiver.* An accused who chooses to testify as a witness waives the privilege against self-incrimination only with respect to the matters about which he or she testifies. If the accused is on trial for two or more offenses and on direct examination testifies about only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Mil. R. Evid. 608(b).

(d) *Exercise of the Privilege.* If a witness states that the answer to a question may tend to incriminate him or her, the witness cannot be required to answer unless the military judge finds

that the facts and circumstances are such that no answer the witness might make to the question would tend to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if he or she is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

(1) *Immunity Requirements.* The minimum grant of immunity adequate to overcome the privilege is that which under either R.C.M. 704 or other proper authority provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) *Notification of Immunity or Leniency.* When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant must be reduced to writing and must be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

(e) *Waiver of the Privilege.* A witness who answers a self-incriminating question without having asserted the privilege against self-incrimination may be required to answer questions relevant to the disclosure, unless the questions are likely to elicit additional self-incriminating information.

(1) If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

(2) Any limited waiver of the privilege under subdivision (e) applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Mil. R. Evid. 608(b).

(f) *Effect of Claiming the Privilege.*

(1) *No Inference to Be Drawn.* The fact that a witness has asserted the privilege against self-incrimination cannot be considered as raising any inference unfavorable to either the accused or the government.

(2) *Pretrial Invocation Not Admissible.* The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the United States Constitution or Article 31 remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated, is not admissible against the accused.

(3) *Instructions Regarding the Privilege.* When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election will be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.

Rule 302. Privilege concerning mental examination of an accused

(a) *General rule.* The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused

notwithstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination.

(b) *Exceptions.*

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) If the court-martial has allowed the defense to present expert testimony as to the mental condition of the accused, an expert witness for the prosecution may testify as to the reasons for his or her conclusions, but such testimony may not extend to statements of the accused except as provided in subdivision (b)(1).

(c) *Release of Evidence from an R.C.M. 706 Examination.* If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, must order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge, upon motion, may order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) *Noncompliance by the Accused.* The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e) *Procedure.* The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress.

Rule 303. Degrading questions

Statements and evidence are inadmissible if they are not material to the issue and may tend to degrade the person testifying.

Rule 304. Confessions and admissions

(a) *General rule.* If the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e).

(1) *Definitions.* As used in this rule:

(A) "Involuntary statement" means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

(B) "Confession" means an acknowledgment of guilt.

(C) "Admission" means a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

(2) Failure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if at the time of the alleged failure the person was under investigation or was in confinement, arrest, or custody for the alleged wrongdoing.

(b) *Evidence Derived from a Statement of the Accused.* When the defense has made an appropriate and timely motion or objection under this rule, evidence allegedly derived from a statement of the accused may not be admitted unless the military judge finds by a preponderance of the evidence that:

(1) the statement was made voluntarily,

(2) the evidence was not obtained by use of the accused's statement, or

(3) the evidence would have been obtained even if the statement had not been made.

(c) *Corroboration of a Confession or Admission.*

(1) An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession.

(2) Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of the admission or confession, then it may be considered as evidence against the accused. Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety.

(3) Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

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

(5) *Procedure.* The military judge alone is to determine when adequate evidence of corroboration has been received. Corroborating evidence must be introduced before the admission or confession is introduced unless the military judge allows submission of such evidence subject to later corroboration.

(d) *Disclosure of Statements by the Accused and Derivative Evidence.* Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused.

(e) *Limited Use of an Involuntary Statement.* A statement obtained in violation of Article 31 or Mil. R. Evid. 305(b)-(c) may be used only:

(1) to impeach by contradiction the in-court testimony of the accused; or

(2) in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

(f) *Motions and Objections.*

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

(2) If the prosecution seeks to offer a statement made by the accused or derivative evidence that was not disclosed before arraignment, the prosecution must provide timely notice to the

military judge and defense counsel. The defense may object at that time, and the military judge may make such orders as are required in the interests of justice.

(3) The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily.

(A) Prior to the introduction of such testimony by the accused, the defense must inform the military judge that the testimony is offered under subdivision (f)(3).

(B) When the accused testifies under subdivision (f)(3), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

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

(5) *Rulings.* The military judge must rule, prior to plea, upon any motion to suppress or objection to evidence made prior to plea unless, for good cause, the military judge orders that the ruling be deferred for determination at trial or after findings. The military judge may not defer ruling if doing so adversely affects a party's right to appeal the ruling. The military judge must state essential findings of fact on the record when the ruling involves factual issues.

(6) *Burden of Proof.* When the defense has made an appropriate motion or objection under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When the military judge has required a specific motion or objection under subdivision (f)(4), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(7) *Standard of Proof.* The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence.

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

(g) *Weight of the Evidence.* If a statement is admitted into evidence, the military judge must permit the defense to present relevant evidence with respect to the voluntariness of the statement and must instruct the members to give such weight to the statement as it deserves under all the circumstances.

(h) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

(i) *Evidence of an Oral Statement.* A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(j) *Refusal to Obey an Order to Submit a Body Substance.* If an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine or other body substance, evidence of such refusal may be admitted into evidence on:

(1) A charge of violating an order to submit such a sample; or

(2) Any other charge on which the results of the chemical analysis would have been admissible.

Rule 305. Warnings about rights

(a) *General rule.* A statement obtained in violation of this rule is involuntary and will be treated under Mil. R. Evid. 304.

(b) *Definitions.* As used in this rule:

(1) "Person subject to the code" means a person subject to the Uniform Code of Military Justice as contained in Chapter 47 of Title 10, United States Code. This term includes, for purposes of subdivision (c) of this rule, a knowing agent of any such person or of a military unit.

(2) "Interrogation" means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

(3) "Custodial interrogation" means questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way.

(c) *Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements.*

(1) *Article 31 Rights Warnings.* A statement obtained from the accused in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible against the accused except as provided in subdivision (d). Pursuant to Article 31, a person subject to the code may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(A) informing the accused or suspect of the nature of the accusation;

(B) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(C) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(2) *Fifth Amendment Right to Counsel.* If a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible against the accused unless counsel was present for the interrogation.

(3) *Sixth Amendment Right to Counsel.* If an accused against whom charges have been preferred is interrogated on matters concerning the preferred charges by anyone acting in a law enforcement capacity, or the agent of such a person, and the accused requests counsel, or if the accused has appointed or retained counsel, any statement made in the interrogation, or evidence derived from the interrogation, is inadmissible unless counsel was present for the interrogation.

(4) *Exercise of Rights.* If a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately. If a person who is subjected to interrogation under the circumstances described in subdivisions (c)(2) or (c)(3) of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present.

(d) *Presence of Counsel.* When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) will be provided by the United States at no expense to the person and without regard to the person's indigency and must be present before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless

otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

(e) *Waiver.*

(1) *Waiver of the Privilege Against Self-Incrimination.* After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must affirmatively acknowledge that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement.

(2) *Waiver of the Right to Counsel.* If the right to counsel is applicable under this rule and the accused or suspect does not affirmatively decline the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel.

(3) *Waiver After Initially Invoking the Right to Counsel.*

(A) *Fifth Amendment Right to Counsel.*

If an accused or suspect subjected to custodial interrogation requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that:

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

(B) *Sixth Amendment Right to Counsel.* If an accused or suspect interrogated after preferral of charges as described in subdivision (c)(3) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver.

(f) *Standards for Nonmilitary Interrogations.*

(1) *United States Civilian Interrogations.* When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, the person's entitlement to rights warnings and the validity of any waiver of applicable rights will be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations.

(2) *Foreign Interrogations.* Warnings under Article 31 and the Fifth and Sixth Amendments to the United States Constitution are not required during an interrogation conducted outside of a State, district, Commonwealth, territory, or possession of the United States by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (f)(1). A statement obtained from a foreign interrogation is admissible unless the statement is obtained through the use of coercion, unlawful influence, or unlawful inducement. An interrogation is not "participated in" by military personnel or their agents or by the officials or agents listed in subdivision (f)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents,

or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

Rule 306. Statements by one of several accused

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

Rule 311. Evidence obtained from unlawful searches and seizures

(a) *General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

(2) the accused had a reasonable expectation of privacy in the person, place, or property searched;

the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and

(3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system.

(b) *Definition.* As used in this rule, a search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the Armed Forces, a federal statute applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil. R. Evid. 312-317;

(2) other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession, and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district courts involving a similar search or seizure; or

(3) officials of a foreign government or their agents, where evidence was obtained as a result of a foreign search or seizure that subjected the accused to gross and brutal maltreatment. A search or seizure is not "participated in" by a United States military or civilian official merely because that person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because that person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

(c) *Exceptions.*

(1) *Impeachment.* Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(2) *Inevitable Discovery.* Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

(3) *Good Faith Execution of a Warrant or Search Authorization.* Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

(B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

(4) *Reliance on Statute or Binding Precedent.* Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acted in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment.

(d) *Motions to Suppress and Objections.*

(1) *Disclosure.* Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, or evidence derived therefrom, that it intends to offer into evidence against the accused at trial.

(2) *Time Requirements.*

(A) When evidence has been disclosed prior to arraignment under subdivision (d)(1), the defense must make any motion to suppress or objection under this rule prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence described in subdivision (d)(1) that was not disclosed prior to arraignment, the prosecution must provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence described in subdivision (d)(1). If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) *Challenging Probable Cause.*

(A) *Relevant Evidence.* If the defense challenges evidence seized pursuant to a search warrant or search authorization on the ground that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in subdivision (d)(4)(B).

(B) *False Statements.* If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, is entitled to a hearing. At the hearing, the defense has the burden of establishing by a

preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion must be granted unless the search is otherwise lawful under these rules.

(5) *Burden and Standard of Proof.*

(A) *In general.* When the defense makes an appropriate motion or objection under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure; that the evidence would have been obtained even if the unlawful search or seizure had not been made; that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence.

(B) *Statement Following Apprehension.* In addition to subdivision (d)(5)(A), a statement obtained from a person apprehended in a dwelling in violation of R.C.M. 302(d)(2) and (e), is admissible if the prosecution shows by a preponderance of the evidence that the apprehension was based on probable cause, the statement was made at a location outside the dwelling subsequent to the apprehension, and the statement was otherwise in compliance with these rules.

(C) *Specific Grounds of Motion or Objection.* When the military judge has required the defense to make a specific motion or objection under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or objected to the evidence.

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

(7) *Rulings.* The military judge must rule, prior to plea, upon any motion to suppress or objection to evidence made prior to plea unless, for good cause, the military judge orders that the ruling be deferred for determination at trial or after findings. The military judge may not defer ruling if doing so adversely affects a party's right to appeal the ruling. The military judge must state essential findings of fact on the record when the ruling involves factual issues.

(8) *Informing the Members.* If a defense motion or objection under this rule is sustained in whole or in part, the court-martial members may not be informed of that fact except when the military judge must instruct the members to disregard evidence.

(e) *Effect of Guilty Plea.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth

Amendment to the Constitution of the United States and Mil. R. Evid. 311-317 with respect to the offense, whether or not raised prior to plea.

Rule 312. Body views and intrusions

(a) *General rule*. Evidence obtained from body views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Visual examination of the body.*

(1) *Consensual Examination*. Evidence obtained from a visual examination of the unclothed body is admissible if the person consented to the inspection in accordance with Mil. R. Evid. 314(e).

(2) *Involuntary Examination*. Evidence obtained from an involuntary display of the unclothed body, including a visual examination of body cavities, is admissible only if the inspection was conducted in a reasonable fashion and authorized under the following provisions of the Military Rules of Evidence:

(A)inspections and inventories under Mil. R. Evid. 313;

(B)searches under Mil. R. Evid. 314(b) and 314(c) if there is a reasonable suspicion that weapons, contraband, or evidence of crime is concealed on the body of the person to be searched;

(C)searches incident to lawful apprehension under Mil. R. Evid. 314(g);

(D)searches within a jail, confinement facility, or similar facility under Mil. R. Evid. 314(h) if reasonably necessary to maintain the security of the institution or its personnel;

(E) emergency searches under Mil. R. Evid. 314(i); and

(F) probable cause searches under Mil. R. Evid. 315.

(c) *Intrusion into Body Cavities.*

(1) *Mouth, Nose, and Ears*. Evidence obtained from a reasonable nonconsensual physical intrusion into the mouth, nose, and ears is admissible under the same standards that apply to a visual examination of the body under subdivision (b).

(2) *Other Body Cavities*. Evidence obtained from nonconsensual intrusions into other body cavities is admissible only if made in a reasonable fashion by a person with appropriate medical qualifications and if:

(A) at the time of the intrusion there was probable cause to believe that a weapon, contraband, or other evidence of crime was present;

(B) conducted to remove weapons, contraband, or evidence of crime discovered under subdivisions (b) or (c)(2)(A) of this rule;

(C) conducted pursuant to Mil. R. Evid. 316(c)(5)(C);

(D) conducted pursuant to a search warrant or search authorization under Mil. R. Evid. 315; or

(E) conducted pursuant to Mil. R. Evid. 314(h) based on a reasonable suspicion that the individual is concealing a weapon, contraband, or evidence of crime.

(d) *Extraction of Body Fluids*. Evidence obtained from nonconsensual extraction of body fluids is admissible if seized pursuant to a search warrant or a search authorization under Mil. R. Evid. 315. Evidence obtained from nonconsensual extraction of body fluids made without such a warrant or authorization is admissible, notwithstanding Mil. R. Evid. 315(g), only when probable cause existed at the time of extraction to believe that evidence of crime would be found and that the delay necessary to obtain a search warrant or search authorization could have resulted in the

destruction of the evidence. Evidence obtained from nonconsensual extraction of body fluids is admissible only when executed in a reasonable fashion by a person with appropriate medical qualifications.

(e) *Other Intrusive Searches.* Evidence obtained from a nonconsensual intrusive search of the body, other than searches described in subdivisions (c) or (d), conducted to locate or obtain weapons, contraband, or evidence of crime is admissible only if obtained pursuant to a search warrant or search authorization under Mil. R. Evid. 315 and conducted in a reasonable fashion by a person with appropriate medical qualifications in such a manner so as not to endanger the health of the person to be searched.

(f) *Intrusions for Valid Medical Purposes.* Evidence or contraband obtained in the course of a medical examination or an intrusion conducted for a valid medical purpose is admissible. Such an examination or intrusion may not, for the purpose of obtaining evidence or contraband, exceed what is necessary for the medical purpose.

(g) *Medical Qualifications.* The Secretary concerned may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this rule.

Rule 313. Inspections and inventories in the Armed Forces

(a) *General Rule.* Evidence obtained from lawful inspections and inventories in the Armed Forces is admissible at trial when relevant and not otherwise inadmissible under these rules. An unlawful weapon, contraband, or other evidence of a crime discovered during a lawful inspection or inventory may be seized and is admissible in accordance with this rule.

(b) *Lawful Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. Inspections must be conducted in a reasonable fashion and, if applicable, must comply with Mil. R. Evid. 312. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.

(1) *Purpose of Inspections.* An inspection may include, but is not limited to, an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness; and that personnel are present, fit, and ready for duty. An order to produce body fluids, such as urine, is permissible in accordance with this rule.

(2) *Searches for Evidence.* An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule.

(3) *Examinations to Locate and Confiscate Weapons or Contraband.*

(A) An inspection may include an examination to locate and confiscate unlawful weapons and other contraband provided that the criteria set forth in subdivision (b)(3)(B) are not implicated.

(B) The prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule if a purpose of an examination is to locate weapons or contraband, and if:

(i) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled;

(ii) specific individuals are selected for examination; or

(iii) persons examined are subjected to substantially different intrusions during the same examination.

(c) *Lawful Inventories.* An "inventory" is a reasonable examination, accounting, or other control measure used to account for or control property, assets, or other resources. It is administrative and not prosecutorial in nature, and if applicable, the inventory must comply with Mil. R. Evid. 312. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 314. Searches not requiring probable cause

(a) *General Rule.* Evidence obtained from reasonable searches not requiring probable cause is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the Armed Forces.

(b) *Border Searches.* Evidence from a border search for customs or immigration purposes authorized by a federal statute is admissible.

(c) *Searches Upon Entry to or Exit from United States Installations, Aircraft, and Vessels Abroad.* In addition to inspections under Mil. R. Evid. 313(b), evidence is admissible when a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, has authorized appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by subdivision (c).

(d) *Searches of Government Property.* Evidence resulting from a search of government property without probable cause is admissible under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Normally a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use, but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(e) *Consent Searches.*

(1) *General Rule.* Evidence of a search conducted without probable cause is admissible if conducted with lawful consent.

(2) *Who May Consent.* A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) *Scope of Consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property, and may be withdrawn at any time.

(4) *Voluntariness.* To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

(5) *Burden and Standard of Proof.* The prosecution must prove consent by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of consent, but it does not affect the standard of proof.

(f) *Searches Incident to a Lawful Stop.*

(1) *Lawfulness.* A stop is lawful when conducted by a person authorized to apprehend under R.C.M. 302(b) or others performing law enforcement duties and when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The stop must be temporary and investigatory in nature.

(2) *Stop and Frisk.* Evidence is admissible if seized from a person who was lawfully stopped and who was frisked for weapons because he or she was reasonably suspected to be armed and dangerous. Contraband or evidence that is located in the process of a lawful frisk may be seized.

(3) *Vehicles.* Evidence is admissible if seized in the course of a search for weapons in the areas of the passenger compartment of a vehicle in which a weapon may be placed or hidden, so long as the person lawfully stopped is the driver or a passenger and the official who made the stop has a reasonable suspicion that the person stopped is dangerous and may gain immediate control of a weapon.

(g) *Searches Incident to Apprehension.*

(1) *General Rule.* Evidence is admissible if seized in a search of a person who has been lawfully apprehended or if seized as a result of a reasonable protective sweep.

(2) *Search for Weapons and Destructible Evidence.* A lawful search incident to apprehension may include a search for weapons or destructible evidence in the area within the immediate control of a person who has been apprehended. "Immediate control" means that area in which the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property.

(3) *Protective Sweep for Other Persons.*

(A) *Area of Potential Immediate Attack.* Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched.

(B) *Wider Protective Sweep.* When an apprehension takes place at a location in which another person might be present who might endanger the apprehending officials or others in the area of the apprehension, a search incident to arrest may lawfully include a reasonable examination of those spaces where a person might be found. Such a reasonable examination is lawful under subdivision (g) if the apprehending official has a reasonable suspicion based on specific and articulable facts that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

(h) *Searches within Jails, Confinement Facilities, or Similar Facilities.* Evidence obtained from a search within a jail, confinement facility, or similar facility is admissible even if conducted without probable cause provided that it was authorized by persons with authority over the institution.

(i) *Emergency Searches to Save Life or for Related Purposes.* Evidence obtained from emergency searches of persons or property conducted to save life, or for a related purpose, is admissible provided that the search was conducted in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) *Searches of Open Fields or Woodlands.* Evidence obtained from a search of an open field or woodland is admissible provided that the search was not unlawful within the meaning of Mil. R. Evid. 311.

Rule 315. Probable cause searches

(a) *General rule.* Evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization, or under the exigent circumstances described in this rule, is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the Armed Forces.

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

(1) "Search authorization" means express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) "Search warrant" means express permission to search and seize issued by competent civilian authority.

(c) *Scope of Search Authorization.* A search authorization may be valid under this rule for a search of:

(1) the physical person of anyone subject to military law or the law of war wherever found;

(2) military property of the United States or of nonappropriated fund activities of an Armed force of the United States wherever located;

(3) persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) nonmilitary property within a foreign country.

(d) *Who May Authorize.* A search authorization under this rule is valid only if issued by an impartial individual in one of the categories set forth in subdivisions (d)(1) and (d)(2). An otherwise impartial authorizing official does not lose impartiality merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated

or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

(2) *Military Judge or Magistrate.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned.

(e) *Who May Search.*

(1) *Search Authorization.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security forces, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(2) *Search Warrants.* Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable federal statute.

(f) *Basis for Search Authorizations.*

(1) *Probable Cause Requirement.* A search authorization issued under this rule must be based upon probable cause.

(2) *Probable Cause Determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule will be based upon any or all of the following:

(A) written statements communicated to the authorizing official;

(B) oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements through regulation.

(g) *Exigencies.* Evidence obtained from a probable cause search is admissible without a search warrant or search authorization when there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought. Military operational necessity may create an exigency by prohibiting or preventing communication with a person empowered to grant a search authorization.

Rule 316. Seizures

(a) *General rule.* Evidence obtained from reasonable seizures is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the Armed Forces.

(b) *Apprehension.* Apprehension is governed by R.C.M. 302.

(c) *Seizure of Property or Evidence.*

(1) *Based on Probable Cause.* Evidence is admissible when seized based on a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

(2) *Abandoned Property.* Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(3) *Consent.* Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Mil. R. Evid. 314.

(4) *Government Property.* Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (d), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Mil. R. Evid. 314(d), at the time of the seizure.

(5) *Other Property.* Property or evidence not included in subdivisions (c)(1)-(4) may be seized for use in evidence by any person listed in subdivision (d) if:

(A) *Authorization.* The person is authorized to seize the property or evidence by a search warrant or a search authorization under Mil. R. Evid. 315;

(B) *Exigent Circumstances.* The person has probable cause to seize the property or evidence and under Mil. R. Evid. 315(g) a search warrant or search authorization is not required; or

(C) *Plain View.* The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.

(6) *Temporary Detention.* Nothing in this rule prohibits temporary detention of property on less than probable cause when authorized under the Constitution of the United States.

(d) *Who May Seize.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security forces, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this rule.

(e) *Other Seizures.* Evidence obtained from a seizure not addressed in this rule is admissible provided that its seizure was permissible under the Constitution of the United States as applied to members of the Armed Forces.

Rule 317. Interception of wire and oral communications

(a) *General rule.* Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of Mil. R. Evid. 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the Armed Forces or if such evidence must be excluded under a federal statute applicable to members of the Armed Forces.

(b) *When Authorized by Court Order.* Evidence from the interception of wire or oral communications is admissible when authorized pursuant to an application to a federal judge of competent jurisdiction under the provisions of a federal statute.

(c) *Regulations.* Notwithstanding any other provision of these rules, evidence obtained by members of the Armed Forces or their agents through interception of wire or oral communications for law enforcement purposes is not admissible unless such interception:

(1) takes place in the United States and is authorized under subdivision (b);

(2) takes place outside the United States and is authorized under regulations issued by the Secretary of Defense or the Secretary concerned; or

(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under applicable federal statutes.

Rule 321. Eyewitness identification

(a) *General rule.* Testimony concerning a relevant out-of-court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules. The witness making the identification and any person who has observed the previous identification may testify concerning it. When in testimony a witness identifies the accused as being, or not being, a participant in an offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness' testimony as to identity even if the credibility of the witness has not been attacked directly, subject to appropriate objection under this rule.

(b) *When Inadmissible.* An identification of the accused as being a participant in an offense, whether such identification is made at the trial or otherwise, is inadmissible against the accused if:

(1) The identification is the result of an unlawful lineup or other unlawful identification process, as defined in subdivision (c), conducted by the United States or other domestic authorities and the accused makes a timely motion to suppress or an objection to the evidence under this rule; or

(2) Exclusion of the evidence is required by the Due Process Clause of the Fifth Amendment to the Constitution of the United States as applied to members of the Armed Forces. Evidence other than an identification of the accused that is obtained as a result of the unlawful lineup or unlawful identification process is inadmissible against the accused if the accused makes a timely motion to suppress or an objection to the evidence under this rule and if exclusion of the evidence is required under the Constitution of the United States as applied to members of the Armed Forces.

(c) *Unlawful Lineup or Identification Process.*

(1) *Unreliable.* A lineup or other identification process is unreliable, and therefore unlawful, if the lineup or other identification process is so suggestive as to create a substantial likelihood of misidentification.

(2) *In Violation of Right to Counsel.* A lineup is unlawful if it is conducted in violation of the accused's rights to counsel.

(A) *Military Lineups.* An accused or suspect is entitled to counsel if, after preferral of charges or imposition of pretrial restraint under R.C.M. 304 for the offense under investigation, the accused is required by persons subject to the code or their agents to participate in a lineup for the purpose of identification. When a person entitled to counsel under this rule requests counsel, a judge advocate or a person certified in accordance with Article 27(b) will be provided by the United States at no expense to the accused or suspect and without regard to indigency or lack thereof before the lineup may proceed. The accused or suspect may waive the rights provided in this rule if the waiver is freely, knowingly, and intelligently made.

(B) *Nonmilitary Lineups.* When a person subject to the code is required to participate in a lineup for purposes of identification by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and the provisions of subdivision (c)(2)(A) do not apply, the person's entitlement to counsel and the validity of any waiver of applicable rights will be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups.

(d) *Motions to Suppress and Objections.*

(1) *Disclosure.* Prior to arraignment, the prosecution must disclose to the defense all evidence of, or derived from, a prior identification of the accused as a lineup or other identification process that it intends to offer into evidence against the accused at trial.

(2) *Time Requirement.* When such evidence has been disclosed, any motion to suppress or objection under this rule must be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move constitutes a waiver of the motion or objection.

(3) *Continuing Duty.* If the prosecution intends to offer such evidence and the evidence was not disclosed prior to arraignment, the prosecution must provide timely notice to the military judge and counsel for the accused. The defense may enter an objection at that time, and the military judge may make such orders as are required in the interests of justice.

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

(5) *Defense Evidence.* The defense may present evidence relevant to the issue of the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the lineup or identification process giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense must inform the military judge that the testimony is offered under subdivision (d). When the accused testifies under subdivision (d), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(6) *Burden and Standard of Proof.* When the defense has raised a specific motion or objection under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(A) *Right to Counsel.*

(i) *Initial Violation of Right to Counsel at a Lineup.* When the accused raises the right to presence of counsel under this rule, the prosecution must prove by a preponderance of the evidence that counsel was present at the lineup or that the accused, having been advised of the right to the presence of counsel, voluntarily and intelligently waived that right prior to the lineup.

(ii) *Identification Subsequent to a Lineup Conducted in Violation of the Right to Counsel.* When the military judge determines that an identification is the result of a lineup conducted without the presence of counsel or an appropriate waiver, any later identification by one present at such unlawful lineup is also a result thereof unless the military judge determines that the contrary has been shown by clear and convincing evidence.

(B) *Unreliable Identification.*

(i) *Initial Unreliable Identification.* When an objection raises the issue of an unreliable identification, the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances.

(ii) *Identification Subsequent to an Unreliable Identification.* When the military judge determines that an identification is the result of an unreliable identification, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

(7) *Rulings.* A motion to suppress or an objection to evidence made prior to plea under this rule will be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination will be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge will state his or her essential findings of fact on the record.

(e) *Effect of Guilty Pleas.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under this rule with respect to that offense whether or not raised prior to the plea.

SECTION IV
RELEVANCY AND ITS LIMITS

Rule 401. Test for relevant evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Rule 402. General admissibility of relevant evidence

(a) Relevant evidence is admissible unless any of the following provides otherwise:

(1) the United States Constitution as it applies to members of the Armed Forces;

(2) a federal statute applicable to trial by courts-martial;

(3) these rules; or

(4) this Manual.

(b) Irrelevant evidence is not admissible.

Rule 403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons

The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character evidence, crimes or other acts

(a) *Character Evidence.*

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for an Accused or Victim*

(A) The accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it. General military character is not a

pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the UCMJ:

(i) Article 105;

(ii) Articles 120-122;

(iii) Articles 123a-124;

(iv) Articles 126-127;

(v) Articles 129-131;

(vi) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(vii) An attempt or conspiracy to commit one of the above offenses.

(B) Subject to the limitations in Mil. R. Evid. 412, the accused may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecution may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the accused's same trait; and

(C) in a homicide or assault case, the prosecution may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness' character may be admitted under Mil R. Evid. 607, 608, and 609.

(b) *Crimes, Wrongs, or Other Acts.*

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by the accused, the prosecution must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial; and

(B) do so before trial – or during trial if the military judge, for good cause, excuses lack of pre-trial notice.

Rule 405. Methods of proving character

(a) *By Reputation or Opinion.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the military judge may allow an inquiry into relevant specific instances of the person's conduct.

(b) *By Specific Instances of Conduct.* When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

(c) *By Affidavit.* The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) *Definitions.* "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the Armed Forces includes a post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit; routine practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The military judge may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 407. Subsequent remedial measures

(a) When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

(1) negligence;

(2) culpable conduct;

(3) a defect in a product or its design; or

(4) a need for a warning or instruction.

(b) The military judge may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise offers and negotiations

(a) *Prohibited Uses.* Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in order to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim - except when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) *Exceptions.* The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Offers to pay medical and similar expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Pleas, plea discussions, and related statements

(a) *Prohibited Uses.* Evidence of the following is not admissible against the accused who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made during plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the government if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) *Exceptions.* The military judge may admit a statement described in subdivision (a)(3) or (a)(4):

(1) when another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a proceeding for perjury or false statement, if the accused made the statement under oath, on the record, and with counsel present.

(c) *Request for Administrative Disposition.* A "statement made during plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Rule 411. Liability insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice or proving agency, ownership, or control.

Rule 412. Sex offense cases: The victim's sexual behavior or predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that a victim engaged in other sexual behavior; or

(2) Evidence offered to prove a victim's sexual predisposition.

(b) *Exceptions.* In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent or if offered by the prosecution; and

(3) evidence the exclusion of which would violate the accused's constitutional rights.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the victim or, when appropriate, the victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial

composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1113 and remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant for a purpose under subdivision (b)(1) or (2) of this rule and that the probative value of such evidence outweighs the danger of unfair prejudice to the victim's privacy, or that the evidence is described by subdivision (b)(3) of this rule, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the victim may be examined or cross-examined. Any evidence introduced under this rule is subject to challenge under Mil. R. Evid. 403.

(d) *Definitions.* For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to a victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder. For purposes of this rule, the term "victim" includes an alleged victim.

Rule 413. Similar crimes in sexual offense cases

(a) *Permitted Uses.* In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Accused.* If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including any witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.

(c) *Effect on Other Rules.* This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definition.* As used in this rule, "sexual offense" means an offense punishable under the Uniform Code of Military Justice, or a crime under federal or state law (as "state" is defined in 18 U.S.C. § 513), involving:

(1) any conduct prohibited by Article 120;

(2) any conduct prohibited by 18 U.S.C. chapter 109A;

(3) contact, without consent, between any part of the accused's body, or an object held or controlled by the accused, and another person's genitals or anus;

(4) contact, without consent, between the accused's genitals or anus and any part of another person's body;

(5) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(6) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

Rule 414. Similar crimes in child-molestation cases

(a) *Permitted Uses.* In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other

offense of child molestation. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Accused.* If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.

(c) *Effect on Other Rules.* This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definitions.* As used in this rule:

(1) "Child" means a person below the age of 16; and

(2) "Child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513), that involves:

(A) any conduct prohibited by Article 120 and committed with a child, or prohibited by Article 120b.

(B) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(C) any conduct prohibited by 18 U.S.C. chapter 110;

(D) contact between any part of the accused's body, or an object held or controlled by the accused, and a child's genitals or anus;

(E) contact between the accused's genitals or anus and any part of a child's body;

(F) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(G) an attempt or conspiracy to engage in conduct described in subdivisions (d)(2)(A)-(F).

SECTION V
PRIVILEGES

Rule 501. Privilege in general

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) the United States Constitution as applied to members of the Armed Forces;

(2) a federal statute applicable to trials by courts-martial;

(3) these rules;

(4) this Manual; or

(5) the principles of common law generally recognized in the trial of criminal cases in the United States district courts under rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term "person" includes an appropriate representative of the Federal Government, a State, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Rule 502. Lawyer-client privilege

(a) *General Rule*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or the client's representative and the lawyer or the lawyer's representative;

(2) between the lawyer and the lawyer's representative;

(3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(4) between representatives of the client or between the client and a representative of the client; or

(5) between lawyers representing the client.

(b) *Definitions*. As used in this rule:

(1) "Client" means a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the Armed Forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term "lawyer" does not include a member of the Armed Forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member:

(A) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding;

(B) is authorized by the Armed Forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the Armed Forces; or

(C) is authorized to practice law and renders professional legal services during off-duty employment.

(3) "Lawyer's representative" means a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may

claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule under any of the following circumstances:

(1) *Crime or Fraud.* If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document Attested by the Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to clergy

(a) *General Rule.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions.* As used in this rule:

(1) "Clergyman" means a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) "Clergyman's assistant" means a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor.

(3) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the person, guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

Rule 504. Marital privilege

(a) *Spousal Incapacity.* A person has a privilege to refuse to testify against his or her spouse. There is no privilege under subdivision (a) when, at the time of the testimony, the parties are divorced, or the marriage has been annulled.

(b) *Confidential Communication Made During the Marriage.*

(1) *General Rule*. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were married and not separated as provided by law.

(2) *Who May Claim the Privilege*. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions.*

(1) *To Confidential Communications Only*. Where both parties have been substantial participants in illegal activity, those communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated are not marital communications for purposes of the privilege in subdivision (b) and are not entitled to protection under the privilege in subdivision (b).

(2) *To Spousal Incapacity and Confidential Communications*. There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other, or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328 with transporting the other spouse in interstate commerce for prostitution, immoral purposes, or another offense in violation of 18 U.S.C. §§ 2421-2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

(d) *Definitions*. As used in this rule:

(1) "A child of either" means a biological child, adopted child, or ward of one of the spouses and includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is:

(A) an individual under the age of 18; or

(B) an individual with a mental handicap who functions under the age of 18.

(2) "Temporary physical custody" means a parent has entrusted his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody, nor is a written agreement required. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of his or her child for recurring care or during absences due to temporary duty or deployments.

(3) As used in this rule, a communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

Rule 505. Classified information

(a) *General Rule.* Classified information must be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.

(b) *Definitions.* As used in this rule:

(1) "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. §2014(y).

(2) "National security" means the national defense and foreign relations of the United States.

(3) "In camera hearing" means a session under Article 39(a) from which the public is excluded.

(4) "In camera review" means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

(5) "Ex parte" means a discussion between the military judge and either defense counsel or prosecution, without the other party or the public present. This discussion can be on or off the record, depending on the circumstances. The military judge will grant a request for an ex parte discussion or hearing only after finding that such discussion or hearing is necessary to protect classified information or other good cause. Prior to granting a request from one party for an ex parte discussion or hearing, the military judge must provide notice to the opposing party on the record. If the ex parte discussion is conducted off the record, the military judge should later state on the record that such ex parte discussion took place and generally summarize the subject matter of the discussion, as appropriate.

(c) *Access to Evidence.* Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge must be provided to the accused.

(d) *Declassification.* Trial counsel should, when practicable, seek declassification of evidence that may be used at trial, consistent with the requirements of national security. A decision not to declassify evidence under this section is not subject to review by a military judge or upon appeal.

(e) *Action Prior to Referral of Charges.*

(1) Prior to referral of charges, upon a showing by the accused that the classified information sought is relevant and necessary to an element of the offense or a legally cognizable defense, the convening authority must respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information. In response to such a request, the convening authority may:

(A) delete specified items of classified information from documents made available to the accused;

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

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

(D) provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

(E) withhold disclosure if actions under (A) through (D) cannot be taken without causing identifiable damage to the national security.

(2) An Article 32 preliminary hearing officer may not rule on any objection by the accused to the release of documents or information protected by this rule.

(3) Any objection by the accused to the withholding of information or to the conditions of disclosure must be raised through a motion for appropriate relief at a pretrial conference.

(f) *Actions after Referral of Charges.*

(1) *Pretrial Conference.* At any time after referral of charges, any party may move for a pretrial conference under Article 39(a) to consider matters relating to classified information that may arise in connection with the trial. Following such a motion, or when the military judge recognizes the need for such conference, the military judge must promptly hold a pretrial conference under Article 39(a).

(2) *Ex Parte Permissible.* Upon request by either party and with a showing of good cause, the military judge must hold such conference ex parte to the extent necessary to protect classified information from disclosure.

(3) *Matters to be Established at Pretrial Conference.*

(A) *Timing of Subsequent Actions.* At the pretrial conference, the military judge must establish the timing of:

(i) requests for discovery;

(ii) the provision of notice required by subdivision (i) of this rule; and

(iii) established by subdivision (j) of this rule.

(B) *Other Matters.* At the pretrial conference, the military judge may also consider any matter that relates to classified information or that may promote a fair and expeditious trial.

(4) *Convening Authority Notice and Action.* If a claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter must be reported to the convening authority. The convening authority may:

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

(B) dismiss the charges;

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

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

(5) *Remedies.* If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge must dismiss the charges or specifications or both to which the classified information relates.

(g) *Protective Orders.* Upon motion of trial counsel, the military judge must issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused in any court-martial proceeding or that has otherwise been provided to, or obtained by, any such accused in any such court-martial proceeding. The terms of any such protective order may include, but are not limited to, provisions:

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

(2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(3) requiring controlled accesses to the material during normal business hours and at other times upon reasonable notice;

(4) mandating that all persons requiring security clearances will cooperate with investigatory personnel in any investigations that are necessary to obtain a security clearance;

(5) requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(6) regulating the making and handling of notes taken from material containing classified information; or

(7) requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Discovery and Access by the Accused.*

(1) *Limitations.*

(A) *Government Claim of Privilege.* In a court-martial proceeding in which the government seeks to delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information, trial counsel must submit a declaration invoking the United States' classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause. The declaration must be signed by the head, or designee, of the executive or military department or government agency concerned.

(B) *Standard for Discovery or Access by the Accused.* Upon the submission of a declaration under subdivision (h)(1)(A), the military judge may not authorize the discovery of or access to such classified information unless the military judge determines that such classified information would be noncumulative and relevant to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. If the discovery of or access to such classified information is authorized, it must be addressed in accordance with the requirements of subdivision (h)(2).

(2) *Alternatives to Full Discovery.*

(A) *Substitutions and Other Alternatives.* The military judge, in assessing the accused's right to discover or access classified information under subdivision (h), may authorize the government:

(i) to delete or withhold specified items of classified information;

(ii) to substitute a summary for classified information; or

(iii) to substitute a statement admitting relevant facts that the classified information or material would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial.

(B) *In Camera Review.* The military judge must, upon the request of the prosecution, conduct an in camera review of the prosecution's motion and any materials submitted in support thereof and must not disclose such information to the accused.

(C) *Action by Military Judge.* The military judge must grant the request of trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with subdivision (h)(2)(A), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.

(3) *Reconsideration.* An order of a military judge authorizing a request of trial counsel to substitute, summarize, withhold, or prevent access to classified information under subdivision (h) is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under subdivision (h).

(i) *Disclosure by the Accused.*

(1) *Notification to Trial Counsel and Military Judge.* If an accused reasonably expects to disclose, or to cause the disclosure of, classified information in any manner in connection with any trial or pretrial proceeding involving the prosecution of such accused, the accused must, within the time specified by the military judge or, where no time is specified, prior to arraignment of the accused, notify trial counsel and the military judge in writing.

(2) *Content of Notice.* Such notice must include a brief description of the classified information.

(3) *Continuing Duty to Notify.* Whenever the accused learns of additional classified information the accused reasonably expects to disclose, or to cause the disclosure of, at any such proceeding, the accused must notify trial counsel and the military judge in writing as soon as possible thereafter and must include a brief description of the classified information.

(4) *Limitation on Disclosure by Accused.* The accused may not disclose, or cause the disclosure of, any information known or believed to be classified in connection with a trial or pretrial proceeding until:

(A) notice has been given under subdivision (i); and

(B) the government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in subdivision (j).

(5) *Failure to comply.* If the accused fails to comply with the requirements of subdivision (i), the military judge:

(A) may preclude disclosure of any classified information not made the subject of notification; and

(B) may prohibit the examination by the accused of any witness with respect to any such information.

(j) *Procedure for Use of Classified Information in Trials and Pretrial Proceedings.*

(1) *Hearing on Use of Classified Information.*

(A) *Motion for Hearing.* Within the time specified by the military judge for the filing of a motion under this rule, either party may move for a hearing concerning the use at any proceeding of any classified information. Upon a request by either party, the military judge must conduct such a hearing and must rule prior to conducting any further proceedings.

(B) *Request for In Camera Hearing.* Any hearing held pursuant to subdivision (j) (or any portion of such hearing specified in the request of a knowledgeable United States official) must be held in camera if a knowledgeable United States official possessing authority to classify information submits to the military judge a declaration that a public proceeding may result in the disclosure of classified information.

(C) *Notice to Accused.* Before the hearing, trial counsel must provide the accused with notice of the classified information that is at issue. Such notice must identify the specific classified information at issue whenever that information previously has been made available to the accused by the United States. When the United States has not previously made the information available to the accused in connection with the case the information may be described by generic category, in such forms as the military judge may approve, rather than by identification of the specific information of concern to the United States.

(D) *Standard for Disclosure.* Classified information is not subject to disclosure under subdivision (j) unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presenting proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment must be admitted only if no unclassified version of such information is available.

(E) *Written Findings.* As to each item of classified information, the military judge must set forth in writing the basis for the determination.

(2) *Alternatives to Full Disclosure.*

(A) *Motion by the Prosecution.* Upon any determination by the military judge authorizing the disclosure of specific classified information under the procedures established by subdivision (j), trial counsel may move that, in lieu of the disclosure of such specific classified information, the military judge order:

(i) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove:

(ii) the substitution for such classified information of a summary of the specific classified information; or

(iii) any other procedure or redaction limiting the disclosure of specific classified information.

(B) *Declaration of Damage to National Security.* Trial counsel may, in connection with a motion under subdivision (j), submit to the military judge a declaration signed by the head, or designee, of the executive or military department or government agency concerned certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by trial counsel, the military judge must examine such declaration during an in camera review.

(C) *Hearing.* The military judge must hold a hearing on any motion under subdivision (j). Any such hearing must be held in camera at the request of a knowledgeable United States official possessing authority to classify information.

(D) *Standard for Use of Alternatives.* The military judge must grant such a motion of trial counsel if the military judge finds that the statement, summary, or other procedure or redaction will provide the accused with substantially the same ability to make his or her defense as would disclosure of the specific classified information.

(3) *Sealing of Records of In Camera Hearings.* If at the close of an in camera hearing under subdivision (j) (or any portion of a hearing under subdivision (j) that is held in camera), the military judge determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing must be sealed in accordance with R.C.M. 1113 and preserved for use in the event of an appeal. The accused may seek reconsideration of the military judge's determination prior to or during trial.

(4) *Remedies.*

(A) If the military judge determines that alternatives to full disclosure may not be used and the prosecution continues to object to disclosure of the information, the military judge must issue any order that the interests of justice require, including but not limited to, an order:

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

(ii) declaring a mistrial;

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

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

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

(B) The government may avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(5) *Disclosure of Rebuttal Information.* Whenever the military judge determines that classified information may be disclosed in connection with a trial or pretrial proceeding, the military judge must, unless the interests of fairness do not so require, order the prosecution to provide the accused with the information it expects to use to rebut the classified information.

(A) *Continuing Duty.* The military judge may place the prosecution under a continuing duty to disclose such rebuttal information.

(B) *Sanction for Failure to Comply.* If the prosecution fails to comply with its obligation under subdivision (j), the military judge:

(i) may exclude any evidence not made the subject of a required disclosure; and

(ii) may prohibit the examination by the prosecution of any witness with respect to such information.

(6) *Disclosure at Trial of Previous Statements by a Witness.*

(A) *Motion for Production of Statements in Possession of the Prosecution.* After a witness called by trial counsel has testified on direct examination, the military judge, on motion of the accused, may order production of statements of the witness in the possession of the prosecution that relate to the subject matter as to which the witness has testified. This paragraph does not preclude discovery or assertion of a privilege otherwise authorized.

(B) *Invocation of Privilege by the Government.* If the government invokes a privilege, trial counsel may provide the prior statements of the witness to the military judge for in camera review to the extent necessary to protect classified information from disclosure.

(C) *Action by Military Judge.* If the military judge finds that disclosure of any portion of the statement identified by the government as classified would be detrimental to the national security in the degree required to warrant classification under the applicable Executive Order, statute, or regulation, that such portion of the statement is consistent with the testimony of the witness, and that the disclosure of such portion is not necessary to afford the accused a fair trial, the military judge must excise that portion from the statement. If the military judge finds that such portion of the statement is inconsistent with the testimony of the witness or that its disclosure is necessary to afford the accused a fair trial, the military judge must, upon the request of trial counsel, consider alternatives to disclosure in accordance with subdivision (j)(2).

(k) *Introduction into Evidence of Classified Information.*

(1) *Preservation of Classification Status.* Writings, recordings, and photographs containing classified information may be admitted into evidence in court-martial proceedings under this rule without change in their classification status.

(A) *Precautions.* The military judge in a trial by court-martial, in order to prevent unnecessary disclosure of classified information, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(B) *Classified Information Kept Under Seal.* The military judge must allow classified information offered or accepted into evidence to remain under seal during the trial, even if such evidence is disclosed in the court-martial proceeding, and may upon motion by the government, seal exhibits containing classified information in accordance with R.C.M. 1113 for any period after trial as necessary to prevent a disclosure of classified information when a knowledgeable United States official possessing authority to classify information submits to the military judge a declaration setting forth the damage to the national security that the disclosure of such information reasonably could be expected to cause.

(2) *Testimony.*

(A) *Objection by Trial Counsel.* During the examination of a witness, trial counsel may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) *Action by Military Judge.* Following an objection under subdivision (k), the military judge must take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring trial counsel to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information sought to be elicited by the accused. Upon request, the military judge may accept an ex parte proffer by trial counsel to the extent necessary to protect classified information from disclosure.

(3) *Closed session.* The military judge may, subject to the requirements of the United States Constitution, exclude the public during that portion of the presentation of evidence that discloses classified information.

(l) *Record of Trial.* If under this rule any information is reviewed in camera by the military judge and withheld from the accused, the accused objects to such withholding, and the trial continues to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) or R.C.M. 1113 and attached to the record of trial as an appellate exhibit. Such material will be made available to reviewing and appellate authorities in accordance with R.C.M. 1113. The record of trial with respect to any classified matter will be prepared under R.C.M. 1112(e)(3).

Rule 506. Government information

(a) *Protection of Government Information.* Except where disclosure is required by a federal statute, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

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

(c) *Definitions.* As used in this rule:

(1) "In camera hearing" means a session under Article 39(a) from which the public is excluded.

(2) "In camera review" means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

(3) "Ex parte" means a discussion between the military judge and either defense counsel or prosecution, without the other party or the public present. This discussion can be on or off the

record, depending on the circumstances. The military judge will grant a request for an ex parte discussion or hearing only after finding that such discussion or hearing is necessary to protect government information or other good cause. Prior to granting a request from one party for an ex parte discussion or hearing, the military judge must provide notice to the opposing party on the record. If the ex parte discussion is conducted off the record, the military judge should later state on the record that such ex parte discussion took place and generally summarize the subject matter of the discussion, as appropriate.

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

(e) *Action Prior to Referral of Charges.*

(1) Prior to referral of charges, upon a showing by the accused that the government information sought is relevant and necessary to an element of the offense or a legally cognizable defense, the convening authority must respond in writing to a request by the accused for government information if the privilege in this rule is claimed for such information. In response to such a request, the convening authority may:

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

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

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

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

(E) withhold disclosure if actions under subdivisions (e)(1)(A)-(D) cannot be taken without causing identifiable damage to the public interest.

(2) Any objection by the accused to withholding of information or to the conditions of disclosure must be raised through a motion for appropriate relief at a pretrial conference.

(f) *Action After Referral of Charges.*

(1) *Pretrial Conference.* At any time after referral of charges, any party may move for a pretrial conference under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such a motion, or when the military judge recognizes the need for such conference, the military judge must promptly hold a pretrial conference under Article 39(a).

(2) *Ex Parte Permissible.* Upon request by either party and with a showing of good cause, the military judge must hold such conference ex parte to the extent necessary to protect government information from disclosure.

(3) *Matters to be Established at Pretrial Conference.*

(A) *Timing of Subsequent Actions.* At the pretrial conference, the military judge must establish the timing of:

(i) requests for discovery;

(ii) the provision of notice required by subdivision (i) of this rule; and

(iii) the initiation of the procedure established by subdivision (j) of this rule.

(B) *Other Matters.* At the pretrial conference, the military judge may also consider any matter which relates to government information or which may promote a fair and expeditious trial.

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

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

(B) dismiss the charges;

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

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

(5) *Remedies.* If after a reasonable period of time the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge must dismiss the charges or specifications or both to which the information relates.

(g) *Protective Orders.* Upon motion of trial counsel, the military judge must issue an order to protect against the disclosure of any government information that has been disclosed by the United States to any accused in any court-martial proceeding or that has otherwise been provided to, or obtained by, any such accused in any such court-martial proceeding. The terms of any such protective order may include, but are not limited to, provisions:

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

(2) requiring storage of the material in a manner appropriate for the nature of the material to be disclosed;

(3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

(5) regulating the making and handling of notes taken from material containing government information; or

(6) requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Discovery and Access by the Accused.*

(1) *Limitations.*

(A) *Government Claim of Privilege.* In a court-martial proceeding in which the government seeks to delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any government information subject to a claim of privilege, trial counsel must submit a declaration invoking the United States' government information privilege and setting forth the detriment to the public interest that the discovery of or access to such information reasonably could be expected to cause. The declaration must be signed by a knowledgeable United States official as described in subdivision (d) of this rule.

(B) *Standard for Discovery or Access by the Accused.* Upon the submission of a declaration under subdivision (h)(1)(A), the military judge may not authorize the discovery of or access to such government information unless the military judge determines that such

government information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. If the discovery of or access to such governmental information is authorized, it must be addressed in accordance with the requirements of subdivision (h)(2).

(2) *Alternatives to Full Disclosure.*

(A) *Substitutions and Other Alternatives.* The military judge, in assessing the accused's right to discovery or access government information under subdivision (h), may authorize the government:

(i) to delete or withhold specified items of government information;

(ii) to substitute a summary for government information; or

(iii) to substitute a statement admitting relevant facts that the government information or material would tend to prove, unless the military judge determines that disclosure of the government information itself is necessary to enable the accused to prepare for trial.

(B) *In Camera Review.* The military judge must, upon the request of the prosecution, conduct an in camera review of the prosecution's motion and any materials submitted in support thereof and must not disclose such information to the accused.

(C) *Action by Military Judge.* The military judge must grant the request of trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with subdivision (h)(2)(A), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific government information.

(i) *Disclosure by the Accused.*

(1) *Notification to Trial Counsel and Military Judge.* If an accused reasonably expects to disclose, or to cause the disclosure of, government information subject to a claim of privilege in any manner in connection with any trial or pretrial proceeding involving the prosecution of such accused, the accused must, within the time specified by the military judge or, where no time is specified, prior to arraignment of the accused, notify trial counsel and the military judge in writing.

(2) *Content of Notice.* Such notice must include a brief description of the government information.

(3) *Continuing Duty to Notify.* Whenever the accused learns of additional government information the accused reasonably expects to disclose, or to cause the disclosure of, at any such proceeding, the accused must notify trial counsel and the military judge in writing as soon as possible thereafter and must include a brief description of the government information.

(4) *Limitation on Disclosure by Accused.* The accused may not disclose, or cause the disclosure of, any information known or believed to be subject to a claim of privilege in connection with a trial or pretrial proceeding until:

(A) notice has been given under subdivision (i); and

(B) the government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in subdivision (j).

(5) *Failure to Comply.* If the accused fails to comply with the requirements of subdivision (i), the military judge:

(A) may preclude disclosure of any government information not made the subject of notification; and

(B) may prohibit the examination by the accused of any witness with respect to any such information.

(j) *Procedure for Use of Government Information Subject to a Claim of Privilege in Trials and Pretrial Proceedings.*

(1) *Hearing on Use of Government Information.*

(A) *Motion for Hearing.* Within the time specified by the military judge for the filing of a motion under this rule, either party may move for an in camera hearing concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Upon a request by either party, the military judge must conduct such a hearing and must rule prior to conducting any further proceedings.

(B) *Request for In Camera Hearing.* Any hearing held pursuant to subdivision (j) must be held in camera if a knowledgeable United States official described in subdivision (d) of this rule submits to the military judge a declaration that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(C) *Notice to Accused.* Subject to subdivision (j)(2) below, the prosecution must disclose government information claimed to be privileged under this rule for the limited purpose of litigating, in camera, the admissibility of the information at trial. The military judge must enter an appropriate protective order to the accused and all other appropriate trial participants concerning the disclosure of the information according to subdivision (g), above. The accused may not disclose any information provided under subdivision (j) unless, and until, such information has been admitted into evidence by the military judge. In the in camera hearing, both parties may have the opportunity to brief and argue the admissibility of the government information at trial.

(D) *Standard for Disclosure.* Government information is subject to disclosure at the court-martial proceeding under subdivision (j) if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the court-martial proceeding.

(E) *Written Findings.* As to each item of government information, the military judge must set forth in writing the basis for the determination.

(2) Alternatives to Full Disclosure.

(A) *Motion by the Prosecution.* Upon any determination by the military judge authorizing disclosure of specific government information under the procedures established by subdivision (j), the prosecution may move that, in lieu of the disclosure of such information, the military judge order:

(i) the substitution for such government information of a statement admitting relevant facts that the specific government information would tend to prove;

(ii) the substitution for such government information of a summary of the specific government information; or

(iii) any other procedure or redaction limiting the disclosure of specific government information.

(B) *Hearing.* The military judge must hold a hearing on any motion under subdivision (j). At the request of trial counsel, the military judge will conduct an in camera hearing.

(C) *Standard for Use of Alternatives.* The military judge must grant such a motion of trial counsel if the military judge finds that the statement, summary, or other procedure or redaction will provide the accused with substantially the same ability to make his or her defense as would disclosure of the specific government information.

(3) *Sealing of Records of In Camera Hearings.* If at the close of an in camera hearing under subdivision (j) (or any portion of a hearing under subdivision (j) that is held in camera), the

military judge determines that the government information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing must be sealed in accordance with R.C.M. 1113 and preserved for use in the event of an appeal. The accused may seek reconsideration of the military judge's determination prior to or during trial.

(4) *Remedies.*

(A) If the military judge determines that alternatives to full disclosure may not be used and the prosecution continues to object to disclosure of the information, the military judge must issue any order that the interests of justice require, including but not limited to, an order:

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

(ii) declaring a mistrial;

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

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

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

(B) The government may avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(5) *Disclosure of Rebuttal Information.* Whenever the military judge determines that government information may be disclosed in connection with a trial or pretrial proceeding, the military judge must, unless the interests of fairness do not so require, order the prosecution to provide the accused with the information it expects to use to rebut the government information.

(A) *Continuing Duty.* The military judge may place the prosecution under a continuing duty to disclose such rebuttal information.

(B) *Sanction for Failure to Comply.* If the prosecution fails to comply with its obligation under subdivision (j), the military judge may make such ruling as the interests of justice require, to include:

(i) excluding any evidence not made the subject of a required disclosure; and

(ii) prohibiting the examination by the prosecution of any witness with respect to such information.

(k) *Appeals of Orders and Rulings.* In a court-martial in which a punitive discharge may be adjudged, the government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the United States to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

(l) *Introduction into Evidence of Government Information Subject to a Claim of Privilege.*

(1) *Precautions.* The military judge in a trial by court-martial, in order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, may order admission into evidence of only part of a writing, recording, or photograph or admit into evidence the whole writing, recording, or photograph with excision of some or all of the government information contained therein, unless the whole ought in fairness to be considered.

(2) *Government Information Kept Under Seal.* The military judge must allow government information offered or accepted into evidence to remain under seal during the trial, even if such evidence is disclosed in the court-martial proceeding, and may, upon motion by the prosecution, seal exhibits containing government information in accordance with R.C.M. 1113 for any period after trial as necessary to prevent a disclosure of government information when a knowledgeable United States official described in subdivision (d) submits to the military judge a declaration setting forth the detriment to the public interest that the disclosure of such information reasonably could be expected to cause.

(3) *Testimony.*

(A) *Objection by Trial Counsel.* During examination of a witness, trial counsel may object to any question or line of inquiry that may require the witness to disclose government information not previously found admissible if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule.

(B) *Action by Military Judge.* Following such an objection, the military judge must take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring trial counsel to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information sought to be elicited by the accused. Upon request, the military judge may accept an ex parte proffer by trial counsel to the extent necessary to protect government information from disclosure.

(m) *Record of Trial.* If under this rule any information is reviewed in camera by the military judge and withheld from the accused, the accused objects to such withholding, and the trial continues to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and attached to the record of trial as an appellate exhibit. Such material will be made available to reviewing and appellate authorities in accordance with R.C.M. 1113.

Rule 507. Identity of informants

(a) *General Rule.* The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

(b) *Definitions.* As used in this rule:

(1) "Informant" means a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime.

(2) "In camera review" means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

(c) *Who May Claim the Privilege.* The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege will not be allowed if the prosecution objects.

(d) *Exceptions.*

(1) *Voluntary Disclosures; Informant as a Prosecution Witness.* No privilege exists under this rule:

(A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informants own action; or

(B) if the informant appears as a witness for the prosecution.

(2) *Informant as a Defense Witness.* If a claim of privilege has been made under this rule, the military judge must, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) *Informant as a Witness regarding a Motion to Suppress Evidence.* If a claim of privilege has been made under this rule with respect to a motion under Mil. R. Evid. 311, the military judge must, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the United States Constitution as applied to members of the Armed Forces. In making this determination, the military judge may make any order required by the interests of justice.

(e) *Procedures.*

(1) *In Camera Review.* If the accused has articulated a basis for disclosure under the standards set forth in this rule, the prosecution may ask the military judge to conduct an in camera review of affidavits or other evidence relevant to disclosure.

(3) *Order by the Military Judge.* If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice.

(3) *Action by the Convening Authority.* If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter must be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances.

(4) *Remedies.* If, after a reasonable period of time disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

Rule 508. Political vote

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 509. Deliberations of courts and juries

Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in

trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

Rule 510. Waiver of privilege by voluntary disclosure

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege

(a) *General Rule.*

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

(b) *Use of Communications Media.*

The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary and in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege; instruction

(a) *Comment or Inference not permitted.*

(1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

(b) *Claiming a Privilege Without the Knowledge of the Members.* In a trial before a court-martial with members, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members.

(c) *Instruction.* Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subdivision (a)(2).

Rule 513. Psychotherapist—patient privilege

(a) *General Rule.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or

an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel, defense counsel, or any counsel representing the patient to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R.

Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.

(e) *Procedure to Determine Admissibility of Patient Records or Communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subdivision (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subdivision (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subdivision (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

Rule 514. Victim advocate—victim privilege

(a) *General Rule.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or between the alleged victim and Department of Defense Safe Helpline staff, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim.

(b) *Definitions.* As used in this rule:

(1) "Victim" means any person who is alleged to have suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) "Victim advocate" means a person, other than a prosecutor, trial counsel, any victims' counsel, law enforcement officer, or military criminal investigator in the case, who:

(A) is designated in writing as a victim advocate in accordance with service regulation;

(B) is authorized to perform victim advocate duties in accordance with service regulation and is acting in the performance of those duties; or

(C) is certified as a victim advocate pursuant to federal or state requirements.

(3) "Department of Defense Safe Helpline staff" are persons who are designated by competent authority in writing as Department of Defense Safe Helpline staff.

(4) A communication is "confidential" if made in the course of the victim advocate-victim relationship or Department of Defense Safe Helpline staff-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a victim's records or communications" means testimony of a victim advocate or Department of Defense Safe Helpline staff, or records that pertain to communications by a victim to a victim advocate or Department of Defense Safe Helpline staff, for the purposes of advising or providing assistance to the victim.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a counsel representing the victim to claim the privilege on his or her behalf. The victim advocate or Department of Defense Safe Helpline staff who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, Department of Defense Safe Helpline staff, guardian, conservator, or a counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the victim is dead;

(2) when federal law, state law, Department of Defense regulation, or service regulation imposes a duty to report information contained in a communication;

(3) when a victim advocate or Department of Defense Safe Helpline staff believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) if the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate or Department of Defense Safe Helpline staff are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

(5) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(6) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to Determine Admissibility of Victim Records or Communications.*

(1) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practicable, notify the victim or the victim's guardian, conservator, or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subdivision (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production of disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subdivision (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subdivision (e)(1)(A) of this rule.

(5) To prevent unnecessary disclosure of evidence of a victim's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

SECTION VI
WITNESSES

Rule 601. Competency to testify in general
Every person is competent to be a witness unless these rules provide otherwise.

Rule 602. Need for personal knowledge
A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness' own testimony. This rule does not apply to a witness' expert testimony under Mil. R. Evid. 703.

Rule 603. Oath or affirmation to testify truthfully
Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.

Rule 604. Interpreter
An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Military judge's competency as a witness
(a) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.
(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

Rule 606. Member's competency as a witness
(a) *At the Trial by Court-Martial.* A member of a court-martial may not testify as a witness before the other members at any proceeding of that court-martial. If a member is called to testify, the military judge must give the opposing party an opportunity to object outside the presence of the members.
(b) *During an Inquiry into the Validity of a Finding or Sentence.*
(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a finding or sentence, a member of a court-martial may not testify about any statement made or incident that occurred during the deliberations of that court-martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the finding or sentence. The military judge may not receive a member's affidavit or evidence of a member's statement on these matters.
(2) *Exceptions.* A member may testify about whether:
(A) extraneous prejudicial information was improperly brought to the members' attention;
(B) unlawful command influence or any other outside influence was improperly brought to bear on any member; or

(C) a mistake was made in entering the finding or sentence on the finding or sentence forms.

Rule 607. Who may impeach a witness

Any party, including the party that called the witness, may attack the witness' credibility.

Rule 608. A witness' character for truthfulness or untruthfulness

(a) *Reputation or Opinion Evidence.* A witness' credibility may be attacked or supported by testimony about the witness' reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. Evidence of truthful character is admissible only after the witness' character for truthfulness has been attacked.

(b) *Specific Instances of Conduct.* Except for a criminal conviction under Mil. R. Evid. 609, extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness. The military judge may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness' character for truthfulness.

(c) *Evidence of Bias.* Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Rule 609. Impeachment by evidence of a criminal conviction or finding of guilty by summary court-martial

(a) *In General.* The following rules apply to attacking a witness' character for truthfulness by evidence of a criminal conviction or finding of guilty by summary court-martial.

(1) For an offense that, in the convicting jurisdiction, was punishable by death, dishonorable discharge, or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Mil. R. Evid. 403, in a court-martial in which the witness is not the accused; and

(B) must be admitted in a court-martial in which the witness is the accused, if the probative value of the evidence outweighs its prejudicial effect to that accused; and

(2) For any offense regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness' admitting – a dishonest act or false statement.

(3) In determining whether an offense tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) *Limit on Using the Evidence After 10 Years.* Subdivision (b) applies if more than 10 years have passed since the witness' conviction or finding of guilty by summary court-martial or release from confinement for it, whichever is later. Evidence of the conviction or finding of guilty by summary court-martial is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) *Effect of a Pardon, Annulment, or Certificate of Rehabilitation.* Evidence of a conviction or finding of guilty by summary court-martial is not admissible if:

(1) the conviction or finding of guilty by summary court-martial has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death, dishonorable discharge, or imprisonment for more than one year; or

(2) the conviction or finding of guilty by summary court-martial has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile Adjudications.* Evidence of a juvenile adjudication is admissible under this rule only if:

(1) the adjudication was of a witness other than the accused;

(2) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(3) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) *Limit on use of a finding of guilty by summary court-martial.* A finding of guilty by summary court-martial may not be used for purposes of impeachment unless the accused at the summary court-martial proceeding was represented by military or civilian defense counsel.

(f) *Pendency of an Appeal.* A conviction that satisfies this rule is admissible even if an appeal is pending, except that a finding of guilty by summary court-martial may not be used for purposes of impeachment until review has been completed under Article 64. Evidence of the pendency is also admissible.

(g) *Definition.* For purposes of this rule, there is a conviction in a general or special court-martial when a sentence has been adjudged.

Rule 610. Religious beliefs or opinions

Evidence of a witness' religious beliefs or opinions is not admissible to attack or support the witness' credibility.

Rule 611. Mode and order of examining witnesses and presenting evidence

(a) *Control by the Military Judge; Purposes.*

The military judge should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of Cross-Examination.* Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility. The military judge may allow inquiry into additional matters as if on direct examination.

(c) *Leading Questions.* Leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, the military judge should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness or a witness identified with an adverse party.

(d) *Remote live testimony of a child.*

(1) In a case involving domestic violence or the abuse of a child, the military judge must, subject to the requirements of subdivision (d)(3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) *Definitions.*

As used in this rule:

(A) "Child" means a person who is under the age of 16 at the time of his or her testimony.

(B) "Abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.

(C) "Exploitation" means child pornography or child prostitution.

(D) "Negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child.

(E) "Domestic violence" means an offense that has as an element the use, or attempted or threatened use of physical force against a person by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

(3) Remote live testimony will be used only where the military judge makes the following three findings on the record:

(A) that it is necessary to protect the welfare of the particular child witness;

(B) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the accused; and

(C) that the emotional distress suffered by the child witness in the presence of the accused is more than *de minimis*.

(4) Remote live testimony of a child will not be used when the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(d).

(5) In making a determination under subdivision (d)(3), the military judge may question the child in chambers, or at some comfortable place other than the courtroom, on the record for a reasonable period of time, in the presence of the child, a representative of the prosecution, a representative of the defense, and the child's attorney or guardian ad litem.

Rule 612. Writing used to refresh a witness' memory

(a) *Scope.* This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the military judge decides that justice requires the party to have those options.

(b) *Adverse Party's Options; Deleting Unrelated Matter.* An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness' testimony. If the producing party claims that the writing includes unrelated or privileged matter, the military judge must examine the writing in camera, delete any unrelated or privileged portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) *Failure to Produce or Deliver the Writing.* If a writing is not produced or is not delivered as ordered, the military judge may issue any appropriate order. If the prosecution does not comply, the military judge must strike the witness' testimony or - if justice so requires - declare a mistrial.
(d) *No Effect on Other Disclosure Requirements.* This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

Rule 613. Witness' prior statement
(a) *Showing or Disclosing the Statement During Examination.* When examining a witness about the witness' prior statement, a party need not show it or disclose its contents to the witness. The party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) *Extrinsic Evidence of a Prior Inconsistent Statement.* Extrinsic evidence of a witness' prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. Subdivision (b) does not apply to an opposing party's statement under Mil R. Evid. 801(d)(2).

Rule 614. Court-martial's calling or examining a witness
(a) *Calling.* The military judge may—sua sponte or at the request of the members or the suggestion of a party—call a witness. Each party is entitled to cross-examine the witness. When the members wish to call or recall a witness, the military judge must determine whether the testimony would be relevant and not barred by any rule or provision of this Manual.
(b) *Examining.* The military judge or members may examine a witness regardless of who calls the witness. Members must submit their questions to the military judge in writing. Following the opportunity for review by both parties, the military judge must rule on the propriety of the questions, and ask the questions in an acceptable form on behalf of the members. When the military judge or the members call a witness who has not previously testified, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.
(c) *Objections.* Objections to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

Rule 615. Excluding witnesses
At a party's request, the military judge must order witnesses excluded so that they cannot hear other witnesses' testimony, or the military judge may do so *sua sponte*. This rule does not authorize excluding:
(a) the accused;
(b) a member of an Armed service or an employee of the United States after being designated as a representative of the United States by trial counsel;
(c) a person whose presence a party shows to be essential to presenting the party's case;
(d) a person authorized by statute to be present; or
(e) a victim of an offense from the trial of an accused for that offense, unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding.

SECTION VII
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses
If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness' perception;
(b) helpful to clearly understanding the witness' testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Mil. R. Evid. 702.

Rule 702. Testimony by expert witnesses
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an expert's opinion testimony
An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the members of a court-martial only if the military judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an ultimate issue
An opinion is not objectionable just because it embraces an ultimate issue.

Rule 705. Disclosing the facts or data underlying an expert's opinion
Unless the military judge orders otherwise, an expert may state an opinion - and give the reasons for it - without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination.

Rule 706. Court-appointed expert witnesses
(a) *Appointment Process.* Trial counsel, defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Article 46 and R.C.M. 703.
(b) *Compensation.* The compensation of expert witnesses is governed by R.C.M. 703.
(c) *Accused's Choice of Experts.* This rule does not limit an accused in calling any expert at the accused's own expense.

Rule 707. Polygraph examinations
(a) *Prohibitions.* Notwithstanding any other provision of law, the result of a polygraph examination, the polygraph examiner's opinion, or any reference to an offer to take, failure to take, or taking of a polygraph examination is not admissible.

(b) *Statements Made During a Polygraph Examination.* This rule does not prohibit admission of an otherwise admissible statement made during a polygraph examination.

SECTION VIII
HEARSAY

Rule 801. Definitions that apply to this section; exclusions from hearsay

(a) *Statement.* "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) *Declarant.* "Declarant" means the person who made the statement.

(c) *Hearsay.* "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) *Statements that Are Not Hearsay.* A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness' Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's co-conspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802. The rule against hearsay

Hearsay is not admissible unless any of the following provides otherwise:

(a) a federal statute applicable in trial by courts-martial; or

(b) these rules.

Rule 803. Exceptions to the rule against hearsay - regardless of whether the declarant is available as a witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that—

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that—

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness' knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a uniformed service, business, institution, association, profession, organization, occupation, or calling of any kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Mil. R. Evid. 902(11) or with a statute permitting certification in a criminal proceeding in a court of the United States; and

(E) the opponent does not show that the source of information or the method or circumstance of preparation indicate a lack of trustworthiness. Records of regularly conducted activities include, but are not limited to, enlistment papers, physical examination papers, fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including a matter observed by law-enforcement personnel and other personnel acting in a law enforcement capacity; or

(iii) against the government, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness. Notwithstanding subdivision (8)(A)(ii), the following are admissible as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, court-martial conviction records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.*
Testimony - or a certification under Rule 902 - that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) a counsel for the government who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the accused does not object in writing within 7 days of receiving the notice - unless the military judge sets a different time for the notice or the objection.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents that Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents that Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists (including government price lists), directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage - or among a person's associates or in the community - concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history, age, ancestry, or other similar fact of the person's personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community - arising before the controversy - concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, State, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death, dishonorable discharge, or imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecution for a purpose other than impeachment, the judgment was against the accused.

The pendency of an appeal may be shown but does not affect admissibility. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or

imprisonment for more than one year, the maximum punishment prescribed by the President under Article 56 of the Uniform of Military Justice at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

Rule 804. Exceptions to the rule against hearsay – when the declarant is unavailable as a witness

(a) *Criteria for Being Unavailable.* A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the military judge rules that a privilege applies;

(2) refuses to testify about the subject matter despite the military judge's order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under subdivision (b)(1) or (b)(5);

(B) the declarant's attendance or testimony, in the case of a hearsay exception under subdivision (b)(2), (b)(3), or (b)(4); or

(6) has previously been deposed about the subject matter and is absent due to military necessity, age, imprisonment, non-amenability to process, or other reasonable cause.

Subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) *The Exceptions.* The following are exceptions to the rule against hearsay, and are not excluded by that rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given by a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Subject to the limitations in Articles 49 and 50, a record of testimony given before a court-martial, court of inquiry, military commission, other military tribunal, or preliminary hearing under Article 32 is admissible under subdivision (b)(1) if the record of the testimony is a verbatim record.

(2) *Statement under the Belief of Imminent Death.* In a prosecution for any offense resulting in the death of the alleged victim, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it tends to expose the declarant to criminal liability and is offered to exculpate the accused.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate

(5) *Other Exceptions.* [Transferred to Mil.R.Evid. 807]

(6) *Statement Offered against a Party that Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result.

Rule 805. Hearsay within hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception or exclusion to the rule.

Rule 806. Attacking and supporting the declarant's credibility

When a hearsay statement - or a statement described in Mil. R. Evid. 801(d)(2)(C), (D), or (E) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The military judge may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Rule 807. Residual exception

(a) *In General.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Mil. R. Evid. 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

SECTION IX
AUTHENTICATION AND IDENTIFICATION

Rule 901. Authenticating or identifying evidence

(a) *In General.* To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) *Examples.* The following are examples only - not a complete list - of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion about Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion about a Voice.* An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence about a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence about Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence about Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence about a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by a federal statute, a rule prescribed by the Supreme Court, or an applicable regulation prescribed pursuant to statutory authority.

Rule 902. Evidence that is self-authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic Public Documents that are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any State, district, Commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents that are Not Sealed but are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in subdivision (1)(A) above; and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester - or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the military judge may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record - or a copy of a document that was recorded or filed in a public office as authorized by law - if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with subdivision (1), (2), or (3) above, a federal statute, a rule prescribed by the Supreme Court, or an applicable regulation prescribed pursuant to statutory authority.

(4a) *Documents or Records of the United States Accompanied by Attesting Certificates.* Documents or records kept under the authority of the United States by any department, bureau, agency, office, or court thereof when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions under a Federal Statute or Regulation.* A signature, document, or anything else that a federal statute, or an applicable regulation prescribed pursuant to statutory authority, declares to be presumptively or prima facie genuine or authentic.
(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Mil. R. Evid. 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, or at a later time that the military judge allows for good cause, the proponent must give an adverse party reasonable written notice of the intent to offer the record and must make the record and certification available for inspection so that the party has a fair opportunity to challenge them.

Rule 903. Subscribing witness' testimony
A subscribing witness' testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

SECTION X
CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions that apply to this section
In this section:
(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.
(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.
(c) A "photograph" means a photographic image or its equivalent stored in any form.
(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout or other output readable by sight if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.
(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002. Requirement of the original
An original writing, recording, or photograph is required in order to prove its content unless these rules, this Manual, or a federal statute provides otherwise.

Rule 1003. Admissibility of duplicates
A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Rule 1004. Admissibility of other evidence of content
An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
(a) *Originals lost or destroyed.* All the originals are lost or destroyed, and not by the proponent acting in bad faith;
(b) *Original not obtainable.* An original cannot be obtained by any available judicial process;

(c) *Original in possession of opponent.* The party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
(d) *Collateral matters.* The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Copies of public records to prove content
The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Mil. R. Evid. 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 1006. Summaries to prove content
The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. The military judge may order the proponent to produce them in court.

Rule 1007. Testimony or statement of a party to prove content
The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Rule 1008. Functions of the military judge and the members
Ordinarily, the military judge determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Mil. R. Evid. 1004 or 1005. When a court-martial is composed of a military judge and members, the members determine - in accordance with Mil. R. Evid. 104(b) - any issue about whether:
(a) an asserted writing, recording, or photograph ever existed;
(b) another one produced at the trial or hearing is the original; or
(c) other evidence of content accurately reflects the content.

SECTION XI
MISCELLANEOUS RULES

Rule 1101. Applicability of these rules
(a) *In General.* Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial, Article 39(a) sessions, Article 30a proceedings, remands, proceedings in revision, and contempt proceedings other than contempt proceedings in which the judge may act summarily.

(b) *Rules Relaxed.* The application of these rules may be relaxed in presentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.
(c) *Rules on Privilege.* The rules on privilege apply at all stages of a case or proceeding.
(d) *Exceptions.* Unless otherwise provided for in this Manual, these rules—except for Mil. R. Evid. 412 and those on privilege—do not apply to the following:

(1) the military judge's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) preliminary hearings under Article 32;

(3) proceedings for vacation of suspension of sentence under Article 72; and

(4) miscellaneous actions and proceedings related to search authorizations, pretrial restraint, pretrial confinement, or other proceedings authorized under the Uniform Code of Military Justice or this Manual that are not listed in subdivision (a).

Rule 1102. Amendments
(a) *General Rule.* Amendments to the Federal Rules of Evidence—other than Articles III and V—will amend parallel provisions of the Military Rules of Evidence by operation of law 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.
(b) *Rules Determined Not to Apply.* The President has determined that the following Federal Rules of Evidence do not apply to the Military Rules of Evidence: Rules 301, 302, 415, and 902(12).

Rule 1103. Title
These rules may be cited as the Military Rules of Evidence.

Sec. 4. Part IV of the Manual for Courts-Martial, United States is amended to read as follows:

PUNITIVE ARTICLES

(Statutory text of each Article is in bold)

1. Article 77 (10 U.S.C. 877)—Principals

a. *Text of statute.*

Any person punishable under this chapter who—

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

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

is a principal.

b. *Explanation.*

(1) *Purpose.* Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly would be an offense, is equally guilty of the offense as one who commits it directly, and may be punished to the same extent.

Article 77 eliminates the common law distinctions between principal in the first degree ("perpetrator"); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime—commonly known as an "aider and abettor"); and accessory before the fact (one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime). All of these are now "principals."

(2) *Who may be liable for an offense.*

(a) *Perpetrator.* A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a soldier shot a person who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).

(b) *Other Parties.* If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose or design.

One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. See the parentheticals in the examples in subparagraph 1.b.(2)(a) of this paragraph. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) *Presence.*

(a) *Not necessary.* Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal. For example, one who, knowing that a person intends to shoot another person and intending that such an assault be carried out, provides the person with a pistol, is guilty of assault when the offense is committed, even though not present at the scene.

(b) *Not sufficient.* Mere presence at the scene of a crime does not make one a principal unless the requirements of subparagraph 1.b.(2)(a) or (b) have been met.

(4) *Parties whose intent differs from the perpetrator's.* When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an "other party" to crime. It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator. For example, when a homicide is committed, the perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer.

(5) *Responsibility for other crimes.* A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of murder. (See also paragraph 5, Conspiracy, concerning liability for offenses committed by co-conspirators.)

(6) *Principals independently liable.* One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) *Withdrawal.* A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

(c) The withdrawal must be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense.

2. Article 78 (10 U.S.C. 878)—Accessory after the fact

a. *Text of statute.*

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

b. *Elements.*

(1) That an offense punishable by the UCMJ was committed by a certain person;

(2) That the accused knew that this person had committed such offense;

(3) That thereafter the accused received, comforted, or assisted the offender; and

(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. *Explanation.*

(1) *In general.* The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

(2) *Failure to report offense.* The mere failure to report a known offense will not make one an accessory after the fact. Such failure may violate a general order or regulation, however, and thus constitute an offense under Article 92. *See* paragraph 18. If the offense involved is a serious offense, and the accused does anything to conceal it, failure to report it may constitute the offense of misprision of a serious offense, under Article 131c. *See* paragraph 84.

(3) *Offense punishable by the UCMJ.* The term "offense punishable by this chapter" in the text of the article means any offense described in the UCMJ.

(4) *Status of principal.* The principal who committed the offense in question need not be subject to the UCMJ, but the offense committed must be punishable by the UCMJ.

(5) *Conviction or acquittal of principal.* The prosecution must prove that a principal committed the offense to which the accused is allegedly an accessory after the fact. However, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted as an accessory after the fact despite the acquittal in a separate trial of the principal whom the accused allegedly comforted, received, or assisted.

(6) *Accessory after the fact not a lesser included offense.* The offense of being an accessory after the fact is not a lesser included offense of the primary offense.

(7) *Actual knowledge.* Actual knowledge is required but may be proved by circumstantial evidence.

d. *Maximum punishment.* Any person subject to the UCMJ who is found guilty as an accessory after the fact to an offense punishable under the UCMJ shall be subject to the maximum punishment authorized for the principal offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

e. *Sample specification.*

In that _____ (personal jurisdiction data), knowing that (at/on board—location), on or about _____ 20 __, had committed an offense punishable by the Uniform Code of Military Justice, to wit: _____, did, (at/on board—location) (subject-matter jurisdiction data, if

required), on or about _____ 20 __, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said _____, (receive) (comfort) (assist) the said _____ by _____.

3. Article 79 (10 U.S.C. 879)—Conviction of offense charged, lesser included offenses, and attempts

a. *Text of statute.*

(a) IN GENERAL.—An accused may be found guilty of any of the following:

(1) The offense charged.

(2) A lesser included offense.

(3) An attempt to commit the offense charged.

(4) An attempt to commit a lesser included offense, if the attempt is an offense in its own right.

(b) LESSER INCLUDED OFFENSE DEFINED.—In this section (article), the term "lesser included offense" means—

(1) an offense that is necessarily included in the offense charged; and

(2) any lesser included offense so designated by regulation prescribed by the President.

(c) REGULATORY AUTHORITY.—Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense.

b. *Explanation.*

(1) *In general.* Article 79 contains two provisions concerning notice of lesser included offenses: (1) offenses that are "necessarily included" in the charged offense in accordance with Article 79(b)(1); and (2) offenses designated as lesser included offenses by the President under Article 79(b)(2). Each provision sets forth an independent basis for providing notice of a lesser included offense.

(2) "*Necessarily included*" *offenses.* Under Article 79(b)(1), an offense is "necessarily included" in a charged offense when the elements of the lesser offense are a subset of the elements of the charged offense, thereby putting the accused on notice to be prepared to defend against the lesser offense in addition to the offense specifically charged. A lesser offense is "necessarily included" when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, wrongful appropriation as a lesser included offense of larceny);

(b) All of the elements of the lesser offense are included in the greater offense, but at least one element is a subset by being legally less serious (for example, unlawful entry as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are "included and necessary" parts of the greater offense, but the mental element is a subset by being legally less serious (for example, voluntary manslaughter as a lesser included offense of premeditated murder).

(3) *Offenses designated by the President.* Under Article 79(b)(2), Congress has authorized the President to designate lesser included offenses by regulation.

(a) The President may designate an offense as a lesser included offense under Article 79(b)(2), subject to the requirement in Article 79(c) that the designated lesser included offense "shall be reasonably included in the greater offense."

(b) Appendix 12A sets forth the list of lesser included offenses designated by the President under Article 79(b)(2).

(c) The President may include a "necessarily included offense" in the list of offenses prescribed under Article 79(b)(2), but is not required to do so. A court may identify an offense as a "necessarily included" offense under Article 79(b)(1) regardless of whether the offense has been designated under Article 79(b)(2).

(4) *Sua sponte duty.* A military judge must instruct panel members on lesser included offenses reasonably raised by the evidence.

(5) *Multiple lesser included offenses.* When the offense charged is a compound offense comprising two or more lesser included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged.

(6) *Findings of guilty to a lesser included offense.* A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word "murder" substituting therefor the words "willfully and unlawfully kill," of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

4. Article 80 (10 U.S.C. 880)—Attempts

a. *Text of statute.*

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

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

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

b. *Elements.*

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the UCMJ;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. *Explanation.*

(1) *In general.* To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) *More than preparation.* Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt

to commit arson to apply a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) *Factual impossibility.* A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) *Voluntary abandonment.* It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.

(5) *Solicitation.* Soliciting another to commit an offense does not constitute an attempt. See paragraph 6 for a discussion of Article 82, Solicitation.

(6) *Attempts not under Article 80.* While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

(a) Article 85—Desertion
(b) Article 94—Mutiny or sedition
(c) Article 100—Subordinate compelling surrender
(d) Article 103a—Espionage
(e) Article 103b—Aiding the enemy
(f) Article 119a—Death or injury of an unborn child
(g) Article 128—Assault

(7) *Regulations.* An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (*see* paragraph 18) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. *Maximum punishment.* Any person subject to the UCMJ who is found guilty of an attempt under Article 80 to commit any offense punishable by the UCMJ shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged. Except in the cases of attempts of rape and sexual assault under Article 120(a) or (b), and rape and sexual assault of a child under Article 120b(a) or (b), mandatory minimum punishment provisions shall not apply.

e. *Sample specification.*
In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

5. Article 81 (10 U.S.C. 881)—Conspiracy
a. *Text of statute.*

(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

b. *Elements.*
(1) *Conspiracy.*
(a) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and
(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.
(2) *Conspiracy when offense is an offense under the law of war resulting in the death of one or more victims.*
(a) That the accused entered into an agreement with one or more persons to commit an offense under the law of war;
(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused knowingly performed an overt act for the purpose of bringing about the object of the conspiracy; and
(c) That death resulted to one or more victims.
c. *Explanation.*
(1) *Co-conspirators.* Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the UCMJ, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.
(2) *Agreement.* The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties.

The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

(3) *Object of the agreement.* The object of the agreement must, at least in part, involve the commission of one or more offenses under the UCMJ. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, extramarital sexual conduct, and bribery.

(4) *Overt act.*

(a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

(b) The overt act need not be in itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

(c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) *Liability for offenses.* Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.

(6) *Withdrawal.* A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. A conspirator who effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the abandonment or withdrawal. However, a person who has abandoned or withdrawn from the conspiracy is not liable for offenses committed thereafter by the remaining conspirators. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) *Factual impossibility.* It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, or that the conspirators were not physically able to accomplish their intended object.

(8) *Conspiracy as a separate offense.* A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

(9) *Special conspiracies under Article 134.* The United States Code prohibits conspiracies to commit certain specific offenses which do not require an overt act. These conspiracies should be charged under Article 134. Examples include conspiracies to impede or injure any federal officer

in the discharge of duties under 18 U.S.C. § 372, conspiracies against civil rights under 18 U.S.C. § 241, and certain drug conspiracies under 21 U.S.C. § 846. *See* subparagraph 91.c.(4)(a)(1)(iii).

d. *Maximum punishment.*

(1) *Offenses under the UCMJ.* Any person subject to the UCMJ who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense that is the object of the conspiracy, except that in no case shall the death penalty be imposed, subject to subparagraph d.(2) of this paragraph.

(2) *Offenses under the law of war resulting in the death of one or more victims.* Any person subject to the UCMJ who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

e. *Sample specification*

(1) *Conspiracy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, conspire with _____ (and_____) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of _____, of a value of (about) $____, the property of _____), and in order to effect the object of the conspiracy the said _____ (and _____) did _____.

(2) *Conspiracy when an offense is an offense under the law of war resulting in the death of one or more victims.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, conspire with _____ (and_____) to commit an offense under the law of war, to wit: (murder of _____), and in order to effect the object of the conspiracy the said _____ knowingly did _____ resulting in the death of _____.

6. Article 82 (10 U.S.C. 882)—Soliciting commission of offenses

a. *Text of statute.*

(a) SOLICITING COMMISSION OF OFFENSES GENERALLY.—Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct.

(b) SOLICITING DESERTION, MUTINY, SEDITION, OR MISBEHAVIOR BEFORE THE ENEMY.—Any person subject to this chapter who solicits or advises another to violate section 885 of this title (article 85), section 894 of this title (article 94), or section 899 of this title (article 99)—

(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and

(2) if the offense solicited or advised is not attempted or committed, shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused solicited or advised a certain person or persons to commit a certain offense under the UCMJ; and

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

[Note: If the offense solicited or advised was attempted or committed, add the following element]

(3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

c. *Explanation.*

(1) *Instantaneous offense.* The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit any offense under the UCMJ. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(2) *Form of solicitation.* Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit any offense under the UCMJ may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) *Solicitations as an element in another offense.* Some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Article 82. When the accused's act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense—for example, pandering and obstructing justice.

d. *Maximum punishment.*

(1) *Solicitation of espionage.* Such punishment that a court-martial may direct, other than death.

(2) *Solicitation of desertion; mutiny or sedition; misbehavior before the enemy.* If the offense solicited or advised is committed or attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or attempted, then the following punishment may be imposed: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years, or the maximum punishment of the underlying offense, whichever is lesser.

(3) *Solicitation of all other offenses.* Any person subject to the UCMJ who is found guilty of soliciting or advising another person to commit an offense not specified in Article 82(b) that, if committed by one subject to the UCMJ, would be punishable under the UCMJ, shall be subject to the following maximum punishment: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years, or the maximum punishment of the underlying offense, whichever is lesser.

e. *Sample specifications.*

(1) *For soliciting another to commit an offense.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (solicit) (advise) _____ (to disobey a general regulation, to wit: _____) (to steal _____, of a value of (about) $_____, the property of _____) (to _____), by_____.

(2) *For soliciting desertion (Article 85) or mutiny (Article 94(a)).*

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 __, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) _____ (and _____) to (desert in violation of Article 85) (mutiny in violation of Article 94(a)) [*and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, 20 __, (at/on board—location), (attempted) (committed) by _____ (and _____)].

[*Note: This language should be added to the end of the specification if the offense solicited or advised is actually committed.]

(3) *For soliciting sedition (Article 94(a)) or misbehavior before or in the presence of the enemy (Article 99).*

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____ 20 __, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) _____ (and _____) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94(a)) [*and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____ 20 __, (at/on board—location), committed by _____ (and _____)].

[*Note: This language should be added to the end of the specification if the offense solicited or advised is actually committed.]

7. Article 83 (10 U.S.C. 883)—Malingering

a. *Text of statute.*

Any person subject to this chapter who, with the intent to avoid work, duty, or service—

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

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service;

(2) That the accused feigned illness, physical disablement, mental lapse, mental derangement, or intentionally inflicted injury upon himself or herself; and

(3) That the accused's purpose or intent in doing so was to avoid the work, duty, or service.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(4) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. *Explanation.*

(1) *Nature of offense.* The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt. The seriousness of a sham physical or mental disability is also not material on the question of guilt. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

(2) *How injury inflicted.* The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission which produces, prolongs, or aggravates any sickness or disability. Thus, voluntary starvation which results in debility is a self-inflicted injury and when done for the purpose of avoiding work, duty, or service constitutes a violation of this article.

d. *Maximum punishment.*

(1) *Feigning illness, physical disablement, mental lapse, or mental derangement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Feigning illness, physical disablement, mental lapse, or mental derangement in a hostile fire pay zone or in time of war.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) *Intentional self-inflicted injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) *Intentional self-inflicted injury in a hostile fire pay zone or in time of war.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (in a hostile fire pay zone) (subject-matter jurisdiction data, if required) (on or about _____ 20 __) (from about _____ 20 __ to about _____ 20 __), (a time of war) for the purpose of avoiding ((his) (her) duty as officer of the day) ((his) (her) duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person) (_____) (feign (a headache) (a sore back) (illness) (mental lapse) (mental derangement) (__)) (intentionally injure himself/herself by _____).

8. Article 84 (10 U.S.C. 884)—Breach of medical quarantine

a. *Text of statute.*

Any person subject to this chapter—

(1) who is ordered into medical quarantine by a person authorized to issue such order; and

(2) who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority; shall be punished as a court-martial may direct.

b. *Elements.*

(1) That a certain person ordered the accused into medical quarantine;

(2) That the person was authorized to order the accused into medical quarantine;

(3) That the accused knew of this medical quarantine and the limits thereof; and

(4) That the accused went beyond the limits of the medical quarantine before being released therefrom by proper authority.

[Note: If the offense involved violation of a medical quarantine imposed in response to emergence of a "quarantinable communicable disease" as defined in 42 C.F.R. § 70.1, add the following element]

(5) That the medical quarantine was imposed in reference to a quarantinable communicable disease (to wit:_____) as defined in 42 C.F.R. § 70.1.

c. *Explanation.*

(1) *Distinguishing "quarantine" from "quarters" orders.* Putting a person "on quarters" or other otherwise excusing a person from duty because of illness does not of itself constitute a medical quarantine.

d. *Maximum punishment.*

(1) *Breach of medical quarantine involving a quarantinable communicable disease defined by 42 C.F.R. § 70.1.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Breach of medical quarantine—all other cases.* Bad-conduct discharge, forfeiture of two-thirds pay per month for 6 months, and confinement for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data) having been placed in medical quarantine by a person authorized to order the accused into medical quarantine (for a quarantinable communicable disease as defined in 42 C.F.R. § 70.1, to wit: _____), having knowledge of the quarantine and the limits of the quarantine, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, break said medical quarantine.

9. Article 85 (10 U.S.C. 885)—Desertion

a. *Text of statute.*

(a) Any member of the armed forces who—

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

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

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

is guilty of desertion.

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

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

b. *Elements.*

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

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty;

(b) That such absence was without authority;

(c) That the accused, at the time the absence began or at some time during the absence, intended to remain away from his or her unit, organization, or place of duty permanently; and

(d) That the accused remained absent until the date alleged.

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

(e) That the accused's absence was terminated by apprehension.

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

(a) That the accused quit his or her unit, organization, or other place of duty;

(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;

(c) That the duty to be performed was hazardous or the service important;

(d) That the accused knew that he or she would be required for such duty or service; and

(e) That the accused remained absent until the date alleged.

(3) *Desertion before notice of acceptance of resignation.*

(a) That the accused was a commissioned officer of an armed force of the United States, and had tendered his or her resignation;

(b) That before he or she received notice of the acceptance of the resignation, the accused quit his or her post or proper duties;

(c) That the accused did so with the intent to remain away permanently from his or her post or proper duties; and

(d) That the accused remained absent until the date alleged.

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

(e) That the accused's absence was terminated by apprehension.

(4) *Attempted desertion.*

(a) That the accused did a certain overt act;

(b) That the act was done with the specific intent to desert;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of desertion.

c. *Explanation.*

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

(a) *In general.* Desertion with intent to remain away permanently is complete when the person absents himself or herself without authority from his or her unit, organization, or place of duty, with the intent to remain away therefrom permanently. A prompt repentance and return, while material in extenuation, is no defense. It is not necessary that the person be absent entirely from military jurisdiction and control.

(b) *Absence without authority*—inception, duration, termination. *See* subparagraph 10.c.

(c) *Intent to remain away permanently.*

(i) The intent to remain away permanently from the unit, organization, or place of duty may be formed any time during the unauthorized absence. The intent need not exist throughout the absence, or for any particular period of time, as long as it exists at some time during the absence.

(ii) The accused must have intended to remain away permanently from the unit, organization, or place of duty. When the accused had such an intent, it is no defense that the accused also intended to report for duty elsewhere, or to enlist or accept an appointment in the same or a different armed force.

(iii) The intent to remain away permanently may be proved by circumstantial evidence. Among the circumstances from which an inference may be drawn that an accused intended to remain absent permanently are: that the period of absence was lengthy; that the accused attempted to, or did, dispose of uniforms or other military property; that the accused purchased a ticket for a distant point or was arrested, apprehended, or surrendered a considerable distance from the accused's station; that the accused could have conveniently surrendered to military control but did not; that the accused was dissatisfied with the accused's unit, ship, or with military service; that the accused made remarks indicating an intention to desert; that the accused was under charges or had escaped from confinement at the time of the absence; that the accused made preparations indicative of an intent not to return (for example, financial arrangements); or that the accused enlisted or accepted an appointment in the same or another armed force without disclosing the fact that the accused had not been regularly separated, or entered any foreign armed service without being authorized by the United States. On the other hand, the following are included in the circumstances which may tend to negate an inference that the accused intended to remain away permanently: previous long and excellent service; that the accused left valuable personal property in the unit or on the ship; or that the accused was under the influence of alcohol or drugs during the absence. These lists are illustrative only.

(iv) Entries on documents, such as personnel accountability records, which administratively refer to an accused as a "deserter" are not evidence of intent to desert.

(v) Proof of, or a plea of guilty to, an unauthorized absence, even of extended duration, does not, without more, prove guilt of desertion.

(d) *Effect of enlistment or appointment in the same or a different armed force.* Article 85(a)(3) does not state a separate offense. Rather, it is a rule of evidence by which the prosecution may prove intent to remain away permanently. Proof of an enlistment or acceptance of an appointment in a Service without disclosing a preexisting duty status in the same or a different service provides the basis from which an inference of intent to permanently remain away from the earlier unit, organization, or place of duty may be drawn. Furthermore, if a person, without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another armed force, the person's presence in the military service under such an enlistment or appointment is not a return to military control and does not terminate any desertion or absence without authority from the earlier unit or organization, unless the facts of the earlier period of service are known to military authorities. If a person, while in desertion, enlists or accepts an appointment in the same or another armed force, and deserts while serving the enlistment or appointment, the person may be tried and convicted for each desertion.

(2) *Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.*

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

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

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

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

(4) *Prisoner with executed punitive discharge.* A prisoner whose dismissal or dishonorable or bad-conduct discharge has been executed is not a "member of the armed forces" within the meaning of Articles 85 or 86, although the prisoner may still be subject to military law under Article 2(a)(7). If the facts warrant, such a prisoner could be charged with escape from confinement under Article 87a or an offense under Article 134.

d. *Maximum punishment.*

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

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

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

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

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

e. *Sample specifications.*

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

In that _____ (personal jurisdiction data), did, on or about _____ 20 __, (a time of war) without authority and with intent to remain away therefrom permanently, absent himself/herself from (his) (her) (unit) (organization) (place of duty), to wit: _____, located at (_____), and did remain so absent in desertion until ((he) (she) was apprehended) on or about _____ 20 __.

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

In that _____ (personal jurisdiction data), knowing that (he) (she) would be required to perform (hazardous duty) (important service), namely: _____, did, on or about _____ 20 __, (a time of war) with intent to (avoid said hazardous duty) (shirk said important service), quit (his) (her) (unit) (organization) (place of duty), to wit: _____, located at (_____), and did remain so absent in desertion until on or about _____ 20 __.

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

In that _____ (personal jurisdiction data) having tendered (his) (her) resignation and prior to due notice of the acceptance of the same, did, on or about _____ 20 __, (a time of war) without leave and with intent to remain away therefrom permanently, quit (his) (her) (post) (proper duties), to wit: _____, and did remain so absent in desertion until ((he) (she) was apprehended) on or about _____ 20 __.

(4) *Attempted desertion.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20 __, (a time of war) attempt to (absent himself/herself from (his) (her) (unit) (organization) (place of duty) to wit: _____, without authority and with intent to remain away therefrom permanently) (quit (his) (her) (unit) (organization) (place of duty), to wit: _____, located at _____, with intent to (avoid hazardous duty) (shirk important service) namely _____) (_____).

10. Article 86 (10 U.S.C. 886)—Absence without leave

a. *Text of statute.*

Any member of the armed forces who, without authority—

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

(2) goes from that place; or

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

shall be punished as a court-martial may direct.

b. *Elements.*

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) That the absence was terminated by apprehension.

(4) *Abandoning watch or guard.*

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

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

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

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

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

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

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

(b) That the absence of the accused was without authority;

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

(d) That the accused knew that the absence would occur during a part of a period of maneuvers or field exercises; and

(e) That the accused intended to avoid all or part of a period of maneuvers or field exercises.

c. *Explanation.*

(1) *In general.* This article is designed to cover every case not elsewhere provided for in which any member of the armed forces is through the member's own fault not at the place where the member is required to be at a prescribed time. It is not necessary that the person be absent entirely from military jurisdiction and control. The first part of this article—relating to the appointed place of duty—applies whether the place is appointed as a rendezvous for several or for one only.

(2) *Actual knowledge.* The offenses of failure to go to and going from appointed place of duty require proof that the accused actually knew of the appointed time and place of duty. The offense of absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises requires proof that the accused actually knew that the absence would occur during a part of a period of maneuvers or field exercises. Actual knowledge may be proved by circumstantial evidence.

(3) *Intent.* Specific intent is not an element of unauthorized absence. Specific intent is an element for certain aggravated unauthorized absences.

(4) *Aggravated forms of unauthorized absence.* There are variations of unauthorized absence under Article 86(3) which are more serious because of aggravating circumstances such as duration of the absence, a special type of duty from which the accused absents himself or herself, and a particular specific intent which accompanies the absence. These circumstances are not essential

elements of a violation of Article 86. They simply constitute special matters in aggravation. The following are aggravated unauthorized absences:

(a) Unauthorized absence for more than 3 days (duration).

(b) Unauthorized absence for more than 30 days (duration).

(c) Unauthorized absence from a guard, watch, or duty (special type of duty).

(d) Unauthorized absence from guard, watch, or duty section with the intent to abandon it (special type of duty and specific intent).

(e) Unauthorized absence with the intent to avoid maneuvers or field exercises (special type of duty and specific intent).

(5) *Control by civilian authorities.* A member of the armed forces turned over to the civilian authorities upon request under Article 14 (*see* R.C.M. 106) is not absent without leave while held by them under that delivery. When a member of the armed forces, being absent with leave, or absent without leave, is held, tried, and acquitted by civilian authorities, the member's status as absent with leave, or absent without leave, is not thereby changed, regardless how long held. The fact that a member of the armed forces is convicted by the civilian authorities, or adjudicated to be a juvenile offender, or the case is "diverted" out of the regular criminal process for a probationary period does not excuse any unauthorized absence, because the member's inability to return was the result of willful misconduct. If a member is released by the civilian authorities without trial, and was on authorized leave at the time of arrest or detention, the member may be found guilty of unauthorized absence only if it is proved that the member actually committed the offense for which detained, thus establishing that the absence was the result of the member's own misconduct.

(6) *Inability to return.* The status of absence without leave is not changed by an inability to return through sickness, lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary is a factor in extenuation and should be given due weight when considering the initial disposition of the offense. When, however, a person on authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave.

(7) *Determining the unit or organization of an accused.* A person undergoing transfer between activities is ordinarily considered to be attached to the activity to which ordered to report. A person on temporary additional duty continues as a member of the regularly assigned unit and if the person is absent from the temporary duty assignment, the person becomes absent without leave from both units, and may be charged with being absent without leave from either unit.

(8) *Duration.* Unauthorized absence under Article 86(3) is an instantaneous offense. It is complete at the instant an accused absents himself or herself without authority. Duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. Even if the duration of the absence is not over 3 days, it is ordinarily alleged in an Article 86(3) specification. If the duration is not alleged or if alleged but not proved, an accused can be convicted of and punished for only 1 day of unauthorized absence.

(9) *Computation of duration.* In computing the duration of an unauthorized absence, any one continuous period of absence found that totals not more than 24 hours is counted as 1 day; any such period that totals more than 24 hours and not more than 48 hours is counted as 2 days, and so on. The hours of departure and return on different dates are assumed to be the same if not alleged and proved. For example, if an accused is found guilty of unauthorized absence from 0600 hours, 4 April, to 1000 hours, 7 April of the same year (76 hours), the maximum punishment would be based on an absence of 4 days. However, if the accused is found guilty simply of unauthorized

absence from 4 April to 7 April, the maximum punishment would be based on an absence of 3 days.

(10) *Termination—methods of return to military control.*

(a) *Surrender to military authority.* A surrender occurs when a person presents himself or herself to any military authority, whether or not a member of the same armed force, notifies that authority of his or her unauthorized absence status, and submits or demonstrates a willingness to submit to military control. Such a surrender terminates the unauthorized absence.

(b) *Apprehension by military authority.* Apprehension by military authority of a known absentee terminates an unauthorized absence.

(c) *Delivery to military authority.* Delivery of a known absentee by anyone to military authority terminates the unauthorized absence.

(d) *Apprehension by civilian authorities at the request of the military.* When an absentee is taken into custody by civilian authorities at the request of military authorities, the absence is terminated.

(e) *Apprehension by civilian authorities without prior military request.* When an absentee is in the hands of civilian authorities for other reasons and these authorities make the absentee available for return to military control, the absence is terminated when the military authorities are informed of the absentee's availability.

(11) *Findings of more than one absence under one specification.* An accused may properly be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not misled. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification.

d. *Maximum punishment.*

(1) *Failing to go to, or going from, the appointed place of duty.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

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

(a) *For not more than 3 days.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

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

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

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

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

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

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

e. *Sample specifications.*

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

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20 __, without authority, (fail to go at the time prescribed to) (go from) (his) (her) appointed place of duty, to wit: (here set forth the appointed place of duty).

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

In that _____ (personal jurisdiction data), did, on or about _____ 20 __, without authority, absent himself/herself from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), to wit: _____, located at _____, and did remain so absent until ((he) (she) was apprehended) on or about _____ 20 __.

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

In that _____ (personal jurisdiction data), did, on or about _____ 20 __, without authority and with intent to avoid (maneuvers) (field exercises), absent himself/herself from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), to wit: _____ located at (_____), and did remain so absent until on or about _____ 20 __.

(4) *Abandoning watch or guard.*

In that _____ (personal jurisdiction data), being a member of the _____ (guard) (watch) (duty section), did, (at/on board—location), on or about _____ 20 __, without authority, go from (his) (her) (guard) (watch) (duty section) (with intent to abandon the same).

11. Article 87 (10 U.S.C. 887)—Missing movement; jumping from vessel

a. *Text of statute.*

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

(b) JUMPING FROM VESSEL INTO THE WATER.—Any person subject to this chapter who wrongfully and intentionally jumps into the water from a vessel in use by the armed forces shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Missing movement.*

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

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

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

(2) *Jumping from vessel into the water.*

(a) That the accused jumped from a vessel in use by the armed forces into the water; and

(b) That such act by the accused was wrongful and intentional.

c. *Explanation.*

(1) *Missing movement.*

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

(b) *Mode of movement.*

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

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

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

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

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

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

(2) *Jumping from vessel into the water.* The phrase "in use by" means any vessel operated by or under the control of the armed forces. This offense may be committed at sea, at anchor, or in port.

d. *Maximum punishment.*

(1) *Missing movement.*

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

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

(2) *Jumping from vessel into the water.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specifications.*

(1) *Missing movement*

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 __, through (neglect) (design) miss the movement of (Aircraft No. _____) (Flight _____) (the USS _____) (Company A, 1st Battalion, 7th Infantry) (_____) with which (he) (she) was required in the course of duty to move.

(2) *Jumping from vessel into the water.*

In that _____ (personal jurisdiction data), did, on board _____, at (location), on or about _____ 20 __, wrongfully and intentionally jump from _____, a vessel in use by the armed forces, into the (sea) (lake) (river).

12. Article 87a (10 U.S.C. 887a)—Resistance, flight, breach of arrest, and escape

a. *Text of statute.*

Any person subject to this chapter who—

(1) resists apprehension;

(2) flees from apprehension;

(3) breaks arrest; or

(4) escapes from custody or confinement;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Resisting apprehension.*

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused actively resisted the apprehension.

(2) *Flight from apprehension.*

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused fled from the apprehension.

(3) *Breaking arrest.*

(a) That a certain person ordered the accused into arrest;

(b) That said person was authorized to order the accused into arrest; and

(c) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

(4) *Escape from custody.*

(a) That a certain person apprehended the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused freed himself or herself from custody before being released by proper authority.

(5) *Escape from confinement.*

(a) That a certain person ordered the accused into confinement;

(b) That said person was authorized to order the accused into confinement; and

(c) That the accused freed himself or herself from confinement before being released by proper authority.

[Note: If the escape was post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction.

c. *Explanation.*

(1) *Resisting apprehension.*

(a) *Apprehension.* Apprehension is the taking of a person into custody. *See* R.C.M. 302.

(b) *Authority to apprehend.* See R.C.M. 302(b) concerning who may apprehend. Whether the status of a person authorized that person to apprehend the accused is a question of law to be decided by the military judge. Whether the person who attempted to make an apprehension had such a status is a question of fact to be decided by the factfinder.

(c) *Nature of the resistance.* The resistance must be active, such as assaulting the person attempting to apprehend. Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses.

(d) *Mistake.* It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. However, the accused's belief at the time that no basis exists for the apprehension is not a defense.

(e) *Illegal apprehension.* A person may not be convicted of resisting apprehension if the attempted apprehension is illegal, but may be convicted of other offenses, such as assault, depending on all the circumstances. An attempted apprehension by a person authorized to apprehend is presumed to be legal in the absence of evidence to the contrary. Ordinarily the legality of an apprehension is a question of law to be decided by the military judge.

(2) *Flight from apprehension.* The flight must be active, such as running or driving away.

(3) *Breaking arrest.*

(a) *Arrest.* There are two types of arrest: pretrial arrest under Article 9 (*see* R.C.M. 304) and arrest under Article 15 (*see* subparagraph 5.c.(3), Part V, MCM). This article prohibits breaking any arrest.

(b) *Authority to order arrest.* See R.C.M. 304(b) and paragraph 2 and subparagraph 5.b., Part V, MCM concerning authority to order arrest.

(c) *Nature of restraint imposed by arrest.* In arrest, the restraint is moral restraint imposed by orders fixing the limits of arrest.

(d) *Breaking.* Breaking arrest is committed when the person in arrest infringes the limits set by orders. The reason for the infringement is immaterial. For example, innocence of the offense with respect to which an arrest may have been imposed is not a defense.

(e) *Illegal arrest.* A person may not be convicted of breaking arrest if the arrest is illegal. An arrest ordered by one authorized to do so is presumed to be legal in the absence of some evidence to the contrary. Ordinarily, the legality of an arrest is a question of law to be decided by the military judge.

(4) *Escape from custody.*

(a) *Custody.* Custody is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) *Authority to apprehend. See* subparagraph (1)(b) of this paragraph.

(c) *Escape.* For a discussion of escape, see subparagraph c.(5)(c) of this paragraph.

(d) *Illegal custody.* A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) *Correctional custody. See* paragraph 13.

(5) *Escape from confinement.*

(a) *Confinement.* Confinement is physical restraint imposed under R.C.M. 305, 1102, or subparagraph 5.b., Part V, MCM. For purposes of the element of post-trial confinement (subparagraph b.(5)(d)) and increased punishment therefrom (subparagraph e.(4)), the

confinement must have been imposed pursuant to an adjudged sentence of a court-martial and not as a result of pretrial restraint or nonjudicial punishment.

(b) *Authority to order confinement.* See R.C.M. 304(b), 1102(b)(2); and paragraph 2 and subparagraph 5.b., Part V, MCM concerning who may order confinement.

(c) *Escape.* An escape may be either with or without force or artifice, and either with or without the consent of the custodian. However, where a prisoner is released by one with apparent authority to do so, the prisoner may not be convicted of escape from confinement. *See also* subparagraph 24.c.(2)(b). Any completed casting off of the restraint of confinement, before release by proper authority, is an escape, and lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. If the movement toward escape is opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is eluded.

(d) *Status when temporarily outside confinement facility.* A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) *Legality of confinement.* A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. *Maximum punishment.*

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

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

(3) *Breaking arrest.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(4) *Escape from custody, pretrial confinement, or confinement pursuant to Article 15.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(5) *Escape from post-trial confinement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Resisting apprehension.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, resist being apprehended by _____, (an armed force policeman) (_____), a person authorized to apprehend the accused.

(2) *Flight from apprehension.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, flee apprehension by _____, (an armed force policeman) (_____), a person authorized to apprehend the accused.

(3) *Breaking arrest.*

In that _____ (personal jurisdiction data), having been placed in arrest (in quarters) (in (his) (her) company area) (_____) by a person authorized to order the accused into arrest, did, (at/on board—location) on or about _____ 20 __, break said arrest.

(4) *Escape from custody.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, escape from the custody of _____, a person authorized to apprehend the accused.

(5) *Escape from confinement.*

In that _____ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order said accused into confinement did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, escape from confinement.

13. Article 87b (10 U.S.C. 887b)—Offenses against correctional custody and restriction

a. *Text of statute.*

(a) ESCAPE FROM CORRECTIONAL CUSTODY.—Any person subject to this chapter—

(1) who is placed in correctional custody by a person authorized to do so;

(2) who, while in correctional custody, is under physical restraint; and

(3) who escapes from the physical restraint before being released from the physical restraint by proper authority;

shall be punished as a court-martial may direct.

(b) BREACH OF CORRECTIONAL CUSTODY.—Any person subject to this chapter—

(1) who is placed in correctional custody by a person authorized to do so;

(2) who, while in correctional custody, is under restraint other than physical restraint; and

(3) who goes beyond the limits of the restraint before being released from the correctional custody or relieved of the restraint by proper authority;

shall be punished as a court-martial may direct.

(c) BREACH OF RESTRICTION.—Any person subject to this chapter—

(1) who is ordered to be restricted to certain limits by a person authorized to do so; and

(2) who, with knowledge of the limits of the restriction, goes beyond those limits before being released by proper authority;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Escape from correctional custody.*

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in such correctional custody, the accused was under physical restraint; and

(c) That the accused freed himself or herself from the physical restraint of this correctional custody before being released therefrom by proper authority.

(2) *Breach of correctional custody.*

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in correctional custody, a certain restraint was imposed upon the accused; and

(c) That the accused went beyond the limits of the restraint imposed before having been released from the correctional custody or relieved of the restraint by proper authority.

(3) *Breach of restriction.*

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

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

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

(d) That the accused went beyond the limits of the restriction before being released therefrom by proper authority.

c. *Explanation.*

(1) *Escape from correctional custody.* Escape from correctional custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15, who, before being set at liberty by proper authority, casts off any physical restraint imposed by the custodian or by the place or conditions of custody.

(2) *Breach of correctional custody.* Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period.

(3) *Authority to impose correctional custody.* See Part V concerning who may impose correctional custody. Whether the status of a person authorized that person to impose correctional custody is a question of law to be decided by the military judge. Whether the person who imposed correctional custody had such a status is a question of fact to be decided by the factfinder.

(4) *Breach of restriction.* Restriction is the moral restraint of a person imposed by an order directing a person to remain within certain specified limits. "Restriction" includes restriction under R.C.M. 304(a)(2), restriction resulting from imposition of either nonjudicial punishment (*see* Part V) or the sentence of a court-martial (*see* R.C.M. 1003(b)(5)), and administrative restriction in the interest of training, operations, security, or safety.

d. *Maximum punishment.*

(1) *Escape from correctional custody.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Breach of correctional custody.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Breach of restriction.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

e. *Sample specifications.*

(1) *Escape from correctional custody.*

In that _____ (personal jurisdiction data), while undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about _____ 20 __, escape from correctional custody.

(2) *Breach of correctional custody.*

In that _____ (personal jurisdiction data), while duly undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about _____ 20 __, breach the restraint imposed thereunder by _____.

(3) *Breach of restriction.*

In that _____ (personal jurisdiction data), having been restricted to the limits of _____, by a person authorized to do so, did, (at/on board—location), on or about _____ 20 __, break said restriction.

14. Article 88 (10 U.S.C. 888)—Contempt toward officials

a. *Text of statute.*

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State,

Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused was a commissioned officer of the United States armed forces;

(2) That the accused used certain words against an official or legislature named in the article;

(3) That by an act of the accused these words came to the knowledge of a person other than the accused; and

(4) That the words used were contemptuous, either in themselves or by virtue of the circumstances under which they were used.

[Note: If the words were against a Governor or legislature, add the following element]

(5) That the accused was then present in the State, Commonwealth, or possession of the Governor or legislature concerned.

c. *Explanation.*

The official or legislature against whom the words are used must be occupying one of the offices or be one of the legislatures named in Article 88 at the time of the offense. Neither "Congress" nor "legislature" includes its members individually. "Governor" does not include "lieutenant governor." It is immaterial whether the words are used against the official in an official or private capacity. If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article. Similarly, expressions of opinion made in a purely private conversation should not ordinarily be charged. Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, aggravates the offense. The truth or falsity of the statements is immaterial.

d. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 __, [use (orally and publicly) (_____) the following contemptuous words] [in a contemptuous manner, use (orally and publicly) (_____) the following words] against the [(President) (Vice President) (Congress) (Secretary of _____)] [(Governor) (legislature) of the (State of _____) (_____), a (State) (_____) in which (he) (she), the said _____, was then (on duty), (present)], to wit: "_____," or words to that effect.

15. Article 89 (10 U.S.C. 889)—Disrespect toward superior commissioned officer; assault of superior commissioned officer

a. *Text of statute.*

(a) DISRESPECT.—Any person subject to this chapter who behaves with disrespect toward that person's superior commissioned officer shall be punished as a court-martial may direct.

(b) ASSAULT.—Any person subject to this chapter who strikes that person's superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer's office shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

b. *Elements.*

(1) *Disrespect toward superior commissioned officer.*

(a) That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;

(b) That such behavior or language was directed toward that officer;

(c) That the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;

(d) That the accused then knew that the commissioned officer toward whom the acts, omissions, or words were directed was the accused's superior commissioned officer; and

(e) That, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

(2) *Striking or assaulting superior commissioned officer.*

(a) That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain commissioned officer;

(b) That the officer was the superior commissioned officer of the accused;

(c) That the accused then knew that the officer was the accused's superior commissioned officer; and

(d) That the superior commissioned officer was then in the execution of office.

[Note: if the offense was committed in time of war, add the following element]

(e) That the offense was committed in time of war.

c. *Explanation.*

(1) *Superior Commissioned Officer. See* 10 U.S.C. § 801(5) ("The term 'superior commissioned officer' means a commissioned officer superior in rank or command.").

(2) *Disrespect toward superior commissioned officer.*

(a) *Knowledge.* If the accused did not know that the person against whom the acts or words were directed was the accused's superior commissioned officer, the accused may not be convicted of a violation of this article. Knowledge may be proved by circumstantial evidence.

(b) *Disrespect.* Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

(c) *Presence.* It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation.

(d) *Special defense—unprotected victim.* A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89.

(3) *Striking or assaulting superior commissioned officer.*

(a) *Superior commissioned officer.* The definition in subparagraph 15.c.(1) of this paragraph, applies here.

(b) *Knowledge.* The explanation in subparagraph 15.c.(2)(a) of this paragraph applies here.

(c) *Strikes.* "Strikes" means an intentional contact and includes any offensive touching of the person of an officer, however slight.

(d) *Draws or lifts up any weapon against.* The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated. The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of and at the superior is the sort of act proscribed. The raising in a threatening manner of a firearm, whether or not loaded, of a club, or of anything by which a serious blow or injury could be given is included in "lifts up."

(e) *Offers any violence against.* The phrase "offers any violence against" includes any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up." If not executed, the violence must be physically attempted or menaced. A mere threatening in words is not an offering of violence in the sense of this article.

(f) *Execution of office.* An officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage. In general, any striking or use of violence against any superior commissioned officer by a person over whom it is the duty of that officer to maintain discipline at the time, would be striking or using violence against the officer in the execution of office. The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times.

(g) *Defenses.* In a prosecution for striking or assaulting a superior commissioned officer in violation of this article, it is a defense that the accused acted in the proper discharge of some duty, or that the victim behaved in a manner toward the accused such as to lose the protection of this article (*see* subparagraph 15.c.(2)(d)). For example, if the victim initiated an unlawful attack on the accused, this would deprive the victim of the protection of this article, and, in addition, could excuse any lesser included offense of assault as done in self-defense, depending on the circumstances (*see* subparagraph 77.c.; R.C.M. 916(e)).

d. *Maximum punishment.*

(1) *Disrespect toward superior commissioned officer in command.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Disrespect toward superior commissioned officer superior in rank.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Striking, drawing or lifting up a weapon or offering any violence to superior commissioned officer in execution of office in time of war.* Death or such other punishment as a court-martial may direct.

(4) *Striking, drawing or lifting up a weapon or offering any violence to superior commissioned officer in execution of office at any other time.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specifications.*

(1) *Disrespect toward superior commissioned officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, behave himself/herself with disrespect toward _____, (his) (her) superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command)

(in rank), by (saying to (him) (her) "_____," or words to that effect) (contemptuously turning from and leaving (him) (her) while (he) (she), the said _____, was talking to (him) (her), the said _____) (_____).

(2) *Striking superior commissioned officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, (a time of war) strike _____, (his) (her) superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office, (in) (on) the _____ with (a) ((his) (her)) _____.

(3) *Drawing or lifting up a weapon against superior commissioned officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (a time of war) (draw) (lift up) a weapon, to wit: a _____, against _____, (his) (her) superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office.

(4) *Offering violence to superior commissioned officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (a time of war) offer violence against _____, his/ her superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office, by _____.

16. Article 90 (10 U.S.C. 890)—Willfully disobeying superior commissioned officer

a. *Text of statute.*

Any person subject to this chapter who willfully disobeys a lawful command of that person's superior commissioned officer shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

b. *Elements.*

(1) That the accused received a lawful command from a superior commissioned officer;

(2) That this officer was the superior commissioned officer of the accused;

(3) That the accused then knew that this officer was the accused's superior commissioned officer; and

(4) That the accused willfully disobeyed the lawful command.

[Note: if the offense was committed in time of war, add the following element]

(5) That the offense was committed in time of war.

c. *Explanation.*

(1) *Superior commissioned officer.* The definition in subparagraph 15.c.(1) applies here.

(2) *Disobeying superior commissioned officer.*

(a) *Lawfulness of the order.*

(i) *Inference of lawfulness.* An order requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.

(ii) *Determination of lawfulness.* The lawfulness of an order is a question of law to be determined by the military judge.

(iii) *Authority of issuing officer.* The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, custom of the Service, or applicable order to direct, coordinate, or control the duties, activities, health, welfare, morale, or discipline of the accused.

(iv) *Relationship to military duty.* The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the Service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

(v) *Relationship to statutory or constitutional rights.* The order must not conflict with the statutory or constitutional rights of the person receiving the order.

(b) *Personal nature of the order.* The order must be directed specifically to the subordinate. Violations of regulations, standing orders or directives, or failure to perform previously established duties are not punishable under this article, but may violate Article 92.

(c) *Form and transmission of the order.* As long as the order is understandable, the form of the order is immaterial, as is the method by which it is transmitted to the accused.

(d) *Specificity of the order.* The order must be a specific mandate to do or not to do a specific act. An exhortation to "obey the law" or to perform one's military duty does not constitute an order under this article.

(e) *Knowledge.* The accused must have actual knowledge of the order and of the fact that the person issuing the order was the accused's superior commissioned officer. Actual knowledge may be proved by circumstantial evidence.

(f) *Nature of the disobedience.* "Willful disobedience" is an intentional defiance of authority. Failure to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of this article but may violate Article 92.

(g) *Time for compliance.* When an order requires immediate compliance, an accused's declared intent not to obey and the failure to make any move to comply constitutes disobedience. Immediate compliance is required for any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. If an order requires performance in the future, an accused's present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may.

(3) *Civilians and discharged prisoners.* A discharged prisoner or other civilian subject to military law (*see* Article 2) and under the command of a commissioned officer is subject to the provisions of this article.

d. *Maximum punishment.*

(1) *Willfully disobeying a lawful order of superior commissioned officer in time of war.* Death or such other punishment as a court-martial may direct.

(2) *At any other time.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), having received a lawful command from _____, (his) (her) superior commissioned officer, then known by the said _____ to be (his) (her) superior commissioned officer, to _____, or words to that effect, did, (at/on board—location), on or about _____ 20 __, willfully disobey the same.

17. Article 91 (10 U.S.C. 891)—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

a. *Text of statute.*

Any warrant officer or enlisted member who—

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

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

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Striking or assaulting warrant, noncommissioned, or petty officer.*

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

(c) That the striking or assault was committed while the victim was in the execution of office; and

(d) That the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned or petty officer of the accused, add the following elements]

(e) That the victim was the superior noncommissioned, or petty officer of the accused; and

(f) That the accused then knew that the person struck or assaulted was the accused's superior noncommissioned, or petty officer.

(2) *Disobeying a warrant, noncommissioned, or petty officer.*

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer;

(c) That the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer;

(d) That the accused had a duty to obey the order; and

(e) That the accused willfully disobeyed the order.

(3) *Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.*

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused did or omitted certain acts, or used certain language;

(c) That such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

(d) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

(e) That the victim was then in the execution of office; and

(f) That under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned, or petty officer of the accused, add the following elements]

(g) That the victim was the superior noncommissioned, or petty officer of the accused; and

(h) That the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, or petty officer.

c. *Explanation.*

(1) *In general.* Article 91 has the same general objects with respect to warrant, noncommissioned, and petty officers as Articles 89 and 90 have with respect to commissioned officers, namely, to ensure obedience to their lawful orders, and to protect them from violence, insult, or disrespect. Unlike Articles 89 and 90, however, this article does not require a superior-subordinate relationship as an element of any of the offenses denounced. This article does not protect an acting noncommissioned officer or acting petty officer, nor does it protect military police or members of the shore patrol who are not warrant, noncommissioned, or petty officers.

(2) *Knowledge.* All of the offenses prohibited by Article 91 require that the accused have actual knowledge that the victim was a warrant, noncommissioned, or petty officer. Actual knowledge may be proved by circumstantial evidence.

(3) *Striking or assaulting a warrant, noncommissioned, or petty officer.* For a discussion of "strikes" and "in the execution of office," see subparagraph 15.c. For a discussion of "assault," see subparagraph 77.c. An assault by a prisoner who has been discharged from the Service, or by any other civilian subject to military law, upon a warrant, noncommissioned, or petty officer should be charged under Article 128 or 134.

(4) *Disobeying a warrant, noncommissioned, or petty officer.* See subparagraph 16.c for a discussion of lawfulness, personal nature, form, transmission, and specificity of the order, nature of the disobedience, and time for compliance with the order.

(5) *Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.* "Toward" requires that the behavior and language be within the sight or hearing of the warrant, noncommissioned, or petty officer concerned. For a discussion of "in the execution of his office," see subparagraph 15.c. For a discussion of "disrespect," see subparagraph 15.c.

d. *Maximum punishment.*

(1) *Striking or assaulting warrant officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Striking or assaulting superior noncommissioned or petty officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) *Striking or assaulting other noncommissioned or petty officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(4) *Willfully disobeying the lawful order of a warrant officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(5) *Willfully disobeying the lawful order of a noncommissioned or petty officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(6) *Contempt or disrespect to warrant officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(7) *Contempt or disrespect to superior noncommissioned or petty officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(8) *Contempt or disrespect to other noncommissioned or petty officer.* Forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months.

e. *Sample specifications.*

(1) *Striking or assaulting warrant, noncommissioned, or petty officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (strike) (assault) _____, a _____ officer, then known to the said _____ to be a (superior) _____ officer who was then in the execution of (his) (her) office, by _____ (him) (her) (in) (on) (the _____) with (a) _____ ((his) (her)) _____.

(2) *Willful disobedience of warrant, noncommissioned, or petty officer.*

In that _____ (personal jurisdiction data), having received a lawful order from _____, a _____ officer, then known by the said _____ to be a _____ officer, to _____, an order which it was (his) (her) duty to obey, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully disobey the same.

(3) *Contempt or disrespect toward warrant, noncommissioned, or petty officer.*

In that _____ (personal jurisdiction data) (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, [did treat with contempt] [was disrespectful in (language) (deportment) toward] _____, a _____ officer, then known by the said _____ to be a (superior) _____ officer, who was then in the execution of (his) (her) office, by (saying to (him) (her), "_____," or words to that effect) (spitting at (his) (her) feet) (_____).

18. Article 92 (10 U.S.C. 892)—Failure to obey order or regulation

a. *Text of statute.*

Any person subject to this chapter who—

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

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

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Violation of or failure to obey a lawful general order or regulation.*

(a) That there was in effect a certain lawful general order or regulation;

(b) That the accused had a duty to obey it; and

(c) That the accused violated or failed to obey the order or regulation.

(2) *Failure to obey other lawful order.*

(a) That a member of the armed forces issued a certain lawful order;

(b) That the accused had knowledge of the order;

(c) That the accused had a duty to obey the order; and

(d) That the accused failed to obey the order.

(3) *Dereliction in the performance of duties.*

(a) That the accused had certain duties;

(b) That the accused knew or reasonably should have known of the duties; and

(c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

[Note: In cases where the dereliction of duty resulted in death or grievous bodily harm, add the following element as applicable]

(d) That such dereliction of duty resulted in death or grievous bodily harm to a person other than the accused.

c. *Explanation.*

(1) *Violation of or failure to obey a lawful general order or regulation.*

(a) *Authority to issue general orders and regulations.* General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Homeland Security, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

(i) an officer having general court-martial jurisdiction;

(ii) a general or flag officer in command; or

(iii) a commander superior to (i) or (ii).

(b) *Effect of change of command on validity of order.* A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) *Lawfulness.* A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See the discussion of lawfulness in subparagraph 16.c.

(d) *Knowledge.* Knowledge of a general order or regulation need not be alleged or proved as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) *Enforceability.* Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for performing military functions may not be enforceable under Article 92(1).

(2) *Violation of or failure to obey other lawful order.*

(a) *Scope.* Article 92(2) includes all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, 91, or 92(1). It includes the violation of written regulations which are not general regulations. See also subparagraph (1)(e) of this paragraph as applicable.

(b) *Knowledge.* In order to be guilty of this offense, a person must have had actual knowledge of the order or regulation. Knowledge of the order may be proved by circumstantial evidence.

(c) *Duty to obey order.*

(i) *From superior.* A member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders which that member has a duty to obey under the same circumstances as a commissioned officer of one armed force is the superior commissioned officer of a member of another armed force for the purposes of Articles 89 and 90. *See* subparagraph 13.c.(1).

(ii) *From one not a superior.* Failure to obey the lawful order of one not a superior is an offense under Article 92(2), provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police. See subparagraph 17.b.(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) *Dereliction in the performance of duties.*

(a) *Duty.* A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service.

(b) *Knowledge.* Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating manuals, customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.

(c) *Derelict.* A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. "Negligently" means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse.

(d) *Ineptitude.* A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

(e) *Grievous bodily harm.* For purposes of this offense, the term "grievous bodily harm" has the same meaning ascribed to it in Article 128 (paragraph 77).

(f) Where the dereliction of duty resulted in death or grievous bodily harm, the intent to cause death or grievous bodily harm is not required.

d. *Maximum punishment.*

(1) *Violation of or failure to obey lawful general order or regulation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Violation of or failure to obey other lawful order.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Dereliction in the performance of duties.*

(A) *Through neglect or culpable inefficiency.* Forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.

(B) *Through neglect or culpable inefficiency resulting in death or grievous bodily harm.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(C) *Willful.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(D) *Willful dereliction of duty resulting in death or grievous bodily harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

[Note: For (1) and (2) of this rule, the punishment set forth does not apply in the following cases: if, in the absence of the order or regulation which was violated or not obeyed, the accused would on the same facts be subject to conviction for another specific offense for which a lesser

punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.]

e. *Sample specifications.*

(1) *Violation or failure to obey lawful general order or regulation.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (violate) (fail to obey) a lawful general (order) (regulation) which was (his)(her) duty to obey, to wit: paragraph __ (Army) (Air Force) Regulation, dated ____) (Article, U.S. Navy Regulations, dated __) (General Order No.__, U.S. Navy, dated ____) (_____), by (wrongfully_____).

(2) *Violation or failure to obey other lawful written order.*

In that _____ (personal jurisdiction data), having knowledge of a lawful order issued by _____, to wit: (paragraph, (the Combat Group Regulation No. __) (USS_____, Regulation _____), dated____) (_____), an order which it was (his) (her) duty to obey, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, fail to obey the same by (wrongfully) _____.

(3) *Failure to obey other lawful order.*

In that_____ (personal jurisdiction data) having knowledge of a lawful order issued by _____ (to submit to certain medical treatment) (to) (not to _____) (_____), an order which it was (his) (her) duty to obey (at/on board—location) (subject-matter jurisdiction data, if required), on or about__20__, fail to obey the same (by (wrongfully) _____.

(4) *Dereliction in the performance of duties.*

In that, _____ (personal jurisdiction data), who (knew) (should have known) of (his) (her) duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about _____ 20__), was derelict in the performance of those duties in that (he) (she) (negligently) (willfully) (by culpable inefficiency) failed _____, as it was (his) (her) duty to do [, and that such dereliction of duty resulted in (grievous bodily harm, to wit: (broken leg) (deep cut) (fractured skull) (_____) to _____) (the death of _____)].

19. Article 93 (10 U.S.C. 893)—Cruelty and maltreatment

a. *Text of statute.*

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

b. *Elements.*

(1) That a certain person was subject to the orders of the accused; and

(2) That the accused was cruel toward, or oppressed, or maltreated that person.

c. *Explanation.*

(1) *Nature of victim.* "Any person subject to his orders" means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the UCMJ or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

(2) *Nature of act.* The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment

may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (was cruel toward) did (oppress) (maltreat) _____), a person subject to (his) (her) orders, by (kicking (him) (her) in the stomach) (confining (him) (her) for twenty-four hours without water) (_____).

20. Article 93a (10 U.S.C. 893a)—Prohibited activities with military recruit or trainee by person in position of special trust

a. *Text of statute.*

(a) ABUSE OF TRAINING LEADERSHIP POSITION.—Any person subject to this chapter—

(1) who is an officer, a noncommissioned officer, or a petty officer;

(2) who is in a training leadership position with respect to a specially protected junior member of the armed forces; and

(3) who engages in prohibited sexual activity with such specially protected junior member of the armed forces;

shall be punished as a court-martial may direct.

(b) ABUSE OF POSITION AS MILITARY RECRUITER.—Any person subject to this chapter—

(1) who is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or

(2) who is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the armed forces who is enlisted under a delayed entry program;

shall be punished as a court-martial may direct.

(c) CONSENT.—Consent is not a defense for any conduct at issue in a prosecution under this section (article).

(d) DEFINITIONS.—In this section (article):

(1) SPECIALLY PROTECTED JUNIOR MEMBER OF THE ARMED FORCES.—The term "specially protected junior member of the armed forces" means—

(A) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

(B) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

(C) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

(2) TRAINING LEADERSHIP POSITION.—The term "training leadership position" means, with respect to a specially protected junior member of the armed forces, any of the following:

(A) Any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

(B) Faculty and staff of the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

(3) APPLICANT FOR MILITARY SERVICE.—The term "applicant for military service" means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.

(4) MILITARY RECRUITER.—The term "military recruiter" means a person who, under regulations prescribed by the Secretary concerned, has the primary duty to recruit persons for military service.

(5) PROHIBITED SEXUAL ACTIVITY.—The term "prohibited sexual activity" means, as specified in regulations prescribed by the Secretary concerned, inappropriate physical intimacy under circumstances described in such regulations.

b. *Elements.*

(1) *Abuse of training leadership position.*

(a) That the accused was a commissioned, warrant, noncommissioned, or petty officer;

(b) That the accused was in a training leadership position with respect to a specially protected member of the armed forces; and

(c) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was a specially protected junior member of the armed forces.

(2) *Abuse of position as a military recruiter.*

(a) That the accused was a commissioned, warrant, noncommissioned or petty officer;

(b) That the accused was performing duties as a military recruiter; and,

(c) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was an applicant for military service or;

(d) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was a specially protected junior member of the armed forces who is enlisted under a delayed entry program.

c. *Explanation.*

(1) *In general.* The prevention of inappropriate sexual activity by trainers, recruiters, and drill instructors with recruits, trainees, students attending service academies, and other potentially vulnerable persons in the initial training environment is crucial to the maintenance of good order and military discipline. Military law, regulation, and custom invest officers, non-commissioned officers, drill instructors, recruiters, cadre, and others with the right and obligation to exercise control over those they supervise. In this context, inappropriate sexual activity between recruits/trainees and their respective recruiters/trainers are inherently destructive to good order and discipline. The responsibility for identifying by regulation relationships subject to this offense and those outside the scope of this offense (e.g., a "training and leadership position" Servicemember and a "specially protected junior member of the armed forces" who were married prior to assuming

those roles as defined by this offense) is entrusted to the individual Services to determine and specify by appropriate regulations.

(2) *Knowledge.* The accused must have actual or constructive knowledge that a person was a "specially protected junior member of the armed forces" or an "applicant for military service" (as those terms are defined in this offense). Knowledge may be proved by circumstantial evidence. Actual knowledge need not be shown if the accused reasonably should have known under the circumstances the status of the person as a "specially protected junior member of the armed forces" or an "applicant for military service." This may be demonstrated by regulations, training or operating manuals, customs of the Service, or similar evidence.

(3) *Consent.* Consent is not a defense to this offense.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Prohibited act with specially protected junior member of the armed forces.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, while in a position of authority over ___, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a prohibited act, to wit: _____ with _____, whom the accused (knew) (reasonably should have known) was a specially protected junior Servicemember in initial active duty training.

(2) *Prohibited act with* an *applicant for military service.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, while in a position of authority over ___, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a prohibited act, to wit: _____ with _____, whom the accused (knew) (reasonably should have known) was (an applicant to the armed forces via (_____)) (a specially protected junior enlisted member of the armed forces enlisted under a delayed entry program).

21. Article 94 (10 U.S.C. 894)—Mutiny or sedition

a. *Text of statute.*

(a) Any person subject to this chapter who—

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

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

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

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

b. *Elements.*

(1) *Mutiny by creating violence or disturbance.*

(a) That the accused created violence or a disturbance; and

(b) That the accused created this violence or disturbance with intent to usurp or override lawful military authority.

(2) *Mutiny by refusing to obey orders or perform duty.*

(a) That the accused refused to obey orders or otherwise do the accused's duty;

(b) That the accused in refusing to obey orders or perform duty acted in concert with another person or persons; and

(c) That the accused did so with intent to usurp or override lawful military authority.

(3) *Sedition.*

(a) That the accused created revolt, violence, or disturbance against lawful civil authority;

(b) That the accused acted in concert with another person or persons; and

(c) That the accused did so with the intent to cause the overthrow or destruction of that authority.

(4) *Failure to prevent and suppress a mutiny or sedition.*

(a) That an offense of mutiny or sedition was committed in the presence of the accused; and

(b) That the accused failed to do the accused's utmost to prevent and suppress the mutiny or sedition.

(5) *Failure to report a mutiny or sedition.*

(a) That an offense of mutiny or sedition occurred;

(b) That the accused knew or had reason to believe that the offense was taking place; and

(c) That the accused failed to take all reasonable means to inform the accused's superior commissioned officer or commander of the offense.

(6) *Attempted mutiny.*

(a) That the accused committed a certain overt act;

(b) That the act was done with specific intent to commit the offense of mutiny;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of mutiny.

c. *Explanation.*

(1) *Mutiny.* Article 94(a)(1) defines two types of mutiny, both requiring an intent to usurp or override military authority.

(a) *Mutiny by creating violence or disturbance.* Mutiny by creating violence or disturbance may be committed by one person acting alone or by more than one acting together.

(b) *Mutiny by refusing to obey orders or perform duties.* Mutiny by refusing to obey orders or perform duties requires collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. This concert of insubordination need not be preconceived, nor is it necessary that the insubordination be active or violent. It may consist simply of a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent, that is, with an intent to usurp or override lawful military authority. The intent may be declared in words or inferred from acts, omissions, or surrounding circumstances.

(2) *Sedition.* Sedition requires a concert of action in resistance to civil authority. This differs from mutiny by creating violence or disturbance. *See* subparagraph c.(1)(a) of this paragraph.

(3) *Failure to prevent and suppress a mutiny or sedition.* "Utmost" means taking those measures to prevent and suppress a mutiny or sedition which may properly be called for by the circumstances, including the rank, responsibilities, or employment of the person concerned.

"Utmost" includes the use of such force, including deadly force, as may be reasonably necessary under the circumstances to prevent and suppress a mutiny or sedition.

(4) *Failure to report a mutiny or sedition.*

(a) *In general.* Failure to "take all reasonable means to inform" includes failure to take the most expeditious means available. When the circumstances known to the accused would have caused a reasonable person in similar circumstances to believe that a mutiny or sedition was occurring, this may establish that the accused had such "reason to believe" that mutiny or sedition was occurring. Failure to report an impending mutiny or sedition is not an offense in violation of Article 94. *But see* subparagraph 18.c.(3) (dereliction of duty).

(b) *Superior commissioned officer.* For purposes of this paragraph, "a superior commissioned officer" means a superior commissioned officer in the chain of command.

(5) *Attempted mutiny.* For a discussion of attempts, see paragraph 4.

d. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

e. *Sample specifications.*

(1) *Mutiny by creating violence or disturbance.*

In that _____ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself/herself in Barracks T7, firing (his) (her) rifle at _____, and exhorting other persons to join (him) (her) in defiance of _____) (_____).

(2) *Mutiny by refusing to obey orders or perform duties.*

In that _____ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, refuse, in concert with _____ (and _____) (others whose names are unknown), to (obey the orders of _____ to _____) (perform (his) (her) duty as _____).

(3) *Sedition.*

In that _____ (personal jurisdiction data), with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, to wit: _____, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, in concert with (_____) and (_____) (others whose names are unknown), create (revolt) (violence) (a disturbance) against such authority by (entering the Town Hall of _____ and destroying property and records therein) (marching upon and compelling the surrender of the police of _____) (_____).

(4) *Failure to prevent and suppress a mutiny or sedition.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, fail to do (his) (her) utmost to prevent and suppress a (mutiny) (sedition) among the (Soldiers) (Sailors) Airmen) (Marines) (_____) of _____, which (mutiny) (sedition) was being committed in (his) (her) presence, in that ((he) (she) took no means to compel the dispersal of the assembly) ((he) (she) made no effort to assist _____ who was attempting to quell the mutiny) (_____).

(5) *Failure to report a mutiny or sedition.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, fail to take all reasonable means to inform (his) (her) superior commissioned officer or (his) (her) commander of a (mutiny)

(sedition) among the (Soldiers) (Sailors) (Airmen) (Marines) (_____) of _____, which (mutiny) (sedition) (he) (she), the said _____ (knew) (had reason to believe) was taking place.

(6) *Attempted mutiny.*

In that _____ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, attempt to (create (violence) (a disturbance) by _____) (_____).

22. Article 95 (10 U.S.C. 895)—Offenses by sentinel or lookout

a. *Text of statute.*

(a) DRUNK OR SLEEPING ON POST, OR LEAVING POST BEFORE BEING RELIEVED.—Any sentinel or lookout who is drunk on post, who sleeps on post, or who leaves post before being regularly relieved, shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) if the offense is committed other than in time of war, by such punishment, other than death, as a court-martial may direct.

(b) LOITERING OR WRONGFULLY SITTING ON POST.—Any sentinel or lookout who loiters or wrongfully sits down on post shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

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

(b) That the accused was drunk while on post, was sleeping while on post, or left post before being regularly relieved.

[Note: If the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element:]

(c) That the offense was committed (in time of war) (while the accused was receiving special pay under 37 U.S.C. § 310).

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

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

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

[Note: If the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element:]

(c) That the accused was so posted (in time of war) (while receiving special pay under 37 U.S.C. § 310).

c. *Explanation.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

(a) *In general.* Article 95(a) defines three kinds of misbehavior committed by sentinels or lookouts: being drunk on post, sleeping on post, or leaving it before being regularly relieved. Article 95(a) does not include an officer or enlisted person of the guard, or of a ship's watch, not posted or performing the duties of a sentinel or lookout, nor does it include a person whose duties as a watchman or attendant do not require constant alertness.

(b) *Post.* "Post" is the area where the sentinel or lookout is required to be for the performance of duties. It is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the

sentinel or lookout was posted. The offense of leaving post is not committed when a sentinel or lookout goes an immaterial distance from the post, unless it is such a distance that the ability to fully perform the duty for which posted is impaired.

(c) *On post.* A sentinel or lookout becomes "on post" after having been given a lawful order to go "on post" as a sentinel or lookout and being formally or informally posted. The fact that a sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given. A sentinel or lookout is "on post" within the meaning of the article not only when at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

(d) *Sentinel or lookout.* A "sentinel" or a "lookout" is a person whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of the enemy, or to guard persons, property, or a place and to sound the alert, if necessary.

(e) *Drunk.* For an explanation of "drunk," see subparagraph 51.c.(6).

(f) *Sleeping.* As used in this article, "sleeping" is that condition of insentience which is sufficient sensibly to impair the full exercise of the mental and physical faculties of a sentinel or lookout. It is not necessary to show that the accused was in a wholly comatose condition. The fact that the accused's sleeping resulted from a physical incapacity caused by disease or accident is an affirmative defense. *See* R.C.M. 916(i).

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

(a) *In general.* The discussion set forth in subparagraph 22.c.(1) applies to loitering or sitting down while posted as a sentinel or lookout in violation of Article 95(b) as well.

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

d. *Maximum punishment.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

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

(b) *While receiving special pay under 37 U.S.C. § 310.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(c) *In all other places.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

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

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

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

e. *Sample specifications.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

In that _____ (personal jurisdiction data), on or about _____ 20 __ (a time of war) (at/on board—location), (while receiving special pay under 37 U.S.C. § 310), being (posted) (on post) as a (sentinel) (lookout) at (warehouse no. 7) (post no. 11) (for radar observation)

(_____) (was (drunk) (sleeping) upon (his) (her) post) (did leave (his) (her) post before (he) (she) was regularly relieved).

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

In that _____ (personal jurisdiction data), while posted as a (sentinel) (lookout), did, (at/on board—location) (while receiving special pay under 37 U.S.C. § 310) on or about _____ 20 __, (a time of war) (loiter) (wrongfully sit down) on (his) (her) post.

23. Article 95a (10 U.S.C. 895a)—Disrespect toward sentinel or lookout

a. *Text of statute.*

(a) DISRESPECTFUL LANGUAGE TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, uses wrongful and disrespectful language that is directed toward and within the hearing of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.

(b) DISRESPECTFUL BEHAVIOR TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, behaves in a wrongful and disrespectful manner that is directed toward and within the sight of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Disrespectful language toward sentinel or lookout.*

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

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

(c) That the accused used certain disrespectful language;

(d) That such language was wrongful;

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

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

(2) *Disrespectful behavior toward sentinel or lookout.*

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

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

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

(d) That such behavior was wrongful;

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

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

c. *Explanation.* See subparagraph 15.c.(2)(b) for a discussion of "disrespect."

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

(1) *Disrespectful language toward sentinel or lookout.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, then knowing that _____ was a sentinel or lookout, wrongfully use the following disrespectful language "_____," or words to that effect, to _____, and that such language was directed toward and within the hearing of _____, the (sentinel) (lookout) in the execution of (his) (her) duty.

(2) *Disrespectful behavior toward sentinel or lookout.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, then knowing that _____ was a sentinel or lookout, wrongfully behave in a disrespectful manner toward _____, by _____, and that such behavior was directed toward and within the sight of _____, the (sentinel) (lookout) in the execution of (his) (her) duty

24. Article 96 (10 U.S.C. 896)—Release of prisoner without authority; drinking with prisoner

a. *Text of statute.*

(a) RELEASE OF PRISONER WITHOUT AUTHORITY.—Any person subject to this chapter—

(1) who, without authority to do so, releases a prisoner; or

(2) who, through neglect or design, allows a prisoner to escape;

shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with the law.

(b) DRINKING WITH PRISONER.—Any person subject to this chapter who unlawfully drinks any alcoholic beverage with a prisoner shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Releasing a prisoner without authority.*

(a) That a certain person was a prisoner; and

(b) That the accused released the prisoner without authority.

(2) *Allowing a prisoner to escape through neglect.*

(a) That a certain person was a prisoner;

(b) That the prisoner escaped;

(c) That the accused did not take such care to prevent the escape as a reasonably careful person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and

(d) That the escape was the proximate result of the neglect.

(3) *Allowing a prisoner to escape through design.*

(a) That a certain person was a prisoner;

(b) That the design of the accused was to allow the escape of that prisoner; and

(c) That the prisoner escaped as a result of the carrying out of the design of the accused.

(4) *Drinking with prisoner.*

(a) That a certain person was a prisoner; and

(b) That the accused unlawfully drank any alcoholic beverage with that prisoner.

c. *Explanation.*

(1) *Prisoner.* A prisoner is a person who is in confinement or custody imposed under R.C.M. 302, 304, or 305, or under sentence of a court-martial who has not been set free by a person with authority to release the prisoner.

(2) *Releasing a prisoner without authority.*

(a) *Release.* The release of a prisoner is removal of restraint by the custodian rather than by the prisoner.

(b) *Authority to release.* See R.C.M. 305(g) as to who may release pretrial prisoners. Normally, the lowest authority competent to order release of a post-trial prisoner is the

commander who convened the court-martial that sentenced the prisoner or the officer exercising general court-martial jurisdiction over the prisoner. *See also* R.C.M. 1103.

(3) *Allowing a prisoner to escape through neglect.*

(a) *Allow.* "Allow" means to permit; not to forbid or hinder.

(b) *Neglect.* "Neglect" is a relative term. It is the absence of conduct that would have been taken by a reasonably careful custodian in the same or similar circumstances.

(c) *Escape.* "Escape" is defined in subparagraph 12.c.(5)(c).

(d) *Status of prisoner after escape not a defense.* After escape, the fact that a prisoner returns, is captured, killed, or otherwise dies is not a defense.

(4) *Allowing a prisoner to escape through design.* An escape is allowed through design when it is intended by the custodian. Such intent may be inferred from conduct so wantonly devoid of care that the only reasonable inference which may be drawn is that the escape was contemplated as a probable result.

(5) *Drinking with prisoner.* For purposes of this section, "unlawful" is synonymous with "wrongful." That is, it is unlawful to drink an alcoholic beverage with a prisoner unless the accused had a legal justification or excuse to do so. In this context, any consumption of alcohol with a prisoner would be unlawful unless the accused had been granted specific authority to do so by competent authority (e.g., a commander of a confinement facility authorizing limited alcohol consumption by prisoners on a holiday or special occasion).

d. *Maximum punishment.*

(1) *Releasing a prisoner without authority.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Allowing a prisoner to escape through neglect.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Allowing a prisoner to escape through design.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) *Drinking with prisoner.* Confinement for 1 year and forfeiture of two-thirds pay per month for 1 year.

e. *Sample specifications.*

(1) *Releasing a prisoner without authority.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, without authority, release _____, a prisoner.

(2) *Allowing a prisoner to escape through neglect or design.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, through (neglect) (design), allow _____, a prisoner, to escape.

(3) *Drinking with prisoner.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, unlawfully drink alcohol with _____, a prisoner.

25. Article 97 (10 U.S.C. 897)—Unlawful detention

a. *Text of statute.*

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

b. *Elements.*

(1) That the accused apprehended, arrested, or confined a certain person; and

(2) That the accused unlawfully exercised the accused's authority to do so.

c. *Explanation.*

(1) *Scope.* This article prohibits improper acts by those empowered by the UCMJ to arrest, apprehend, or confine. *See* Articles 7 and 9; R.C.M. 302, 304, 305, and 1103, and paragraph 2 and subparagraph 5.b., Part V. It does not apply to private acts of false imprisonment or unlawful restraint of another's freedom of movement by one not acting under such a delegation of authority under the UCMJ.

(2) *No force required.* The apprehension, arrest, or confinement must be against the will of the person restrained, but force is not required.

(3) *Defense.* A reasonable belief held by the person imposing restraint that it is lawful is a defense.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), did, (at/on board—location), on or about _____ 20 __, unlawfully (apprehend _____) (place _____ in arrest) (confine _____ in _____).

26. Article 98 (10 U.S.C. 898)—Misconduct as prisoner

a. *Text of statute.*

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

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

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

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Acting without authority to the detriment of another for the purpose of securing favorable treatment.*

(a) That without proper authority the accused acted in a manner contrary to law, custom, or regulation;

(b) That the act was committed while the accused was in the hands of the enemy in time of war;

(c) That the act was done for the purpose of securing favorable treatment of the accused by the captors; and

(d) That other prisoners held by the enemy, either military or civilian, suffered some detriment because of the accused's act.

(2) *Maltreating prisoners while in a position of authority.*

(a) That the accused maltreated a prisoner held by the enemy;

(b) That the act occurred while the accused was in the hands of the enemy in time of war;

(c) That the accused held a position of authority over the person maltreated; and

(d) That the act was without justifiable cause.

c. *Explanation.*

(1) *Enemy.* For a discussion of "enemy," see subparagraph 27.c.(1)(b).

(2) *In time of war. See* R.C.M. 103(21).

(3) *Acting without authority to the detriment of another for the purpose of securing favorable treatment.*

(a) *Nature of offense.* Unauthorized conduct by a prisoner of war must be intended to result in improvement by the enemy of the accused's condition and must operate to the detriment of other prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm. Examples of this conduct include reporting plans of escape being prepared by others or reporting secret food caches, equipment, or arms. The conduct of the prisoner must be contrary to law, custom, or regulation.

(b) *Escape.* Escape from the enemy is authorized by custom. An escape or escape attempt which results in closer confinement or other measures against fellow prisoners still in the hands of the enemy is not an offense under this article.

(4) *Maltreating prisoners while in a position of authority.*

(a) *Authority.* The source of authority is not material. It may arise from the military rank of the accused or—despite Service regulations or customs to the contrary—designation by the captor authorities, or voluntary election or selection by other prisoners for their self-government.

(b) *Maltreatment.* The maltreatment must be real, although not necessarily physical, and it must be without justifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense.

d. *Maximum punishment.* Any punishment other than death that a court-martial may direct.

e. *Sample specifications.*

(1) *Acting without authority to the detriment of another for the purpose of securing favorable treatment.*

In that _____ (personal jurisdiction data), while in the hands of the enemy, did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, a time of war, without proper authority and for the purpose of securing favorable treatment by (his) (her) captors, (report to the commander of Camp _____ the preparations by _____, a prisoner at said camp, to escape, as a result of which report the said _____ was placed in solitary confinement) (_____).

(2) *Maltreating prisoner while in a position of authority.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, a time of war, while in the hands of the enemy and in a position of authority over _____, a prisoner at _____, as (officer in charge of prisoners at _____) (_____), maltreat the said _____ by (depriving (him) (her) of _____) (_____), without justifiable cause.

27. Article 99 (10 U.S.C. 899)—Misbehavior before the enemy

a. *Text of statute.*

Any member of the armed forces who before or in the presence of the enemy—

(1) runs away;

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

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

(4) casts away his arms or ammunition;

(5) is guilty of cowardly conduct;

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

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

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

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct.

b. *Elements.*

(1) *Running away.*

(a) That the accused was before or in the presence of the enemy;

(b) That the accused misbehaved by running away; and

(c) That the accused intended to avoid actual or impending combat with the enemy by running away.

(2) *Shamefully abandoning, surrendering, or delivering up command.*

(a) That the accused was charged by orders or circumstances with the duty to defend a certain command, unit, place, ship, or military property;

(b) That, without justification, the accused shamefully abandoned, surrendered, or delivered up that command, unit, place, ship, or military property; and

(c) That this act occurred while the accused was before or in the presence of the enemy.

(3) *Endangering safety of a command, unit, place, ship, or military property.*

(a) That it was the duty of the accused to defend a certain command, unit, place, ship, or certain military property;

(b) That the accused committed certain disobedience, neglect, or intentional misconduct;

(c) That the accused thereby endangered the safety of the command, unit, place, ship, or military property; and

(d) That this act occurred while the accused was before or in the presence of the enemy.

(4) *Casting away arms or ammunition.*

(a) That the accused was before or in the presence of the enemy; and

(b) That the accused cast away certain arms or ammunition.

(5) *Cowardly conduct.*

(a) That the accused committed an act of cowardice;

(b) That this conduct occurred while the accused was before or in the presence of the enemy; and

(c) That this conduct was the result of fear.

(6) *Quitting place of duty to plunder or pillage.*

(a) That the accused was before or in the presence of the enemy;

(b) That the accused quit the accused's place of duty; and

(c) That the accused's intention in quitting was to plunder or pillage public or private property.

(7) *Causing false alarms.*

(a) That an alarm was caused in a certain command, unit, or place under control of the armed forces of the United States;

(b) That the accused caused the alarm;

(c) That the alarm was caused without any reasonable or sufficient justification or excuse; and

(d) That this act occurred while the accused was before or in the presence of the enemy.

(8) *Willfully failing to do utmost to encounter enemy.*

(a) That the accused was serving before or in the presence of the enemy;

(b) That the accused had a duty to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels, aircraft, or a certain other thing; and

(c) That the accused willfully failed to do the utmost to perform that duty.

(9) *Failing to afford relief and assistance.*

(a) That certain troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or an ally of the United States were engaged in battle and required relief and assistance;

(b) That the accused was in a position and able to render relief and assistance to these troops, combatants, vessels, or aircraft, without jeopardy to the accused's mission;

(c) That the accused failed to afford all practicable relief and assistance; and

(d) That, at the time, the accused was before or in the presence of the enemy.

c. *Explanation.*

(1) *Running away.*

(a) *Running away.* "Running away" means an unauthorized departure to avoid actual or impending combat. It need not, however, be the result of fear, and there is no requirement that the accused literally run.

(b) *Enemy.* Enemy includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. Enemy is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.

(c) *Before or in the presence of the enemy.* Whether a person is before or in the presence of the enemy is a question of tactical relation, not distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article.

(2) *Shamefully abandoning, surrendering, or delivering up of command.*

(a) *Scope.* This provision concerns primarily commanders chargeable with responsibility for defending a command, unit, place, ship or military property. Abandonment by a subordinate would ordinarily be charged as running away.

(b) *Shameful.* Surrender or abandonment without justification is shameful within the meaning of this article.

(c) *Surrender; deliver up.* "Surrender" and "deliver up" are synonymous for the purposes of this article.

(d) *Justification.* Surrender or abandonment of a command, unit, place, ship, or military property by a person charged with its defense can be justified only by the utmost necessity or extremity.

(3) *Endangering safety of a command, unit, place, ship, or military property.*

(a) *Neglect.* Neglect is the absence of conduct which would have been taken by a reasonably careful person in the same or similar circumstances.

(b) *Intentional misconduct.* Intentional misconduct does not include a mere error in judgment.

(4) *Casting away arms or ammunition.* Self-explanatory.

(5) *Cowardly conduct.*

(a) *Cowardice.* Cowardice is misbehavior motivated by fear.

(b) *Fear.* Fear is a natural feeling of apprehension when going into battle. The mere display of apprehension does not constitute this offense.

(c) *Nature of offense.* Refusal or abandonment of a performance of duty before or in the presence of the enemy as a result of fear constitutes this offense.

(d) *Defense.* Genuine and extreme illness, not generated by cowardice, is a defense.

(6) *Quitting place of duty to plunder or pillage.*

(a) *Place of duty.* Place of duty includes any place of duty, whether permanent or temporary, fixed or mobile.

(b) *Plunder or pillage.* "Plunder or pillage" means to seize or appropriate public or private property unlawfully.

(c) *Nature of offense.* The essence of this offense is quitting the place of duty with intent to plunder or pillage. Merely quitting with that purpose is sufficient, even if the intended misconduct is not done.

(7) *Causing false alarms.* This provision covers spreading of false or disturbing rumors or reports, as well as the false giving of established alarm signals.

(8) *Willfully failing to do utmost to encounter enemy.* Willfully refusing a lawful order to go on a combat patrol may violate this provision.

(9) *Failing to afford relief and assistance.*

(a) *All practicable relief and assistance.* "All practicable relief and assistance" means all relief and assistance which should be afforded within the limitations imposed upon a person by reason of that person's own specific tasks or mission.

(b) *Nature of offense.* This offense is limited to a failure to afford relief and assistance to forces engaged in battle.

d. *Maximum punishment.* All offenses under Article 99. Death or such other punishment as a court-martial may direct.

e. *Sample specifications.*

(1) *Running away.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the enemy, run away (from (his) (her) company) (and hide) (_____), (and did not return until after the engagement had been concluded) (_____).

(2) *Shamefully abandoning, surrendering, or delivering up command.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the

enemy, shamefully (abandon) (surrender) (deliver up) _____, which it was (his) (her) duty to defend.

(3) *Endangering safety of a command, unit, place, ship, or military property.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the enemy, endanger the safety of _____, which it was (his) (her) duty to defend, by (disobeying an order from _____ to engage the enemy) (neglecting (his) (her) duty as a sentinel by engaging in a card game while on (his) (her) post) (intentional misconduct in that (he) (she) became drunk and fired flares, thus revealing the location of (his) (her) unit) (_____).

(4) *Casting away arms or ammunition.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the enemy, cast away (his) (her) (rifle) (ammunition) (_____).

(5) *Cowardly conduct.*

In that _____ (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the enemy, was guilty of cowardly conduct as a result of fear, in that _____.

(6) *Quitting place of duty to plunder or pillage.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the enemy, quit (his) (her) place of duty for the purpose of (plundering) (pillaging) (plundering and pillaging).

(7) *Causing false alarms.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the enemy, cause a false alarm in (Fort _____) (the said ship) (the camp) (_____) by (needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm)) (_____).

(8) *Willfully failing to do utmost to encounter enemy.*

In that _____ (personal jurisdiction data), being (before) (in the presence of) the enemy, did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, by, (ordering (his) (her) troops to halt their advance) (_____), willfully fail to do (his) (her) utmost to (encounter) (engage) (capture) (destroy), as it was (his) (her) duty to do, (certain enemy troops which were in retreat) (_____).

(9) *Failing to afford relief and assistance.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (before) (in the presence of) the enemy, fail to afford all practicable relief and assistance to (the USS _____, which was engaged in battle and had run aground, in that (he) (she) failed to take her in tow) (certain troops of the ground forces of _____, which were engaged in battle and were pinned down by enemy fire, in that (he) (she) failed to furnish air cover) (_____) as (he) (she) properly should have done.

28. Article 100 (10 U.S.C. 900)—Subordinate compelling surrender

a. *Text of statute.*

Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of

members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

b. *Elements.*

(1) *Compelling surrender.*

(a) That a certain person was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces;

(b) That the accused did an overt act which was intended to and did compel that commander to give it up to the enemy or abandon it; and

(c) That the place, vessel, aircraft, or other military property or body of members of the armed forces was actually given up to the enemy or abandoned.

(2) *Attempting to compel surrender.*

(a) That a certain person was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces;

(b) That the accused did a certain overt act;

(c) That the act was done with the intent to compel that commander to give up to the enemy or abandon the place, vessel, aircraft, or other military property or body of members of the armed forces;

(d) That the act amounted to more than mere preparation; and

(e) That the act apparently tended to bring about the compelling of surrender or abandonment.

(3) *Striking the colors or flag.*

(a) That there was an offer of surrender to an enemy;

(b) That this offer was made by striking the colors or flag to the enemy or in some other manner;

(c) That the accused made or was responsible for the offer; and

(d) That the accused did not have proper authority to make the offer.

c. *Explanation.*

(1) *Compelling surrender.*

(a) *Nature of offense.* The offenses under this article are similar to mutiny or attempted mutiny designed to bring about surrender or abandonment. Unlike some cases of mutiny, however, concert of action is not an essential element of the offenses under this article. The offense is not complete until the place, military property, or command is actually abandoned or given up to the enemy.

(b) *Surrender.* "Surrender" and "to give it up to an enemy" are synonymous.

(c) *Acts required.* The surrender or abandonment must be compelled or attempted to be compelled by acts rather than words.

(2) *Attempting to compel surrender.* The offense of attempting to compel a surrender or abandonment does not require actual abandonment or surrender, but there must be some act done with this purpose in view, even if it does not accomplish the purpose.

(3) *Striking the colors or flag.*

(a) *In general.* To "strike the colors or flag" is to haul down the colors or flag in the face of the enemy or to make any other offer of surrender. It is traditional wording for an act of surrender.

(b) *Nature of offense.* The offense is committed when one assumes the authority to surrender a military force or position when not authorized to do so either by competent authority or by the necessities of battle. If continued battle has become fruitless and it is impossible to communicate

with higher authority, those facts will constitute proper authority to surrender. The offense may be committed whenever there is sufficient contact with the enemy to give the opportunity of making an offer of surrender and it is not necessary that an engagement with the enemy be in progress. It is unnecessary to prove that the offer was received by the enemy or that it was rejected or accepted. The sending of an emissary charged with making the offer or surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.

(4) *Enemy.* For a discussion of "enemy," see subparagraph 27.c.(1)(b).

d. *Maximum punishment.* All offenses under Article 100. Death or such other punishment as a court-martial may direct.

e. *Sample specifications.*

(1) *Compelling surrender or attempting to compel surrender.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (attempt to) compel _____, the commander of _____, (to give up to the enemy) (to abandon) said _____, by _____.

(2) *Striking the colors or flag.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, without proper authority, offer to surrender to the enemy by (striking the (colors) (flag)) (_____).

29. Article 101 (10 U.S.C. 901)—Improper use of countersign

a. *Text of statute.*

Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct.

b. *Elements.*

(1) *Disclosing the parole or countersign to one not entitled to receive it.*

(a) That, in time of war, the accused disclosed the parole or countersign to a person, identified or unidentified; and

(b) That this person was not entitled to receive it.

(2) *Giving a parole or countersign different from that authorized.*

(a) That, in time of war, the accused knew that the accused was authorized and required to give a certain parole or countersign; and

(b) That the accused gave to a person entitled to receive and use this parole or countersign a different parole or countersign from that which the accused was authorized and required to give.

c. *Explanation.*

(1) *Countersign.* A countersign is a word, signal, or procedure given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines. It consists of a secret challenge and a password, signal, or procedure.

(2) *Parole.* A parole is a word used as a check on the countersign; it is given only to those who are entitled to inspect guards and to commanders of guards.

(3) *Who may receive countersign.* The class of persons entitled to receive the countersign or parole will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any particular case, by the general or special orders under which the

accused was acting. Before disclosing such a word, a person subject to military law must determine at that person's peril that the recipient is a person authorized to receive it.

(4) *Intent, motive, negligence, mistake, ignorance not defense.* The accused's intent or motive in disclosing the countersign or parole is immaterial to the issue of guilt, as is the fact that the disclosure was negligent or inadvertent. It is no defense that the accused did not know that the person to whom the countersign or parole was given was not entitled to receive it.

(5) *How accused received countersign or parole.* It is immaterial whether the accused had received the countersign or parole in the regular course of duty or whether it was obtained in some other way.

(6) *In time of war. See* R.C.M. 103(21).

d. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

e. *Sample specifications.*

(1) *Disclosing the parole or countersign to one not entitled to receive it.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, a time of war, disclose the (parole) (countersign), to wit: _____, to _____, a person who was not entitled to receive it.

(2) *Giving a parole or countersign different from that authorized.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, a time of war, give to _____, a person entitled to receive and use the (parole) (countersign), a (parole) (countersign), namely: _____ which was different from that which, to (his) (her) knowledge, (he) (she) was authorized and required to give, to wit: _____.

30. Article 102 (10 U.S.C. 902)—Forcing a safeguard

a. *Text of statute.*

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

b. *Elements.*

(1) That a safeguard had been issued or posted for the protection of a certain person or persons, place, or property;

(2) That the accused knew or should have known of the safeguard; and

(3) That the accused forced the safeguard.

c. *Explanation.*

(1) *Safeguard.* A safeguard is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency. The term also includes a written order left by a commander with an enemy subject or posted upon enemy property for the protection of that person or property. A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to ensure order within its own forces, even if those forces are in a theater of combat operations, and the posting of guards or of off-limits signs does not establish a safeguard unless a commander takes those actions to protect enemy or neutral persons or property. The effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national armed forces.

(2) *Forcing a safeguard.* "Forcing a safeguard" means to perform an act or acts in violation of the protection of the safeguard.

(3) *Nature of offense.* Any trespass on the protection of the safeguard will constitute an offense under this article, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

(4) *Knowledge.* Actual knowledge of the safeguard is not required. It is sufficient if an accused should have known of the existence of the safeguard.

d. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, force a safeguard, (known by (him) (her) to have been placed over the premises occupied by _____ at _____ by (overwhelming the guard posted for the protection of the same) (_____)) (_____).

31. Article 103 (10 U.S.C. 903)—Spies

a. *Text of statute.*

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death or such other punishment as a court-martial or a military commission may direct. This section does not apply to a military commission established under chapter 47A of this title.

b. *Elements.*

(1) That the accused was found in, about, or in and about a certain place, vessel, or aircraft within the control or jurisdiction of an armed force of the United States, or a shipyard, manufacturing or industrial plant, or other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere;

(2) That the accused was lurking, acting clandestinely or under false pretenses;

(3) That the accused was collecting or attempting to collect certain information;

(4) That the accused did so with the intent to convey this information to the enemy; and

(5) That this was done in time of war.

c. *Explanation.*

(1) *In time of war. See* R.C.M. 103(21).

(2) *Enemy.* For a discussion of "enemy," see subparagraph 27.c.(1)(b).

(3) *Scope of offense.* The words "any person" bring within the jurisdiction of general courts-martial and military commissions all persons of whatever nationality or status who commit spying.

(4) *Nature of offense.* A person can be a spy only when, acting clandestinely or under false pretenses, that person obtains or seeks to obtain information with the intent to convey it to a hostile party. It is not essential that the accused obtain the information sought or that it be communicated. The offense is complete with lurking or acting clandestinely or under false pretenses with intent to accomplish these objects.

(5) *Intent.* It is necessary to prove an intent to convey information to the enemy. This intent may be inferred from evidence of a deceptive insinuation of the accused among our forces, but evidence that the person had come within the lines for a comparatively innocent purpose, as to visit family or to reach friendly lines by assuming a disguise, is admissible to rebut this inference.

(6) *Persons not included under "spying."*

(a) Members of a military organization not wearing a disguise, dispatch drivers, whether members of a military organization or civilians, and persons in ships or aircraft who carry out their missions openly and who have penetrated enemy lines are not spies because, while they may have resorted to concealment, they have not acted under false pretenses.

(b) A spy who, after rejoining the armed forces to which the spy belongs, is later captured by the enemy incurs no responsibility for previous acts of spying.

(c) A person living in occupied territory who, without lurking, or acting clandestinely or under false pretenses, merely reports what is seen or heard through agents to the enemy may be charged under Article 103a with giving intelligence to or communicating with the enemy, but may not be charged under this article as being a spy.

d. *Maximum punishment.* Death or such other punishment as a court-martial or military commission may direct.

e. *Sample specification.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, a time of war, found (lurking) (acting) as a spy (in) (about) (in and about) _____, (a (fortification) (port) (base) (vessel) (aircraft) (_____) within the (control) (jurisdiction) (control and jurisdiction) of an armed force of the United States, to wit: _____) (a (shipyard) (manufacturing plant) (industrial plant) (_____) engaged in work in aid of the prosecution of the war by the United States) (_____), for the purpose of (collecting) (attempting to collect) information in regard to the [(numbers) (resources) (operations) (__) of the armed forces of the United States] [(military production) (_____) of the United States] [_____], with intent to impart the same to the enemy.

32. Article 103a (10 U.S.C. 903a)—Espionage

a. *Text of statute.*

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

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

(A) a foreign government;

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

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

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

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

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

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

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

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

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

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

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

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

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

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

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

b. *Elements.*

(1) *Espionage.*

(a) That the accused communicated, delivered, or transmitted any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense;

(b) That this matter was communicated, delivered, or transmitted to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof, either directly or indirectly; and

(c) That the accused did so with intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation.

(2) *Attempted espionage.*

(a) That the accused did a certain overt act;

(b) That the act was done with the intent to commit the offense of espionage;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to bring about the offense of espionage.

(3) *Espionage as a capital offense.*

(a) That the accused committed espionage or attempted espionage; and

(b) That the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or cryptographic information, or (4) any other major weapons system or major element of defense strategy.

c. *Explanation.*

(1) *Intent.* "Intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of a foreign nation" means that the accused acted in bad faith and without lawful authority with respect to information that is not lawfully accessible to the public.

(2) *National defense information.* "Instrument, appliance, or information relating to the national defense" includes the full range of modern technology and matter that may be developed in the future, including chemical or biological agents, computer technology, and other matter related to the national defense.

(3) *Espionage as a capital offense.* Capital punishment is authorized if the government alleges and proves that the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or cryptographic information, or (4) any other major weapons system or major element of defense strategy. See R.C.M. 1004 concerning presentencing proceedings in capital cases.

d. *Maximum punishment.*

(1) *Espionage as a capital offense.* Death or such other punishment as a court-martial may direct.

(2) *Espionage or attempted espionage.* Any punishment, other than death, that a court-martial may direct.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, with intent or reason to believe it would be used to the injury of the United States or to the advantage of _____, a foreign nation, (attempt to) (communicate) (deliver) (transmit) _____ (description of item), (a document) (a writing) (a code book) (a sketch) (a photograph) (a photographic negative) (a blueprint) (a plan) (a map) (a model) (a note) (an instrument) (an appliance) (information) relating to the national defense, [(which directly concerned (nuclear weaponry) (military spacecraft) (military satellites) (early warning systems) (_____, a means of defense or retaliation against a large scale attack) (war plans) (communications intelligence) (cryptographic information) (_____, a major weapons system) (_____, a major element of defense strategy)] to _____ ((a representative of) (an officer of) (an agent of) (an employee of) (a subject of) (a citizen of)) ((a foreign government) (a faction within a foreign country) (a party within a foreign country) (a military force within a foreign country) (a naval force within a foreign country)) (indirectly by _____).

33. Article 103b (10 U.S.C. 903b)—Aiding the enemy

a. *Text of statute.*

Any person who—

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

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

shall suffer death or such other punishment as a court-martial or military commission may direct. This section does not apply to a military commission established under chapter 47A of this title.

b. *Elements.*

(1) *Aiding the enemy.*

(a) That the accused aided the enemy; and

(b) That the accused did so with certain arms, ammunition, supplies, money, or other things.

(2) *Attempting to aid the enemy.*

(a) That the accused did a certain overt act;

(b) That the act was done with the intent to aid the enemy with certain arms, ammunition, supplies, money, or other things;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to bring about the offense of aiding the enemy with certain arms, ammunition, supplies, money, or other things.

(3) *Harboring or protecting the enemy.*

(a) That the accused, without proper authority, harbored or protected a person;

(b) That the person so harbored or protected was the enemy; and

(c) That the accused knew that the person so harbored or protected was an enemy.

(4) *Giving intelligence to the enemy.*

(a) That the accused, without proper authority, knowingly gave intelligence information to the enemy; and

(b) That the intelligence information was true, or implied the truth, at least in part.

(5) *Communicating with the enemy.*

(a) That the accused, without proper authority, communicated, corresponded, or held intercourse with the enemy; and;

(b) That the accused knew that the accused was communicating, corresponding, or holding intercourse with the enemy.

c. *Explanation.*

(1) *Scope of Article 103b.* This article denounces offenses by all persons whether or not otherwise subject to military law. Offenders may be tried by court-martial or by military commission.

(2) *Enemy.* For a discussion of "enemy," see subparagraph 27.c.(1)(b).

(3) *Aiding or attempting to aid the enemy.* It is not a violation of this article to furnish prisoners of war subsistence, quarters, and other comforts or aid to which they are lawfully entitled.

(4) *Harboring or protecting the enemy.*

(a) *Nature of offense.* An enemy is harbored or protected when, without proper authority, that enemy is shielded, either physically or by use of any artifice, aid, or representation from any injury or misfortune which in the chance of war may occur.

(b) *Knowledge.* Actual knowledge is required, but may be proved by circumstantial evidence.

(5) *Giving intelligence to the enemy.*

(a) *Nature of offense.* Giving intelligence to the enemy is a particular case of corresponding with the enemy made more serious by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. This intelligence may be conveyed by direct or indirect means.

(b) *Intelligence.* Intelligence imports that the information conveyed is true or implies the truth, at least in part.

(c) *Knowledge.* Actual knowledge is required but may be proved by circumstantial evidence.

(6) *Communicating with the enemy.*

(a) *Nature of the offense.* No unauthorized communication, correspondence, or intercourse with the enemy is permissible. The intent, content, and method of the communication, correspondence, or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused. The communication, correspondence, or intercourse may be conveyed directly or indirectly. A prisoner of war may violate this Article by engaging in unauthorized communications with the enemy. *See also* subparagraph 26.c.(3).

(b) *Knowledge.* Actual knowledge is required but may be proved by circumstantial evidence.

(c) *Citizens of neutral powers.* Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.

d. *Maximum punishment.*

Death or such other punishment as a court-martial or military commission may direct.

e. *Sample specifications.*

(1) *Aiding or attempting to aid the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (attempt to) aid the enemy with (arms) (ammunition) (supplies) (money) (_____), by (furnishing and delivering to _____, members of the enemy's armed forces _____) (____).

(2) *Harboring or protecting the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, without proper authority, knowingly (harbor) (protect) _____, an enemy, by (concealing the said _____ in (his) (her) house) (_____).

(3) *Giving intelligence to the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, without proper authority, knowingly give intelligence to the enemy, by (informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) (____).

(4) *Communicating with the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, without proper authority, knowingly (communicate with) (correspond with) (hold intercourse with) the enemy (by writing and transmitting secretly through the lines to one _____, whom (he) (she), the said _____, knew to be (an officer of the enemy's armed forces) (_____) a communication in words and figures substantially as follows, to wit: _____) (indirectly by publishing in _____, a newspaper published at _____, a communication in words and figures as follows, to wit: _____, which communication was intended to reach the enemy) (_____).

34. Article 104 (10 U.S.C. 904)—Public records offenses

a. *Text of statute.*

Any person subject to this chapter who, willfully and unlawfully—

(1) alters, conceals, removes, mutilates, obliterates, or destroys a public record; or

(2) takes a public record with the intent to alter, conceal, remove, mutilate, obliterate, or destroy the public record;
shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused altered, concealed, removed, mutilated, obliterated, destroyed, or took with the intent to alter, conceal, remove, mutilate, obliterate, or destroy, a certain public record; and

(2) That the act of the accused was willful and unlawful.

c. *Explanation.* "Public records" include records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report. "Public records" include classified matters.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully and unlawfully [(alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] [take with intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] a public record, to wit: _____.

35. Article 104a (10 U.S.C. 904a)—Fraudulent enlistment, appointment, or separation

a. *Text of statute.*

Any person who—

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

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

b. *Elements.*

(1) *Fraudulent enlistment or appointment.*

(a) That the accused was enlisted or appointed in an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;

(c) That the accused's enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and

(d) That under this enlistment or appointment that accused received pay or allowances or both.

(2) *Fraudulent separation.*

(a) That the accused was separated from an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts about the accused's eligibility for separation; and

(c) That the accused's separation was obtained or procured by that knowingly false representation or deliberate concealment.

c. *Explanation.*

(1) *In general.* A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer.

(2) *Receipt of pay or allowances.* A member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 104a only if that member has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the Government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. The receipt of pay or allowances may be proved by circumstantial evidence.

(3) *One offense.* One who procures one's own enlistment, appointment, or separation by several misrepresentations or concealment as to qualifications for the one enlistment, appointment, or separation so procured, commits only one offense under Article 104a.

d. *Maximum punishment.*

(1) *Fraudulent enlistment or appointment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Fraudulent separation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *For fraudulent enlistment or appointment.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, by means of [knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were concealed)], procure himself/herself to be (enlisted as a _____) (appointed as a _____) in the (here state the armed force in which the accused procured the enlistment or appointment), and did thereafter, (at/on board—location), receive (pay) (allowances) (pay and allowances) under the enlistment) (appointment) so procured.

(2) *For fraudulent separation.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, by means of [knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts concealed which made the accused ineligible for separation)], procure himself/herself to be separated from the (here state the armed force from which the accused procured (his) (her) separation).

36. Article 104b (10 U.S.C. 904b)—Unlawful enlistment, appointment, or separation

a. *Text of statute.*

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

b. *Elements.*

(1) That the accused effected the enlistment, appointment, or separation of the person named;

(2) That this person was ineligible for this enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and

(3) That the accused knew of the ineligibility at the time of the enlistment, appointment, or separation.

c. *Explanation.* It must be proved that the enlistment, appointment, or separation was prohibited by law, regulation, or order when effected and that the accused then knew that the person enlisted, appointed, or separated was ineligible for the enlistment, appointment, or separation.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, effect [the (enlistment) (appointment) of _____ as a _____ in (here state the armed force in which the person was enlisted or appointed)] [the separation of _____ from (here state the armed force from which the person was separated)], then well knowing that the said _____ was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

37. Article 105 (10 U.S.C. 905)—Forgery

a. *Text of statute.*

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

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

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

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

b. *Elements.*

(1) *Forgery—making or altering.*

(a) That the accused falsely made or altered a certain signature or writing;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and

(c) That the false making or altering was with the intent to defraud.

(2) *Forgery—uttering.*

(a) That a certain signature or writing was falsely made or altered;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;

(c) That the accused uttered, offered, issued, or transferred the signature or writing;

(d) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(e) That the uttering, offering, issuing or transferring was with the intent to defraud.

c. *Explanation.*

(1) *In general.* Forgery may be committed either by falsely making a writing or by knowingly uttering a falsely made writing. There are three elements common to both aspects of forgery: a writing falsely made or altered; an apparent capability of the writing as falsely made or altered to impose a legal liability on another or to change another's legal rights or liabilities to that person's prejudice; and an intent to defraud.

(2) *False.* "False" refers not to the contents of the writing or to the facts stated therein but to the making or altering of it. Hence, forgery is not committed by the genuine making of a false instrument even when made with intent to defraud. A person who, with intent to defraud, signs that person's own signature as the maker of a check drawn on a bank in which that person does not have money or credit does not commit forgery. Although the check falsely represents the existence of the account, it is what it purports to be, a check drawn by the actual maker, and therefore it is not falsely made. *But see* paragraph 70. Likewise, if a person makes a false signature of another to an instrument, but adds the word "by" with that person's own signature thus indicating authority to sign, the offense is not forgery even if no such authority exists. False recitals of fact in a genuine document, as an aircraft flight report which is "padded" by the one preparing it, do not make the writing a forgery. But see paragraph 41 concerning false official statements.

(3) *Signatures.* Signing the name of another to an instrument having apparent legal efficacy without authority and with intent to defraud is forgery as the signature is falsely made. The distinction is that in this case the falsely made signature purports to be the act of one other than the actual signer. Likewise, a forgery may be committed by a person signing that person's own name to an instrument. For example, when a check payable to the order of a certain person comes into the hands of another of the same name, forgery is committed if, knowing the check to be another's, that person indorses it with that person's own name intending to defraud. Forgery may also be committed by signing a fictitious name, as when Roe makes a check payable to Roe and signs it with a fictitious name—Doe—as drawer.

(4) *Nature of writing.* The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person's legal rights or liabilities to that person's prejudice, as a receipt. Some other instruments which may be the subject of forgery are orders for the delivery of money or goods, railroad tickets, and military orders directing travel. A writing falsely "made" includes an instrument that may be partially or entirely printed, engraved, written with a pencil, or made by photography or other device. A writing may be falsely "made" by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written. With respect to the apparent legal efficacy of the writing falsely made or altered, the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability to the prejudice of another. If under all the circumstances the instrument has neither real nor apparent legal efficacy, there is no forgery. Thus, the false making with intent to defraud of an instrument affirmatively invalid on its face is not forgery nor is the false making or altering, with intent to defraud, of a writing which could not impose a legal liability, as a mere letter of introduction. However, the false making of another's signature on an instrument with intent to defraud is forgery, even if there is no resemblance to the genuine signature and the name is misspelled.

(5) *Intent to defraud. See* subparagraph 70.c.(14). The intent to defraud need not be directed toward anyone in particular nor be for the advantage of the offender. It is immaterial that nobody was actually defrauded, or that no further step was made toward carrying out the intent to defraud other than the false making or altering of a writing.

(6) *Alteration.* The alteration must effect a material change in the legal tenor of the writing. Thus, an alteration which apparently increases, diminishes, or discharges any obligation is material. Examples of material alterations in the case of a promissory note are changing the date, amount, or place of payment. If a genuine writing has been delivered to the accused and while in the accused's possession is later found to be altered, it may be inferred that the writing was altered by the accused.

(7) *Uttering. See* subparagraph 70.c.(4).

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Forgery—making or altering.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, with intent to defraud, falsely [make (in its entirety) (the signature of _____ as an indorsement to) (the signature of _____ to) (_____) a certain (check) (writing) (_____) in the following words and figures, to wit: _____] [alter a certain (check) (writing) (_____) in the following words and figures, to wit: _____, by (adding thereto _____) (_____)], which said (check) (writing) (_____) would, if genuine, apparently operate to the legal harm of another [*and which _____ (could be) (was) used to the legal harm of _____, in that _____].

[*Note: This allegation should be used when the document specified is not one which by its nature would clearly operate to the legal prejudice of another—for example, an insurance application. The manner in which the document could be or was used to prejudice the legal rights of another should be alleged in the last blank.]

(2) *Forgery—uttering.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, with intent to defraud, (utter) (offer) (issue) (transfer) a certain (check) (writing) (_____) in the following words and figures, to wit: _____, a writing which would, if genuine, apparently operate to the legal harm of another, (which said (check) (writing) (_____)) (the signature to which said (check) (writing) (_____)) (_____) was, as (he) (she), the said _____, then well knew, falsely (made) (altered) (*and which _____ (could be) (was) used to the legal harm of _____, in that _____).

[*Note: See the note following (1), of subparagraph e.]

38. Article 105a (10 U.S.C. 905a)—False or unauthorized pass offenses

a. Text of statute.

(a) WRONGFUL MAKING, ALTERING, ETC.—Any person subject to this chapter who, wrongfully and falsely, makes, alters, counterfeits, or tampers with a military or official pass, permit, discharge certificate, or identification card shall be punished as a court-martial may direct.

(b) WRONGFUL SALE, ETC.—Any person subject to this chapter who wrongfully sells, gives, lends, or disposes of a false or unauthorized military or official pass, permit, discharge

certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

(c) WRONGFUL USE OR POSSESSION.—Any person subject to this chapter who wrongfully uses or possesses a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Wrongful making, altering, counterfeiting, or tampering with a military or official pass, permit, discharge certificate, or identification card.*

(a) That the accused wrongfully and falsely made, altered, counterfeited, or tampered with a certain military or official pass, permit, discharge certificate, or identification card; and

(b) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized.

(2) *Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.*

(a) That the accused wrongfully sold, gave, loaned, or disposed of a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized; and

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized.

(3) *Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.*

(a) That the accused wrongfully used or possessed a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized; and

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized.

[Note: When there is intent to defraud or deceive, add the following element:]

(d) That the accused used or possessed the pass, permit, discharge certificate, or identification card with intent to defraud or deceive.

c. *Explanation.*

(1) *In general.* Military or official pass, permit, discharge certificate, or identification card includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies thereof.

(2) *Intent to defraud or deceive. See* subparagraphs 70.c.(14) and (15).

d. *Maximum punishment.*

(1) *Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

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

e. *Sample specifications.*

(1) *Wrongful making, altering, counterfeiting, or tampering with military or official pass, permit, discharge certificate, or identification card.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully and falsely (make) (forge) (alter by _____) (counterfeit) (tamper with by _____) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows _____.

(2) *Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (sell to _____) (give to _____) (loan to _____) (dispose of by _____) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____, (he) (she), the said _____, then well knowing the same to be (false) (unauthorized).

(3) *Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (use) (possess) (with intent to (defraud) (deceive)) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____), (he) (she), the said _____, then well knowing the same to be (false) (unauthorized).

39. Article 106 (10 U.S.C. 906)—Impersonation of officer, noncommissioned or petty officer, or agent or official

a. Text of statute.

(a) IN GENERAL.—Any person subject to this chapter who, wrongfully and willfully, impersonates—

(1) an officer, a noncommissioned officer, or a petty officer;

(2) an agent of superior authority of one of the armed forces; or

(3) an official of a government;

shall be punished as a court-martial may direct.

(b) IMPERSONATION WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and with intent to defraud, impersonates any person referred to in paragraph (1), (2), or (3) of subsection (a) shall be punished as a court-martial may direct.

(c) IMPERSONATION OF GOVERNMENT OFFICIAL WITHOUT INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and without intent to defraud, impersonates an official of a government by committing an act that exercises or asserts the authority of the office that the person claims to have shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused impersonated an officer, noncommissioned officer, or petty officer, or an agent of superior authority of one of the armed forces, or an official of a certain government, in a certain manner; and

(2) That the impersonation was wrongful and willful.

[Note 1: If intent to defraud is in issue, add the following element:]

(3) That the accused did so with the intent to defraud a certain person or organization in a certain manner.

[Note 2: If the accused is charged with impersonating an official of a certain government without an intent to defraud, use the following element:]

(3) That the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have.

c. *Explanation.*

(1) *Nature of offense.* Impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, although this is an aggravating factor.

(2) *Officer.* The term "officer" has the same meaning as that term carries in 10 U.S.C. § 101(b)(1).

(3) *Willfulness.* "Willful" means with the knowledge that one is falsely holding one's self out as such.

(4) *Intent to defraud. See* subparagraph 70.c.(14).

d. *Maximum punishment.*

(1) *With intent to defraud.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

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

f. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully and willfully impersonate (a(n) (officer) (noncommissioned officer) (petty officer) (agent of superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)) (an official of the Government of _____) by (publicly wearing the uniform and insignia of rank of a (lieutenant of the _____) (_____)) (showing the credentials of _____) (_____) [*with intent to defraud _____ by _____] [**and (exercised) (asserted) the authority of _____ by _____].

[**See* subparagraph b note 1.]

[***See* subparagraph b note 2.]

40. Article 106a (10 U.S.C. 906a)—Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

a. *Text of statute.*

Any person subject to this chapter—

(1) who is not authorized to wear an insignia, decoration, badge, ribbon, device, or lapel button; and

(2) who wrongfully wears such insignia, decoration, badge, ribbon, device, or lapel button upon the person's uniform or civilian clothing;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform or civilian clothing;

(2) That the accused was not authorized to wear the item; and

(3) That the wearing was wrongful.

[Note: If applicable, add the following element]

(4) That the accused wore any of the following decorations: (Medal of Honor); (Distinguished Service Cross); (Navy Cross); (Air Force Cross); (Silver Star); (Purple Heart) (or any valor device on any personal award).

c. *Explanation.*

(1) *In general.* Authorization of the wearing of a military insignia, decoration, badge, ribbon, device, or lapel pin is governed by Department of Defense and Service regulations. The wearing of an item is "wrongful" where it is intentional and the accused knew that the accused was not entitled to wear it.

(2) *Scope of "unauthorized" wearing.* The wearing of an item is not unauthorized if the circumstances reveal it to be in jest or for an innocent or legitimate purpose—for instance, as part of a costume for dramatic or other reasons, or for legitimate law enforcement activities.

(3) *Wrongful.* Conduct is wrongful when it is done without legal justification or excuse. Actual knowledge that the accused was not authorized to wear the item in question is required. Knowledge may be proved by circumstantial evidence.

d. *Maximum punishment.*

(1) *Wrongful wearing of the Medal of Honor; Distinguished Service Cross; Navy Cross; Air Force Cross; Silver Star; Purple Heart; or a valor device on any personal award.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

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

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, wrongfully, without authority, wear upon (his) (her) (uniform) (civilian clothing) (the insignia or grade of a (master sergeant of _____) (chief gunner's mate of _____)) (Combat Infantryman Badge) (the Distinguished Service Cross) (the ribbon representing the Silver Star) (the lapel button representing the Legion of Merit) (_____).

41. Article 107 (10 U.S.C. 907)—False official statements; false swearing

a. *Text of statute.*

(a) FALSE OFFICIAL STATEMENTS.—Any person subject to this chapter who, with intent to deceive—

(1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or

(2) makes any other false official statement knowing it to be false;

shall be punished as a court-martial may direct.

(b) FALSE SWEARING.—Any person subject to this chapter—

(1) who takes an oath that—

(A) is administered in a matter in which such oath is required or authorized by law; and

(B) is administered by a person with authority to do so; and

(2) who, upon such oath, makes or subscribes to a statement;

if the statement is false and at the time of taking the oath, the person does not believe the statement to be true, shall be punished as a court-martial may direct.

b. *Elements.*

(1) *False official statements.*

(a) That the accused signed a certain official document or made a certain official statement;

(b) That the document or statement was false in certain particulars;

(c) That the accused knew it to be false at the time of signing it or making it; and

(d) That the false document or statement was made with the intent to deceive.

(2) *False swearing.*

(a) That the accused took an oath or equivalent;

(b) That the oath or equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law;

(c) That the oath or equivalent was administered by a person having authority to do so;

(d) That upon this oath or equivalent the accused made or subscribed a certain statement;

(e) That the statement was false; and

(f) That the accused did not then believe the statement to be true.

c. *Explanation.*

(1) *False official statements.*

(a) *Statements.* Statements may be made orally or in writing and include records, returns, regulations, orders, or other documents.

(b) *Official statements.* Official statements are those that affect military functions, which encompass matters within the jurisdiction of the military departments and Services. There are three broad categories of official statements under this offense:

(i) where the accused makes a statement while acting in the line of duty or where the statement bears a clear and direct relationship to the accused's official duties;

(ii) where the accused makes a statement to a military member who is carrying out a military duty at the time the statement is made; or

(iii) where the accused makes a statement to a civilian who is necessarily performing a military function at the time the accused makes the statement.

(c) *Status of victim of deception.* The rank or status of any person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement from the accused. The Government may be the victim of this offense.

(d) *Intent to deceive.* The false representation must be made with the intent to deceive. It is not necessary that the false statement be material to the issue inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive, while immateriality may tend to show an absence of this intent.

(e) *Material gain.* The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing on the element of intent to deceive.

(f) *Knowledge that the statement was false.* The false representation must be one which the accused actually knew was false. Actual knowledge may be proved by circumstantial evidence. An honest, although erroneous, belief that a statement made is true, is a defense.

(2) *False swearing.*

(a) *Nature of offense.* False swearing is the making under a lawful oath or equivalent of any false statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding or course of justice, as those are under Article 131, perjury (*see* paragraph 81). Unlike a false official statement, there is no requirement that the statement be made with an intent to deceive or that the statement be official.

(b) *Oath.* See Article 136 and R.C.M. 807 as to the authority to administer oaths, and see Section IX of Part III (Military Rules of Evidence) concerning proof of the signatures of persons authorized to administer oaths. An oath includes an affirmation when authorized in lieu of an oath.

d. *Maximum punishment.*

(1) *False official statement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *False swearing.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications.*

(1) *False official statements.*

In that _____ (personal jurisdiction data), did, (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 __, with intent to deceive, [sign an official (record) (return) (_____), to wit: _____] [make to _____, an official statement, to wit: _____], which (record) (return) (statement) (_____) was (totally false) (false in that _____), and was then known by the said _____ to be so false.

(2) *False swearing.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (in an affidavit) (in _____), (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: _____, which statement (he) (she) did not then believe to be true.

42. Article 107a (10 U.S.C. 907a)—Parole violation

a. *Text of statute.*

Any person subject to this chapter—

(1) who, having been a prisoner as the result of a court-martial conviction or other criminal proceeding, is on parole with conditions; and

(2) who violates the conditions of parole;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused was a prisoner as the result of a court-martial conviction or other criminal proceeding;

(2) That the accused was on parole;

(3) That there were certain conditions of parole that the parolee was bound to obey; and

(4) That the accused violated the conditions of parole by doing an act or failing to do an act.

c. *Explanation.*

(1) "Prisoner" refers only to those in confinement resulting from conviction at a court-martial or other criminal proceeding.

(2) "Parole" is defined as "word of honor." A prisoner on parole, or parolee, has agreed to adhere to a parole plan and conditions of parole. A parole plan is a written or oral agreement made by the prisoner prior to parole to do or refrain from doing certain acts or activities. A parole plan may include a residence requirement stating where and with whom a parolee will live, and a requirement that the prisoner have an offer of guaranteed employment. Conditions of parole include the parole plan and other reasonable and appropriate conditions of parole, such as paying restitution, beginning or continuing treatment for alcohol or drug abuse, or paying a fine ordered executed as part of the prisoner's court-martial sentence. In return for giving his or her word of honor to abide by a parole plan and conditions of parole, the prisoner is granted parole.

d. *Maximum punishment.* Bad-conduct discharge, confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), a prisoner on parole, did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, violate the conditions of (his) (her) parole by _____.

43. Article 108 (10 U.S.C. 908)—Military property of United States—Loss, damage, destruction, or wrongful disposition

a. *Text of statute.*

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

(1) sells or otherwise disposes of;

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

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

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

b. *Elements.*

(1) *Selling or otherwise disposing of military property.*

(a) That the accused sold or otherwise disposed of certain property (which was a firearm or explosive);

(b) That the sale or disposition was without proper authority;

(c) That the property was military property of the United States; and

(d) That the property was of a certain value.

(2) *Damaging, destroying, or losing military property.*

(a) That the accused, without proper authority, damaged or destroyed certain property in a certain way, or lost certain property;

(b) That the property was military property of the United States;

(c) That the damage, destruction, or loss was willfully caused by the accused or was the result of neglect by the accused; and

(d) That the property was of a certain value or the damage was of a certain amount.

(3) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.*

(a) That certain property (which was a firearm or explosive) was lost, damaged, destroyed, sold, or wrongfully disposed of;

(b) That the property was military property of the United States;

(c) That the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by the accused;

(d) That the omission was willful or negligent; and

(e) That the property was of a certain value or the damage was of a certain amount.

c. *Explanation.*

(1) *Military property.* Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. Military property is a term of art, and should not be confused with Government property. The terms are not interchangeable. While all military property is Government property, not all Government property is military property. An item of Government property is not military property unless the item in question meets the definition provided in this paragraph. It is immaterial whether the property sold, disposed, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by

either direct or circumstantial evidence that items of individual issue were issued to the accused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of Service exchange stores is not military property under this article.

(2) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.* "To suffer" means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.

(3) *Value and damage.* In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the Government agency normally employed in such work, or the cost of replacement, as shown by Government price lists or otherwise, whichever is less.

(4) *Firearm or explosive.* For purposes of determining the maximum punishment for this offense (*see* subparagraphs d.(1)(b) and d.(3)(b)), the term "explosive" includes ammunition. *See generally* R.C.M. 103(11), (12).

d. *Maximum punishment.*

(1) *Selling or otherwise disposing of military property.*

(a) *Of a value of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of a value of more than $1,000 or any firearm or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.*

(a) *Of a value or damage of $1,000 or less.* Confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.

(b) *Of a value or damage of more than $1,000.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.*

(a) *Of a value or damage of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of a value or damage of more than $1,000, or of any firearm or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specifications.*

(1) *Selling or disposing of military property.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, without proper authority, (sell to _____) (dispose of by _____) _____, [(a firearm) (an explosive)] of a value of (about) $_____, military property of the United States.

(2) *Damaging, destroying, or losing military property.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, without proper authority, (willfully) (through neglect) (damage by _____) (destroy by _____) (lose)

_____, of a value of (about) $_____, military property of the United States (the amount of said damage being in the sum of (about) $_____).

(3) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, without proper authority, (willfully) (through neglect) suffer _____, [(a firearm) (an explosive)] (of a value of (about) $_____) military property of the United States, to be (lost) (damaged by _____) (destroyed by _____) (sold to _____) (wrongfully disposed of by _____) (the amount of said damage being in the sum of (about $_____).

44. Article 108a (10 U.S.C. 908a)—Captured or abandoned property

a. *Text of statute.*

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

(b) Any person subject to this chapter who—

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

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

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Failing to secure public property taken from the enemy.*

(a) That certain public property was taken from the enemy;

(b) That this property was of a certain value; and

(c) That the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States.

(2) *Failing to report and turn over captured or abandoned property.*

(a) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused;

(b) That this property was of a certain value; and

(c) That the accused failed to give notice of its receipt and failed to turn over to proper authority, without delay, the captured or abandoned public or private property.

(3) *Dealing in captured or abandoned property.*

(a) That the accused bought, sold, traded, or otherwise dealt in or disposed of certain public or private captured or abandoned property;

(b) That this property was of certain value; and

(c) That by so doing the accused received or expected some profit, benefit, or advantage to the accused or to a certain person or persons connected directly or indirectly with the accused.

(4) *Looting or pillaging.*

(a) That the accused engaged in looting, pillaging, or looting and pillaging by unlawfully seizing or appropriating certain public or private property;

(b) That this property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and

(c) That this property was:

(i) left behind, owned by, or in the custody of the enemy, an occupied state, an inhabitant of an occupied state, or a person under the protection of the enemy or occupied state, or who, immediately prior to the occupation of the place where the act occurred, was under the protection of the enemy or occupied state; or

(ii) part of the equipment of a seized or captured vessel; or

(iii) owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel.

c. *Explanation.*

(1) *Failing to secure public property taken from the enemy.*

(a) *Nature of property.* Unlike the remaining offenses under this article, failing to secure public property taken from the enemy involves only public property. Immediately upon its capture from the enemy public property becomes the property of the United States. Neither the person who takes it nor any other person has any private right in this property.

(b) *Nature of duty.* Every person subject to military law has an immediate duty to take such steps as are reasonably within that person's power to secure public property for the service of the United States and to protect it from destruction or loss.

(2) *Failing to report and turn over captured or abandoned property.*

(a) *Reports.* Reports of receipt of captured or abandoned property are to be made directly or through such channels as are required by current regulations, orders, or the customs of the Service.

(b) *Proper authority.* "Proper authority" is any authority competent to order disposition of the property in question.

(3) *Dealing in captured or abandoned property.* "Disposed of" includes destruction or abandonment.

(4) *Looting or pillaging.* "Looting or pillaging" means unlawfully seizing or appropriating property which is located in enemy or occupied territory.

(5) *Enemy.* For a discussion of "enemy," see subparagraph 27.c.(1)(b).

(6) *Firearms or explosive.* For purposes of determining the maximum punishment for this offense (*see* subparagraph d.(1)(b)), the term "explosive" includes ammunition. *See generally* R.C.M. 103(11), (12).

d. *Maximum punishment.*

(1) *Failing to secure public property taken from the enemy; failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of captured or abandoned property:*

(a) *Of a value of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Of a value of more than $1,000 or any firearm or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Looting or pillaging.* Any punishment, other than death, that a court-martial may direct.

e. *Sample specifications.*

(1) *Failing to secure public property taken from the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, fail to secure for the service of the United States certain public property taken from the enemy, to wit: __, of a value of (about) $_____.

(2) *Failing to report and turn over captured or abandoned property.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, fail to give notice and turn over to proper authority without delay certain (captured) (abandoned) property which had come into (his) (her) (possession) (custody) (control), to wit: _____, of a value of (about) $_____.

(3) *Dealing in captured or abandoned property.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, (buy) (sell) (trade) (deal in) (dispose of) (__) certain (captured) (abandoned) property, to wit: _____, (a firearm) (an explosive), of a value of (about) $_____, thereby (receiving) (expecting) a (profit) (benefit) (advantage) to (himself/herself) (_____, (his) (her) accomplice) (_____, (his) (her) brother) (_____).

(4) *Looting or pillaging.*

In that (personal jurisdiction data), did, (at/onboard—location) (subject-matter jurisdiction, if required), on or about (date), engage in (looting) (and) (pillaging) by unlawfully (seizing) (appropriating) _____, (property which had been left behind) (the property of _____), [(an inhabitant of _____) (_____)].

45. Article 109 (10 U.S.C. 909)—Property other than military property of United States—waste, spoilage, or destruction

a. *Text of statute.*

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

b. *Elements.*

(1) *Wasting or spoiling of non-military property.*

(a) That the accused willfully or recklessly wasted or spoiled certain real property in a certain manner;

(b) That the property was that of another person; and

(c) That the property was of a certain value.

(2) *Damaging non-military property.*

(a) That the accused willfully and wrongfully damaged certain personal property in a certain manner;

(b) that the property was that of another person; and

(c) that the damage inflicted on the property was of a certain amount.

(3) *Destroying non-military property.*

(a) That the accused willfully and wrongfully destroyed certain personal property in a certain manner;

(b) That the property was that of another person; and

(c) That the property was of a certain value.

c. *Explanation.*

(1) *Wasting or spoiling non-military property.* This portion of Article 109 proscribes willful or reckless waste or spoliation of the real property of another. The terms "wastes" and "spoils" as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. This destruction is punishable whether done willfully, that is intentionally, recklessly, or is through a culpable disregard of the foreseeable consequences of some voluntary act.

(2) *Destroying or damaging non-military property.* This portion of Article 109 proscribes the willful and wrongful destruction or damage of the personal property of another. To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose. Damage consists of any physical injury to the property. To constitute an offense under this section, the destruction or damage of the property must have been willful and wrongful. As used in this section "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom. Willfulness may be proved by circumstantial evidence, such as the manner in which the acts were done.

(3) *Value and damage.* In the case of destruction, the value of the property destroyed controls the maximum punishment which may be adjudged. In the case of damage, the amount of the damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. *See also* subparagraph 64.c.(1)(g).

d. *Maximum punishment.*

(1) *Wasting or spoiling, non-military property—real property.*

(a) *Of property valued at $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of property valued at more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Damaging any property other than military property of the United States.*

(a) *Inflicting damage of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Inflicting damage of more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Destroying any property other than military property of the United States.*

(a) *Destroying property valued at $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Destroying property valued at more than $1,000.* Dishonorable discharge; forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Wasting or spoiling real property other than military property of the United States.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, [(willfully) recklessly) waste _____] [(willfully) (recklessly) spoil_____] (of a value of (about) $_____) (the amount of said damage being in the sum of (about) $_____), the property of _____.

(2) *Damaging any property other than military property of the United States.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully and wrongfully damage by (method of damage) (identify property damaged_____) (the amount of said damage being in the sum of (about) $_____), the property of _____.

(3) *Destroying personal property other than military property of the United States.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully and wrongfully destroy (identify property destroyed _____), of a value of (about) $_____ the property of _____.

46. Article 109a (10 U.S.C. 909a)—Mail matter: wrongful taking, opening, etc.

a. *Text of statute.*

(a) TAKING.—Any person subject to this chapter who, with the intent to obstruct the correspondence of, or to pry into the business or secrets of, any person or organization, wrongfully takes mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

(b) OPENING, SECRETING, DESTROYING, STEALING.—Any person subject to this chapter who wrongfully opens, secretes, destroys, or steals mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Taking.*

(a) That the accused took certain mail matter;

(b) That such taking was wrongful;

(c) That the mail matter was taken by the accused before it was delivered to or received by the addressee; and

(d) That such taking was with the intent to obstruct the correspondence or pry into the business or secrets of any person or organization.

(2) *Opening, secreting, destroying, or stealing.*

(a) That the accused opened, secreted, destroyed, or stole certain mail matter;

(b) That such opening, secreting, destroying, or stealing was wrongful; and

(c) That the mail matter was opened, secreted, destroyed, or stolen by the accused before it was delivered to or received by the addressee.

c. *Explanation.* These offenses are intended to protect the mail and mail system. "Mail matter" means any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an agency thereof including the armed forces. The value of the mail matter is not an element. See subparagraph 64.c.(1) concerning "steal."

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Taking.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully take certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)), addressed to _____, (out of the (_____ Post Office _____) (orderly room of _____) (unit mail box of _____) (_____) (from _____) before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the (addressee) with intent to (obstruct the correspondence) (pry into the (business) (secrets)) of _____.

(2) *Opening, secreting, destroying, or stealing.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20 __, (wrongfully (open) (secret) (destroy)) (steal) certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)) addressed to _____, which said (letters(s)) (_____) (was) (were) then (in (the _____ Post Office _____) (orderly room of _____) (unit mail box of _____) (custody of _____) (_____) (had previously been committed to _____, (a representative of

_____,) (an official agency for the transmission of communications)) before said (letter(s)) (_____) (was) (were) (delivered) (actually received) (to) (by) the (addressee).

47. Article 110 (10 U.S.C. 910)—Improper hazarding of vessel or aircraft

a. *Text of statute.*

(a) WILLFUL AND WRONGFUL HAZARDING.—Any person subject to this chapter who, willfully and wrongfully, hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished by death or such other punishment as a court-martial may direct.

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

b. *Elements.*

(1) That a vessel or aircraft of the armed forces was hazarded in a certain manner; and

(2) That the accused by certain acts or omissions, willfully and wrongfully, or negligently, caused or suffered the vessel or aircraft to be hazarded.

c. *Explanation.*

(1) *Hazard.* "Hazard" means to put in danger of loss or injury. Actual damage to, or loss of, a vessel or aircraft of the armed forces by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that the vessel or aircraft was hazarded but not of the fact of culpability on the part of any particular person. "Strand" means run a vessel aground so that the vessel is fast for a time.

(2) *Willfully and wrongfully.* As used in this article, "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom.

(3) *Negligence.* "Negligence" as used in this article means the failure to exercise the care, prudence, or attention to duties which the interests of the Government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the Service for the safety and protection of vessels and aircraft of the armed forces, simply because these duties are not specifically enumerated in a regulation or order. However, a mere error in judgment that a reasonably able person might have committed under the same circumstances does not constitute an offense under this article.

(4) *Suffer.* "To suffer" means to allow or permit. A ship or aircraft is willfully suffered to be hazarded by one who, although not in direct control of the vessel or aircraft, knows a danger to be imminent but takes no steps to prevent it, for example, as by a navigator of a ship under way who fails to report to the officer of the deck a radar target which is observed to be on a collision course with, and dangerously close to, the ship, or an aircraft's copilot or navigator who similarly fails to report an imminent danger. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.

(5) *Vessel. See* 1 U.S.C. § 3.

(6) *Aircraft. See* 18 U.S.C. § 31(a)(1). Additionally, aircraft includes remotely piloted aircraft and unmanned aerial vehicles.

d. *Maximum Punishment.*

(1) *Willfully and wrongfully.* Death or such other punishment as a court-martial may direct.

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

e. *Sample specifications.*

(1) *Hazarding or suffering to be hazarded any vessel or aircraft, willfully and wrongfully.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), did, on _____ 20 __, while serving as _____ (aboard) (on) the _____ in the vicinity of _____, willfully and wrongfully (hazard the said (vessel) (aircraft)) (suffer the said (vessel) (aircraft)) to be hazarded) by (causing the said (vessel) (aircraft) to collide with _____) (allowing the said vessel to run aground) (allowing said aircraft to ___) (_____).

(2) *Hazarding of vessel or aircraft, negligently.*

(a) *Example 1.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), on _____ 20 __, while serving (in command of the _____) (as the pilot of _____), (making entrance to (Boston Harbor)) (approaching (_____ Air Force Base) (_____ Air Field)) did negligently hazard the said (vessel) (aircraft) by failing and neglecting to maintain or cause to be maintained an accurate (running plot of the true position) (location) of said (vessel) (aircraft) while making said approach, as a result of which neglect the said _____, at or about _____, hours on the day aforesaid, became (stranded) (_____) in the vicinity of (Channel Buoy Number Three) (_____ runway) (_____).

(b) *Example 2.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), on _____ 20 __, while serving as navigator of the _____, cruising on special service in the _____ Ocean off the coast of _____, notwithstanding the fact that at about midnight, _____ 20 __, the northeast point of _____ Island bore abeam and was about six miles distant, the said ship being then under way and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then and there negligently hazard the said vessel or aircraft by failing and neglecting to exercise proper care and attention in navigating said ship while approaching _____ Island, in that (he) (she) neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of said _____, ran upon a rock off the southwest coast of _____ Island, at about _____ hours, _____, 20 __, in consequence of which the said _____ was lost.

(c) *Example 3.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), on _____ 20 __, while serving as navigator of the _____ and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from the _____ position, obtained and plotted by (him) (her), to the position of _____, and well knowing the difficulty of sighting _____, from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise (his) (her) commanding officer to lay a safe course for said ship to the northward before continuing on a westerly course, as it was the duty of said _____ to do; in consequence of which the said ship was, at about _____ hours on the day above mentioned, run upon _____ bank in the _____ Sea, about latitude __ degrees, __ minutes, north, and longitude __ degrees, __ minutes, west, and seriously injured.

(3) *Suffering a vessel or aircraft to be hazarded, negligently.*

(a) *Example 1.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), while serving as combat intelligence center officer on board the _____, making passage from Boston to Philadelphia, and having, between _____ and _____ hours on _____, 20 __, been duly informed of decreasing radar ranges and constant radar bearing indicating that the said _____ was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel or aircraft to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was (his) (her) duty to do, and (he) (she), the said _____, through negligence, did cause the said _____ to collide with the _____ at or about _____ hours on said date, with resultant damage to _____.

(b) *Example 2.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), while serving as (navigator) (_____) on _____, transiting from (_____ Air Force Base) to (_____ Air Force Base), and having, between _____ and _____ hours on _____, 20 ___, becoming aware of (inclement weather conditions) (inaccurate fuel calculations) threatening said aircraft, did then and there negligently suffer the said aircraft to be hazarded by failing and neglecting to report said (weather conditions) (inaccurate fuel calculations) to the (pilot) (copilot), as it was (his) (her) duty to do, the said (navigator) (_____), through negligence, did cause the said aircraft to _____, at or about _____ hours on said date, with resultant damage to wit: _____.

48. Article 111 (10 U.S.C. 911)—Leaving scene of vehicle accident

a. *Text of statute.*

(a) DRIVER.—Any person subject to this chapter—

(1) who is the driver of a vehicle that is involved in an accident that results in personal injury or property damage; and

(2) who wrongfully leaves the scene of the accident—

(A) without providing assistance to an injured person; or

(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.

(b) SENIOR PASSENGER.—Any person subject to this chapter—

(1) who is a passenger in a vehicle that is involved in an accident that results in personal injury or property damage;

(2) who is the superior commissioned or noncommissioned officer of the driver of the vehicle or is the commander of the vehicle; and

(3) who wrongfully and unlawfully orders, causes, or permits the driver to leave the scene of the accident—

(A) without providing assistance to an injured person; or

(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Driver.*

(a) That the accused was the driver of a vehicle;

(b) That while the accused was driving the vehicle was involved in an accident;

(c) That the accused knew that the vehicle had been in an accident;

(d) That the accused left the scene of the accident without (providing assistance to the victim who had been struck (and injured) by the said vehicle) or (providing identification); and

(e) That such leaving was wrongful.

(2) *Senior passenger.*

(a) That the accused was a passenger in a vehicle which was involved in an accident;

(b) That the accused knew that said vehicle had been in an accident; and

(c) That the accused was the superior commissioned or noncommissioned officer of the driver, or commander of the vehicle, and wrongfully and unlawfully ordered, caused, or permitted the driver to leave the scene of the accident without (providing assistance to the victim who had been struck (and injured) by the said vehicle) (or) (providing identification).

c. *Explanation.*

(1) *Nature of offense.* This offense covers "hit and run" situations where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the driver's vehicle. It also covers accidents caused by the accused, even if the accused's vehicle does not contact other people, vehicles, or property.

(2) *Knowledge.* Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

(3) *Passenger.* A passenger other than a senior passenger may also be liable under this paragraph. *See* paragraph 1 of this Part.

d. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), [the driver of)][*a passenger in] [the senior officer/noncommissioned officer in] (_____ in) a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident, did, at _____ (subject-matter jurisdiction data, if required), on or about _____ 20 __ [wrongfully leave] [*by _____, assist the driver of the said vehicle in wrongfully leaving] [wrongfully order, cause, or permit the driver to leave] the scene of the accident without (providing assistance to _____, who had been struck (and injured) by the said vehicle) (making (his) (her) (the driver's) identity known).

[*Note: This language should be used when the accused was a passenger and is charged as a principal. *See* paragraph 1 of this Part.]

49. Article 112 (10 U.S.C. 912)—Drunkenness and other incapacitation offenses

a. *Text of statute.*

(a) DRUNK ON DUTY.—Any person subject to this chapter who is drunk on duty shall be punished as a court-martial may direct.

(b) INCAPACITATION FOR DUTY FROM DRUNKENNESS OR DRUG USE.—Any person subject to this chapter who, as a result of indulgence in any alcoholic beverage or any drug, is incapacitated for the proper performance of duty shall be punished as a court-martial may direct.

(c) DRUNK PRISONER.—Any person subject to this chapter who is a prisoner and, while in such status, is drunk shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Drunk on duty.*

(a) That the accused was on a certain duty; and

(b) That the accused was drunk while on this duty.

(2) *Incapacitation for duty from drunkenness or drug use.*

(a) That the accused had certain duties to perform;

(b) That the accused was incapacitated for the proper performance of such duties; and

(c) That such incapacitation was the result of previous indulgence in intoxicating liquor or any drug.

(3) *Drunk prisoner.*

(a) That the accused was a prisoner; and

(b) That while in such status the accused was drunk.

c. *Explanation.*

(1) *Drunk on duty.*

(a) *Drunk.* "Drunk" means—

(i) the state of intoxication by alcohol that is sufficient to impair the rational and full exercise of mental or physical faculties; or

(ii) the state of meeting or exceeding a blood alcohol content limit with respect to alcohol concentration in a person's blood of 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath of 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

(b) *Duty.* "Duty" as used in this article means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. Within the meaning of this article, when in the actual exercise of command, the commander of a post, or of a command, or of a detachment in the field is constantly on duty, as is the commanding officer on board a ship. In the case of other officers or enlisted persons, "on duty" relates to duties or routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as "off duty" or "on liberty." In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

(c) *Nature of offense.* It is necessary that the accused be drunk while actually on the duty alleged, and the fact the accused became drunk before going on duty, although material in extenuation, does not affect the question of guilt. If, however, the accused does not undertake the responsibility or enter upon the duty at all, the accused's conduct does not fall within the terms of this article, nor does that of a person who absents himself or herself from duty and is drunk while so absent. Included within the article is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty.

(d) *Defenses.* If the accused is known by superior authorities to be drunk at the time a duty is assigned, and the accused is thereafter allowed to assume that duty anyway, or if the drunkenness results from an accidental over dosage administered for medicinal purposes, the accused will have a defense to this offense.

(2) *Incapacitation for duty from drunkenness or drug use.*

(a) *Incapacitated.* "Incapacitated" means unfit or unable to properly perform duties as a result of previous alcohol consumption or drug use. Illness resulting from previous indulgence is an example of being "unable" to perform duties.

(b) *Affirmative defense.* The accused's lack of knowledge of the duties assigned is an affirmative defense to this offense.

(3) *Drunk prisoner.*

(a) *Prisoner. See* subparagraph 24.c.(1).

(b) *Drunk. See* subparagraph 49.c.(1)(a).

d. *Maximum punishment.*

(1) *Drunk on duty.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(2) *Incapacitation for duty from drunkenness or drug use.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(3) *Drunk prisoner.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specifications.*

(1) *Drunk on duty.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, found drunk while on duty as _____.

(2) *Incapacitation for duty from drunkenness or drug use.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, as a result of previous overindulgence in intoxicating liquor or drugs incapacitated for the proper performance of (his) (her) duties.

(3) *Drunk prisoner.*

In that _____ (personal jurisdiction data), a prisoner, was (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, found drunk.

50. Article 112a (10 U.S.C. 912a)—Wrongful use, possession, etc., of controlled substances

a. *Text of statute.*

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

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

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

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

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

b. *Elements.*

(1) *Wrongful possession of controlled substance.*

(a) That the accused possessed a certain amount of a controlled substance; and

(b) That the possession by the accused was wrongful.

(2) *Wrongful use of controlled substance.*

(a) That the accused used a controlled substance; and

(b) That the use by the accused was wrongful.

(3) *Wrongful distribution of controlled substance.*

(a) That the accused distributed a certain amount of a controlled substance; and

(b) That the distribution by the accused was wrongful.

(4) *Wrongful introduction of a controlled substance.*

(a) That the accused introduced onto a vessel, aircraft, vehicle, or installation used by the armed forces or under the control of the armed forces a certain amount of a controlled substance; and

(b) That the introduction was wrongful.

(5) *Wrongful manufacture of a controlled substance.*

(a) That the accused manufactured a certain amount of a controlled substance; and

(b) That the manufacture was wrongful.

(6) *Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute.*

(a) That the accused (possessed) (manufactured) (introduced) a certain amount of a controlled substance;

(b) That the (possession) (manufacture) (introduction) was wrongful; and

(c) That the (possession) (manufacture) (introduction) was with the intent to distribute.

(7) *Wrongful importation or exportation of a controlled substance.*

(a) That the accused (imported into the customs territory of) (exported from) the United States a certain amount of a controlled substance; and

(b) That the (importation) (exportation) was wrongful.

[Note: When any of the aggravating circumstances listed in subparagraph d. is alleged, it must be listed as an element.]

c. *Explanation.*

(1) *Controlled substance.* "Controlled substance" means amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, and barbituric acid, including phenobarbital and secobarbital. "Controlled substance" also means any substance that is included in Schedules I through V established by the Controlled Substances Act of 1970 (21 U.S.C. § 812).

(2) *Possess.* "Possess" means to exercise control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

(3) *Distribute, deliver.* "Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship.

(4) *Manufacture.* "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by

extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container. Production, as used in this subparagraph, includes the planting, cultivating, growing, or harvesting of a drug or other substance.

(5) *Wrongfulness.* To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the UCMJ shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

(6) *Intent to distribute.* Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

(7) *Certain amount.* When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused possessed, distributed, introduced, or manufactured "some," "traces of," or "an unknown quantity of" a controlled substance.

(8) *Missile launch facility.* A missile launch facility includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

(9) *Customs territory of the United States.* Customs territory of the United States includes only the States, the District of Columbia, and Puerto Rico.

(10) *Use.* "Use" means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the Government's burden of proof as to knowledge.

(11) *Deliberate ignorance.* An accused who consciously avoids knowledge of the presence of a controlled substance or the contraband nature of the substance is subject to the same criminal liability as one who has actual knowledge.

d. *Maximum punishment.*

(1) *Wrongful use, possession, manufacture, or introduction of controlled substance.*

(a) *Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, III controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(b) *Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance.*

(a) *Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(b) *Phenobarbital and Schedule IV and V controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

When any offense under this paragraph is committed; while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. § 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such offense shall be increased by 5 years.

e. *Sample specifications.*

(1) *Wrongful possession, manufacture, or distribution of controlled substance.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20 __, wrongfully (possess) (distribute) (manufacture) _____ (grams) (ounces) (pounds) (_____) of _____ (a schedule (_____) controlled substance), (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____) (while receiving special pay under 37 U.S.C. § 310) (during time of war).

(2) *Wrongful use of controlled substance.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20 __, wrongfully use _____ (a Schedule __ controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____) (while receiving special pay under 37 U.S.C. § 310) (during time of war).

(3) *Wrongful introduction of controlled substance.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20 __, wrongfully introduce _____ (grams) (ounces) (pounds) (_____) of _____ (a Schedule (_____) controlled substance) onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: _____ (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while receiving special pay under 37 U.S.C. § 310) (during a time of war).

(4) *Wrongful importation or exportation of controlled substance.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20 __, wrongfully (import) (export) _____ (grams) (ounces) (pounds) (_____) of _____ (a Schedule (__) controlled substance) (into the customs territory of) (from) the United States (while on board a vessel/aircraft used by the armed forces or under the control of the armed forces, to wit: _____) (during time of war).

51. Article 113 (10 U.S.C. 913)—Drunken or reckless operation of a vehicle, aircraft, or vessel

a. *Text of statute.*

(a) Any person subject to this chapter who—

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

(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is equal to or exceeds the applicable limit under subsection (b),

shall be punished as a court-martial may direct.

(b)(1) For purposes of subsection (a), the applicable limit on the alcohol concentration in a person's blood or breath is as follows:

(A) In the case of the operation or control of a vehicle, aircraft, or vessel in the United States, such limit is the lesser of—

(i) the blood alcohol content limit under the law of the State in which the conduct occurred, except as may be provided under paragraph (2) for conduct on a military installation that is in more than one State; or

(ii) the blood alcohol content limit specified in paragraph (3).

(B) In the case of the operation or control of a vehicle, aircraft, or vessel outside the United States, the applicable blood alcohol content limit is the blood alcohol content limit specified in paragraph (3) or such lower limit as the Secretary of Defense may by regulation prescribe.

(2) In the case of a military installation that is in more than one State, if those States have different blood alcohol content limits under their respective State laws, the Secretary may select one such blood alcohol content limit to apply uniformly on that installation.

(3) For purposes of paragraph (1), the blood alcohol content limit with respect to alcohol concentration in a person's blood is 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath is 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis. The Secretary may by regulation prescribe limits that are lower than the limits specified in the preceding sentence, if such lower limits are based on scientific developments, as reflected in Federal law of general applicability.

(4) In this subsection:

(A) The term "blood alcohol content limit" means the amount of alcohol concentration in a person's blood or breath at which operation or control of a vehicle, aircraft, or vessel is prohibited.

(B) The term "United States" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and the term "State" includes each of those jurisdictions.

b. *Elements.*

(1) That the accused was operating or in physical control of a vehicle, aircraft, or vessel; and

(2) That while operating or in physical control of a vehicle, aircraft, or vessel, the accused—

(a) did so in a wanton or reckless manner; or

(b) was drunk or impaired; or

(c) the alcohol concentration in the accused's blood or breath equaled or exceeded the applicable limit under Article 113(b).

[Note: Add the following if applicable]

(3) That the accused thereby caused the vehicle, aircraft, or vessel to injure a person.

c. *Explanation.*

(1) *Vehicle. See* 1 U.S.C. § 4.

(2) *Vessel. See* 1 U.S.C. § 3.

(3) *Aircraft. See* 18 U.S.C. § 31(a)(1).

(4) *Operates.* Operating a vehicle, aircraft, or vessel includes not only driving or guiding a vehicle, aircraft, or vessel while it is in motion, either in person or through the agency of another, but also setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle, aircraft, or vessel to move.

(5) *Physical control and actual physical control.* These terms as used in the statute are synonymous. They describe the present capability and power to dominate, direct, or regulate the vehicle, vessel, or aircraft, either in person or through the agency of another, regardless of whether such vehicle, aircraft, or vessel is operated. For example, the intoxicated person seated behind the steering wheel of a vehicle with the keys of the vehicle in or near the ignition but with the engine not turned on could be deemed in actual physical control of that vehicle. However, the person asleep in the back seat with the keys in his or her pocket would not be deemed in actual physical control. Physical control necessarily encompasses operation.

(6) *Drunk or impaired.* Drunk and impaired mean any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties. The term drunk is used in relation to intoxication by alcohol. The term impaired is used in relation to intoxication by a substance described in Article 112(a).

(7) *Reckless.* The operation or physical control of a vehicle, vessel, or aircraft is reckless when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: whether, under all the circumstances, the accused's manner of operation or physical control of the vehicle, vessel, or aircraft was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is operating or physically controlling a vehicle, vessel, or aircraft with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The nature of the conditions in which the vehicle, vessel, or aircraft is operated or controlled, the time of day or night, the proximity and number of other vehicles, vessels, or aircraft and the condition of the vehicle, vessel, or aircraft, are often matters of importance in the proof of an offense charged under this article and, where they are of importance, may properly be alleged.

(8) *Wanton.* Wanton includes "reckless," but in describing the operation or physical control of a vehicle, vessel, or aircraft, wanton may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(9) *Causation.* The accused's drunken or reckless driving must be a proximate cause of injury for the accused to be guilty of drunken or reckless driving resulting in personal injury. To be proximate, the accused's actions need not be the sole cause of the injury, nor must they be the immediate cause of the injury, that is, the latest in time and space preceding the injury. A contributing cause is deemed proximate only if it plays a material role in the victim's injury.

(10) *Separate offenses.* While the same course of conduct may constitute violations of both paragraphs (a)(1) and (2) of Article 113, e.g., both drunken and reckless operation or physical control, this article proscribes the conduct described in both paragraphs (a)(1) and (2) as separate offenses, which may be charged separately. However, as recklessness is a relative matter, evidence of all the surrounding circumstances that made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, for example, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

d. *Maximum punishment.*

(1) *Resulting in personal injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(2) *No personal injury involved.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20 __, (in the motor pool area) (near the Officers' Club) (at the intersection of _____ and _____) (while in the Gulf of Mexico) (while in flight over North America) physically control [a vehicle, to wit: (a truck) (a passenger car) (_____)] [an aircraft, to wit: (an AH-64 helicopter) (an F-14A fighter) (a KC-135 tanker) (_____)] [a vessel, to wit: (the aircraft carrier USS _____) (the Coast Guard Cutter _____) (_____)], [while drunk] [while impaired by _____] [while the alcohol concentration in (his) (her) (blood or breath) equaled or exceeded the applicable limit under subsection (b) of the text of the statute in paragraph 50 as shown by chemical analysis] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (ordering that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) (injure _____)].

52. Article 114 (10 U.S.C. 914)—Endangerment offenses

a. *Text of statute.*

(a) RECKLESS ENDANGERMENT.—Any person subject to this chapter who engages in conduct that—

(1) is wrongful and reckless or is wanton; and

(2) is likely to produce death or grievous bodily harm to another person;

shall be punished as a court-martial may direct.

(b) DUELING.—Any person subject to this chapter—

(1) who fights or promotes, or is concerned in or connives at fighting, a duel; or

(2) who, having knowledge of a challenge sent or about to be sent, fails to report the facts promptly to the proper authority;

shall be punished as a court-martial may direct.

(c) FIREARM DISCHARGE, ENDANGERING HUMAN LIFE.—Any person subject to this chapter who, willfully and wrongly, discharges a firearm, under circumstances such as to endanger human life shall be punished as a court-martial may direct.

(d) CARRYING CONCEALED WEAPON.—Any person subject to this chapter who unlawfully carries a dangerous weapon concealed on or about his person shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Reckless endangerment*

(a) That the accused did engage in conduct;

(b) That the conduct was wrongful and reckless or wanton; and

(c) That the conduct was likely to produce death or grievous bodily harm to another person.

(2) *Dueling.*

(a) That the accused fought another person with deadly weapons;

(b) That the combat was for private reasons; and

(c) That the combat was by prior agreement.

(3) *Promoting a duel.*

(a) That the accused promoted a duel between certain persons; and

(b) That the accused did so in a certain manner.

(4) *Conniving at fighting a duel.*

(a) That certain persons intended to and were about to engage in a duel;

(b) That the accused had knowledge of the planned duel; and

(c) That the accused connived at the fighting of the duel in a certain manner.

(5) *Failure to report a duel.*

(a) That a challenge to fight a duel had been sent or was about to be sent;

(b) That the accused had knowledge of this challenge; and

(c) That the accused failed to report this fact promptly to proper authority.

(6) *Firearm discharge, endangering human life.*

(a) That the accused discharged a firearm;

(b) That the discharge was willful and wrongful; and

(c) That the discharge was under circumstances such as to endanger human life.

(7) *Carrying concealed weapon.*

(a) That the accused carried a certain weapon concealed on or about the accused's person;

(b) That the carrying was unlawful; and

(c) That the weapon was a dangerous weapon.

c. *Explanation.*

(1) *Reckless endangerment.*

(a) *In general.* This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or grievous bodily harm to others.

(b) *Wrongfulness.* Conduct is wrongful when it is without legal justification or excuse.

(c) *Recklessness.* "Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.

(d) *Wantonness.* "Wanton" includes "reckless" but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(e) *Likely to produce.* When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is likely to produce that result.

(f) *Grievous bodily harm.* This phrase has the same meaning given it in subparagraph 77.c.(1)(c).

(g) *Death or injury not required.* It is not necessary that death or grievous bodily harm be actually inflicted to prove reckless endangerment.

(2) *Dueling.*

(a) *Duel.* A duel is combat between two persons for private reasons fought with deadly weapons by prior agreement.

(b) *Promoting a duel.* Urging or taunting another to challenge or to accept a challenge to duel, acting as a second or as carrier of a challenge or acceptance, or otherwise furthering or contributing to the fighting of a duel are examples of promoting a duel.

(c) *Conniving at fighting a duel.* Anyone who has knowledge that steps are being taken or have been taken toward arranging or fighting a duel and who fails to take reasonable preventive action thereby connives at the fighting of a duel.

(3) *Firearm discharge, endangering human life.* "Under circumstances such as to endanger human life" refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general.

(4) *Carrying concealed weapon.*

(a) *Concealed weapon.* A weapon is concealed when it is carried by a person and intentionally covered or kept from sight.

(b) *Dangerous weapon.* For purposes of this paragraph, a weapon is dangerous if it was specifically designed for the purpose of doing grievous bodily harm, or it was used or intended to be used by the accused to do grievous bodily harm.

(c) *On or about.* "On or about" means the weapon was carried on the accused's person or was within the immediate reach of the accused.

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

e. *Sample specifications.*

(1) *Reckless endangerment.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully and (recklessly) (wantonly) engage in conduct, to wit: _____, conduct likely to cause death or grievous bodily harm to _____.

(2) *Dueling.*

(a) *Dueling.*

In that_____ (personal jurisdiction data) (and_____), did, (at/onboard—location) (subject-matter jurisdiction data, if required), on or about _____20_____, fight a duel (with _____), using as weapons therefor (pistols) (swords) (_____).

(a) *Promoting a duel.*

In that_____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20____, promote a duel between _____ and _____ by (telling said _____ (he) (she) would be a coward if (he) (she) failed to challenge said _____ to a duel) (knowingly carrying from said _____ to said _____ a challenge to fight a duel).

(b) *Conniving at fighting a duel.*

In that _____ (personal jurisdiction data), having knowledge that _____ and _____ were about to engage in a duel, did (at/onboard—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, connive at the fighting of said duel by (failing to take reasonable preventive action) (_____).

(c) *Failure to report a duel.*

In that _____ (personal jurisdiction data), having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by _____ to _____, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, fail to report that fact promptly to the proper authority.

(3) *Firearm discharge, endangering human life.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully and willfully discharge a firearm, to wit: _____, (in the mess hall of _____) (_____), under circumstances such as to endanger human life.

(4) *Carrying concealed weapon.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, unlawfully carry on or about (his) (her) person a concealed weapon, to wit: a _____.

53. Article 115 (10 U.S.C. 915)—Communicating threats

a. *Text of statute.*

(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct.

(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injure the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct.

(c) COMMUNICATING FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct. As used in the preceding sentence, the term "false threat" means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.

b. *Elements.*

(1) *Threats generally.*

(a) That the accused communicated certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future;

(b) That the communication was made known to that person or to a third person; and

(c) That the communication was wrongful.

(2) *Threat to use explosive, etc.*

(a) That the accused communicated certain language;

(b) That the information communicated amounted to a threat;

(c) That the harm threatened was to be done by means of an explosive; weapon of mass destruction; biological or chemical agent, substance, or weapon; or hazardous material; and

(d) That the communication was wrongful.

(3) *False threats concerning use of explosives, etc.*

(a) That the accused communicated or conveyed certain information;

(b) That the information communicated or conveyed concerned an attempt being made or to be made by means of an explosive; weapon of mass destruction; biological or chemical agent, substance, or weapon; or hazardous material, to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;

(c) That the information communicated or conveyed by the accused was false and that the accused then knew it to be false; and

(d) That the communication of the information by the accused was malicious.

c. *Explanation.*

(1) *Threat.* A "threat" means an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage or destroy is not required.

(2) *Wrongful.* A communication must be wrongful in order to constitute this offense. The wrongfulness of the communication relates to the accused's subjective intent. For purposes of this paragraph, the mental state requirement is satisfied if the accused transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. A statement made under circumstances that reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act is not wrongful. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving a threat.

(3) *Explosive.* "Explosive" means gunpowder, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other explosive compound, mixture, or similar material.

(4) *Weapon of mass destruction.* A "weapon of mass destruction" means any device, explosive or otherwise, that is intended, or has the capability, to cause death or serious bodily

injury to a significant number of people through the release, dissemination, or impact of: toxic or poisonous chemicals, or their precursors; a disease organism; or radiation or radioactivity.

(5) *Biological agent.* The term "biological agent" means any microorganism (including bacteria, viruses, fungi, rickettsiac, or protozoa), pathogen, or infectious substance, and any naturally occurring, bioengineered, or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method of production, that is capable of causing—

(a) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(b) deterioration of food, water, equipment, supplies, or materials of any kind; or

(c) deleterious alteration of the environment.

(6) *Chemical agent, substance, or weapon.* A "chemical agent, substance, or weapon" refers to a toxic chemical and its precursors or a munition or device, specifically designed to cause death or other harm through toxic properties of those chemicals that would be released as a result of the employment of such munition or device, and any equipment specifically designed for use directly in connection with the employment of such munitions or devices.

(7) *Hazardous material.* A substance or material (including explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas, or mixture thereof) or a group or class of material designated as hazardous by the Secretary of Transportation.

(8) *Malicious.* A communication is malicious if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

d. *Maximum punishment.*

(1) *Threats and false threats generally.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *Threats and false threats concerning use of explosives, etc.* Dishonorable discharge, forfeitures of all pay and allowances, and confinement for 10 years.

e. *Sample specifications.*

(1) *Threats generally.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully communicate to _____ a threat (to injure _____ by _____) (to accuse _____ of having committed the offense of _____) (_____).

(2) *Threats concerning use of explosives, etc.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully communicate certain information, to wit: _____, which language constituted a threat to harm a person or property by means of a(n) [explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (a) hazardous material(s)].

(3) *False threats concerning use of explosives, etc.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully [(kill) (injure) (intimidate) _____] [(damage) (destroy) _____] by means of a(n)

[explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (a) hazardous material(s)], to wit: _____, which information was false and which the accused then knew to be false.

54. Article 116 (10 U.S.C. 916)—Riot or breach of peace

a. *Text of statute.*

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

b. *Elements.*

(1) *Riot.*

(a) That the accused was a member of an assembly of three or more persons;

(b) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

(c) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

(d) That these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

(2) *Breach of the peace.*

(a) That the accused caused or participated in a certain act of a violent or turbulent nature; and

(b) That the peace was thereby unlawfully disturbed.

c. *Explanation.*

(1) *Riot.* A riot is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against anyone who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. The gravamen of the offense of riot is terrorization of the public. It is immaterial whether the act intended was lawful. Furthermore, it is not necessary that the common purpose be determined before the assembly. It is sufficient if the assembly begins to execute in a tumultuous manner a common purpose formed after it assembled.

(2) *Breach of the peace.* A breach of the peace is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others.

(3) *Community and public.* Community and public include a military organization, post, camp, ship, aircraft, or station.

d. *Maximum punishment.*

(1) *Riot.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Breach of the peace.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

e. *Sample specifications.*

(1) *Riot.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (cause) (participate in) a riot by unlawfully assembling with _____ (and _____) (and) (others to the number of about _____ whose names are unknown) for the purpose of (resisting the police of _____) (assaulting passers-by) (_____), and in furtherance of said purpose did (fight with said police) (assault certain persons, to wit: _____) (_____), to the terror and disturbance of _____.

(2) *Breach of the peace.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (cause) (participate in) a breach of the peace by (wrongfully engaging in a fist fight in the dayroom with _____) (using the following provoking language (toward _____), to wit: "_____," or words to that effect) (wrongfully shouting and singing in a public place, to wit: _____) (_____).

55. Article 117 (10 U.S.C. 917)—Provoking speeches or gestures

a. *Text of statute.*

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

b. *Elements.*

(1) That the accused wrongfully used words or gestures toward a certain person;

(2) That the words or gestures used were provoking or reproachful; and

(3) That the person toward whom the words or gestures were used was a person subject to the UCMJ.

c. *Explanation.*

(1) *In general.* As used in this article, provoking and reproachful describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. These words and gestures do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

(2) *Knowledge.* It is not necessary that the accused have knowledge that the person toward whom the words or gestures are directed is a person subject to the UCMJ.

d. *Maximum punishment.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully use (provoking) (reproachful) (words, to wit: "_____" or words to that effect) (and) (gestures, to wit: _____) towards (Sergeant _____, U.S. Air Force) (_____).

56. Article 118 (10 U.S.C. 918)—Murder

a. *Text of statute.*

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

(1) has a premeditated design to kill;

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

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

(4) is engaged in the perpetration or attempted perpetration of burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

b. *Elements.*

(1) *Premeditated murder.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had a premeditated design to kill.

(2) *Intent to kill or inflict great bodily harm.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

(3) *Act inherently dangerous to another.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the intentional act of the accused;

(c) That this act was inherently dangerous to another and showed a wanton disregard for human life;

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(e) That the killing was unlawful.

(4) *During certain offenses.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused was engaged in the perpetration or attempted perpetration of burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson.

c. *Explanation.*

(1) *In general.* Killing a human being is unlawful when done without justification or excuse. *See* R.C.M. 916. Whether an unlawful killing constitutes murder or a lesser offense depends upon the circumstances. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission.

(2) *Premeditated murder.*

(a) *Premeditation.* A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated

murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

(b) *Transferred premeditation.* When an accused with a premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim.

(c) *Intoxication.* Voluntary intoxication (*see* R.C.M. 916(l)(2)) not amounting to legal insanity may reduce premeditated murder (Article 118(1)) to unpremeditated murder (Article 118(2) or (3)) but it does not reduce either premeditated murder or unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(3) *Intent to kill or inflict great bodily harm.*

(a) *Intent.* An unlawful killing without premeditation is also murder when the accused had either an intent to kill or inflict great bodily harm. It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death is inflicted in the heat of a sudden passion caused by adequate provocation – *see* paragraph 57). For example, a person committing housebreaking who strikes and kills the householder attempting to prevent flight can be guilty of murder even if the householder was not seen until the moment before striking the fatal blow.

(b) *Great bodily harm.* "Great bodily harm" means serious injury; it does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries. It is synonymous with the term "grievous bodily harm."

(c) *Intoxication.* Voluntary intoxication not amounting to legal insanity does not reduce unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(4) *Act inherently dangerous to others.*

(a) *Wanton disregard of human life.* Intentionally engaging in an act inherently dangerous to another—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may also constitute murder if the act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm. Examples include throwing a live grenade toward another in jest or flying an aircraft very low over one or more persons to cause alarm.

(b) *Knowledge.* The accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act. Such knowledge may be proved by circumstantial evidence.

(5) *During certain offenses.*

(a) *In general.* The commission or attempted commission of any of the offenses listed in Article 118(4) is likely to result in homicide, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of these offenses, the killing is

murder. Under these circumstances it is not a defense that the killing was unintended or accidental.

(b) *Separate offenses.* The perpetration or attempted perpetration of burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson may be charged separately from the homicide.

d. *Maximum punishment.*

(1) Article 118(1) or (4)—death. Mandatory minimum—imprisonment for life with the eligibility for parole.

(2) Article 118(2) or (3)—such punishment other than death as a court-martial may direct.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20___, (with premeditation) (while (perpetrating) (attempting to perpetrate)_____) murder _____ by means of (shooting (him) (her) with a rifle) (_____).

57. Article 119 (10 U.S.C. 919)—Manslaughter

a. *Text of statute.*

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

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

(1) by culpable negligence; or

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

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

b. *Elements.*

(1) *Voluntary manslaughter.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.

[Note: Add the following if applicable]

(e) That the person killed was a child under the age of 16 years.

(2) *Involuntary manslaughter.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson.

[Note: Add the following if applicable]

(e) That the person killed was a child under the age of 16 years.

c. *Explanation.*

(1) *Voluntary manslaughter.*

(a) *Nature of offense.* An unlawful killing, although done with an intent to kill or inflict great bodily harm, is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation. Heat of passion may result from fear or rage. A person may be provoked to such an extent that in the heat of sudden passion caused by the provocation, although not in necessary defense of life or to prevent bodily harm, a fatal blow may be struck before self-control has returned. Although adequate provocation does not excuse the homicide, it does preclude conviction of murder.

(b) *Nature of provocation.* The provocation must be adequate to excite uncontrollable passion in a reasonable person, and the act of killing must be committed under and because of the passion. However, the provocation must not be sought or induced as an excuse for killing or doing harm. If, judged by the standard of a reasonable person, sufficient cooling time elapses between the provocation and the killing, the offense is murder, even if the accused's passion persists. Examples of acts which may, depending on the circumstances, constitute adequate provocation are the unlawful infliction of great bodily harm, unlawful imprisonment, and the sight by one spouse of an act of adultery committed by the other spouse. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, adequate provocation.

(c) *When committed upon a child under 16 years of age.* The maximum punishment is increased when voluntary manslaughter is committed upon a child under 16 years of age. The accused's knowledge that the child was under 16 years of age at the time of the offense is not required for the increased maximum punishment.

(2) *Involuntary manslaughter.*

(a) *Culpable negligence.*

(i) *Nature of culpable negligence.* Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission. Acts which may amount to culpable negligence include negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.

(ii) *Legal duty required.* When there is no legal duty to act there can be no neglect. Thus, when a stranger makes no effort to save a drowning person, or a person allows a beggar to freeze or starve to death, no crime is committed.

(b) *Offense directly affecting the person.* An "offense directly affecting the person" means an offense affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming.

(c) *When committed upon a child under 16 years of age.* The maximum punishment is increased when involuntary manslaughter is committed upon a child under 16 years of age. The

accused's knowledge that the child was under 16 years of age at the time of the offense is not required for the increased maximum punishment.

d. *Maximum punishment.*

(1) *Voluntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *Involuntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) *Voluntary manslaughter of a child under 16 years of age.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Involuntary manslaughter of a child under 16 years of age.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

e. *Sample specification.*

(1) *Voluntary manslaughter.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 ___, willfully and unlawfully kill _____, (a child under 16 years of age) by _____ (him) (her) (in) (on) the _____ with a _____.

(2) *Involuntary manslaughter.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 ___, (by culpable negligence) (while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of _____, to wit: (maiming) (a battery) (_____)) unlawfully kill _____, (a child under 16 years of age) by _____ (him) (her) (in) (on) the _____ with a _____.

58. Article 119a (10 U.S.C. 919a)—Death or injury of an unborn child

a. *Text of statute.*

(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section and shall, upon conviction, be punished by such punishment, other than death, as a court-martial may direct, which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother.

(2) An offense under this section does not require proof that—

(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the accused intended to cause the death of, or bodily injury to, the unborn child.

(3) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall, instead of being punished under paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

(4) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 926, 928, and 928a of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 126, 128, and 128a).

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) In this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

b. *Elements.*

(1) *Injuring an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120(a))), (robbery (article 122)), (maiming (article 128a)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

(b) That the woman was then pregnant; and

(c) That the accused thereby caused bodily injury to the unborn child of that woman.

(2) *Killing an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120(a))), (robbery (article 122)), (maiming (article 128a)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

(b) That the woman was then pregnant; and

(c) That the accused thereby caused the death of the unborn child of that woman.

(3) *Attempting to kill an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120(a))), (robbery (article 122)), (maiming (article 128a)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

(b) That the woman was then pregnant; and

(c) That the accused thereby intended and attempted to kill the unborn child of that woman.

(4) *Intentionally killing an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120(a))), (robbery (article 122)), (maiming (article 128a)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

(b) That the woman was then pregnant; and

(c) That the accused thereby intentionally killed the unborn child of that woman.

c. *Explanation.*

(1) *Nature of offense.* This article makes it a separate, punishable crime to cause the death of or bodily injury to an unborn child while engaged in arson (article 126, UCMJ); murder (article 118, UCMJ); voluntary manslaughter (article 119(a), UCMJ); involuntary manslaughter (article 119(b)(2), UCMJ); rape (article 120(a), UCMJ); robbery (article 122, UCMJ); maiming (article 128a, UCMJ); or assault (article 128, UCMJ) against a pregnant woman. For all underlying offenses, except arson, this article requires that the victim of the underlying offense be the pregnant mother. For purposes of arson, the pregnant mother must have some nexus to the arson such that she sustained some bodily injury due to the arson. For the purposes of this article the term "woman" means a female of any age. This article does not permit the prosecution of any—

(a) person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(b) person for any medical treatment of the pregnant woman or her unborn child; or

(c) woman with respect to her unborn child.

(2) The offenses of injuring an unborn child and killing an unborn child do not require proof that—

(a) the accused had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(b) the accused intended to cause the death of, or bodily injury to, the unborn child.

(3) The offense of attempting to kill an unborn child requires that the accused intended by his conduct to cause the death of the unborn child (*see* subparagraph b.(3)(c) of this paragraph).

(4) *Bodily injury.* For the purpose of this offense, the term "bodily injury" is that which is provided by section 1365 of title 18, to wit: a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.

(5) *Unborn child.* "Unborn child" means a child in utero or a member of the species homo sapiens who is carried in the womb, at any stage of development, from conception to birth.

d. *Maximum punishment.* The maximum punishment for (1) Injuring an unborn child; (2) Killing an unborn child; (3) Attempting to kill an unborn child; or (4) Intentionally killing an unborn child is such punishment, other than death, as a court-martial may direct, but shall be consistent with the punishment had the bodily injury, death, attempt to kill, or intentional killing occurred to the unborn child's mother.

d. *Sample specifications.*

(1) *Injuring an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 ____, cause bodily injury to the unborn child of a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(2) *Killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 ____, cause the death of the unborn child of a pregnant woman, by engaging in the [(murder) (voluntary manslaughter)

(involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(3) *Attempting to kill an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 ____, attempt to kill the unborn child of a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(4) *Intentionally killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 ____, intentionally kill the unborn child of a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

59. Article 119b (10 U.S.C. 919b)—Child endangerment

a. *Text of statute.*

Any person subject to this chapter—

(1) who has a duty for the care of a child under the age of 16 years; and

(2) who, through design or culpable negligence, endangers the child's mental or physical health, safety, or welfare;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused had a duty for the care of a certain child;

(2) That the child was under the age of 16 years; and

(3) That the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence.

c. *Explanation.*

(1) *Design.* "Design" means on purpose, intentionally, or according to plan and requires specific intent to endanger the child.

(2) *Culpable negligence.* Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child. The age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

(3) *Harm.* Actual physical or mental harm to the child is not required. The offense requires that the accused's actions reasonably could have caused physical or mental harm or suffering. However, if the accused's conduct does cause actual physical or mental harm, the potential

maximum punishment increases. See subparagraph 77.c.(1)(c) for an explanation of grievous bodily harm.

(4) *Endanger.* "Endanger" means to subject one to a reasonable probability of harm.

(5) *Age of victim as a factor.* While this offense may be committed against any child under 16, the age of the victim is a factor in the culpable negligence determination. Leaving a teenager alone for an evening may not be culpable (or even simple) negligence; leaving an infant or toddler for the same period might constitute culpable negligence. On the other hand, leaving a teenager without supervision for an extended period while the accused was on temporary duty outside commuting distance might constitute culpable negligence.

(6) *Duty required.* The duty of care is determined by the totality of the circumstances and may be established by statute, regulation, legal parent-child relationship, mutual agreement, or assumption of control or custody by affirmative act. When there is no duty of care of a child, there is no offense under this paragraph. Thus, there is no offense when a stranger makes no effort to feed a starving child or an individual not charged with the care of a child does not prevent the child from running and playing in the street.

d. *Maximum punishment.*

(1) *Endangerment by design resulting in grievous bodily harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(2) *Endangerment by design resulting in harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Other cases by design.* Dishonorable discharge, forfeiture of all pay and allowances and confinement for 4 years.

(4) *Endangerment by culpable negligence resulting in grievous bodily harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(5) *Endangerment by culpable negligence resulting in harm.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(6) *Other cases by culpable negligence.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specifications.*

(1) *Resulting in grievous bodily harm.*

In that_____(personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required) on or about ____ 20 __, had a duty for the care of _____, a child under the age of 16 years and did endanger the (mental health) (physical health) (safety) (welfare) of said _____, by (leaving the said _____ unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said_____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence) (which resulted in grievous bodily harm, to wit:_____) (broken leg) (deep cut) (fractured skull)).

(2) *Resulting in harm.*

In that _____ (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required) on or about _____ 20 __, had a duty for the care of _____, a child under the age of 16 years, and did endanger the (mental health) (physical health) (safety) (welfare) of said _____, by (leaving the said _____unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said _____'s diabetic condition) (_____), and that

such conduct (was by design) (constituted culpable negligence) (which resulted in (harm, to wit:_____) (a black eye) (bloody nose) (minor cut)).

(3) *Other cases.*

In that _____(personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required) on or about _____ 20 __, was responsible for the care of _____, a child under the age of 16 years, and did endanger the (mental health) (physical health) (safety) (welfare) of said_____, by (leaving the said _____ unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said _____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence).

60. Article 120 (10 U.S.C. 920)—Rape and sexual assault generally

[Note: This statute applies to offenses committed on or after 1 January 2019. Previous versions of Article 120 are located as follows: for offenses committed on or before 30 September 2007, *see* Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28; for offenses committed during the period 28 June 2012 through 31 December 2018, *see* Appendix 29.]

a. *Text of statute.*

(a) RAPE.—Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;

(2) using force causing or likely to cause death or grievous bodily harm to any person;

(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(4) first rendering that other person unconscious; or

(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

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

(b) SEXUAL ASSAULT.—Any person subject to this chapter who—

(1) commits a sexual act upon another person by—

(A) threatening or placing that other person in fear;

(B) making a fraudulent representation that the sexual act serves a professional purpose; or

(C) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits a sexual act upon another person—

(A) without the consent of the other person; or

(B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring;

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

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

(c) AGGRAVATED SEXUAL CONTACT.—Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) ABUSIVE SEXUAL CONTACT.—Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) PROOF OF THREAT.—In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) DEFENSES.—An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) DEFINITIONS.—In this section:

(1) SEXUAL ACT.—The term "sexual act" means—

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) SEXUAL CONTACT.—The term "sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

(3) GRIEVOUS BODILY HARM.—The term "grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(4) FORCE.—The term "force" means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(5) UNLAWFUL FORCE.—The term "unlawful force" means an act of force done without legal justification or excuse.

(6) THREATENING OR PLACING THAT OTHER PERSON IN FEAR.—The term "threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the

victim or another person being subjected to the wrongful action contemplated by the communication or action.

(7) CONSENT.—

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).

(C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

(8) INCAPABLE OF CONSENTING.—The term "incapable of consenting" means the person is—

(A) incapable of appraising the nature of the conduct at issue; or

(B) physically incapable of declining participation in, or communicating [unwillingness] to engage in, the sexual act at issue.

b. *Elements.*

(1) *Rape.*

(a) *By unlawful force.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so with unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.

(d) *By first rendering that other person unconscious.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by first rendering that other person unconscious.

(e) *By administering a drug, intoxicant, or other similar substance.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

(2) *Sexual assault.*

(a) *By threatening or placing that other person in fear.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by threatening or placing that other person in fear.

(b) *By fraudulent representation.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose.

(c) *By artifice, pretense, or concealment.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused was another person.

(d) *Without consent.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so without the consent of the other person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.*

(i) That the accused committed a sexual act upon another person;

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

(f) *When the other person is incapable of consenting.*

(i) That the accused committed a sexual act upon another person;

(ii) That the other person was incapable of consenting to the sexual act due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability; and

(iii) That the accused knew or reasonably should have known of that condition.

(3) *Aggravated sexual contact.*

(a) *By force.*

(i) That the accused committed sexual contact upon or by another person; and

(ii) That the accused did so with unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.

(d) *By first rendering that other person unconscious.*

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by first rendering that other person unconscious.

(e) *By administering a drug, intoxicant, or other similar substance.*

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

(4) *Abusive sexual contact.*

(a) *By threatening or placing that other person in fear.*

(i) That the accused committed sexual contact upon or by another person; and

(ii) That the accused did so by threatening or placing that other person in fear.

(b) *By fraudulent representation.*

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose.

(c) *By artifice, pretense, or concealment.*

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused was another person.

(d) *Without consent.*

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so without the consent of the other person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the contact is occurring.*

(i) That the accused committed sexual contact upon another person;

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring; and

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring.

(f) *When the other person is incapable of consenting.*

(i) That the accused committed sexual contact upon another person;

(ii) That the other person was incapable of consenting to the sexual contact due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability; and

(iii) That the accused knew or reasonably should have known of that condition.

c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against adults (Art. 120), offenses against children (Art. 120b), and other offenses (Art. 120c).

(2) *Definitions.* The terms are defined in subparagraph 60.a.(g).

(3) *Victim sexual behavior or predisposition and privilege.* See Mil. R. Evid. 412 concerning rules of evidence relating to the sexual behavior or predisposition of the victim of an alleged sexual offense. See Mil. R. Evid. 514 concerning rules of evidence relating to privileged communications between the victim and victim advocate.

(4) *Scope of "threatening or placing that other person in fear."* For purposes of this offense, the phrase "wrongful action" within Article 120(g)(6) (defining "threatening or placing that other person in fear") includes an abuse of military rank, position, or authority in order to engage in a sexual act or sexual contact with a victim. This includes, but is not limited to, threats to initiate an adverse personnel action unless the victim submits to the accused's requested sexual act or contact; and threats to withhold a favorable personnel action unless the victim submits to the accused's requested sexual act or sexual contact. Superiority in rank is a factor in, but not dispositive of, whether a reasonable person in the position of the victim would fear that his or her noncompliance with the accused's desired sexual act or sexual contact would result in the threatened wrongful action contemplated by the communication or action.

d. *Maximum punishment.*

(1) *Rape.* Forfeiture of all pay and allowances and confinement for life without eligibility for parole. Mandatory minimum – Dismissal or dishonorable discharge.

(2) *Sexual assault.* Forfeiture of all pay and allowances, and confinement for 30 years. Mandatory minimum – Dismissal or dishonorable discharge.

(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

e. *Sample specifications.*

(1) *Rape.*

(a) *By force.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 20__, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using force likely to cause death or grievous bodily harm to _____, to wit:_____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) *By first rendering that other person unconscious.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by first rendering _____ unconscious by_____.

(e) *By administering a drug, intoxicant, or other similar substance.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (list other similar substance), to wit: _____, thereby substantially impairing the ability of _____to appraise or control (his) (her) conduct.

(2) *Sexual assault.*

(a) *By threatening or placing that other person in fear.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing_____ in fear).

(b) *By fraudulent representation.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by making a fraudulent representation that the sexual act served a professional purpose, to wit:_____.

(c) *By false pretense.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

(d) *Without consent.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus),] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], without the consent of _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon_____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], when (he) (she) knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual act was occurring due to _____).

(f) *When the other person is incapable of consenting.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], when _____was incapable of consenting to the sexual act because (he) (she) [was impaired by (a drug, to wit: _____) (an intoxicant, to wit:_____) (_____)] [had a (mental disease, to wit:_____) (mental defect, to wit:_____) (physical disability, to wit:_____)], and the accused (knew) (reasonably should have known) of that condition.

(3) *Aggravated sexual contact.*

(a) *By force.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____] by using unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by using force likely to cause death or grievous bodily harm to_____, to wit:_____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) *By first rendering that other person unconscious.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by rendering _____unconscious by_____.

(e) *By administering a drug, intoxicant, or other similar substance.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20___, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by administering to_____(by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (_____) thereby substantially impairing the ability of _____ to appraise or control (his) (her) conduct.

(4) *Abusive sexual contact.*

(a) *By threatening or placing that other person in fear.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by (threatening _____) (placing _____ in fear).

(b) *By fraudulent representation.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by making a

fraudulent representation that the sexual contact served a professional purpose, to wit: _____.

(c) *By false pretense.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

(d) *Without consent.*

In that _____(person jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20___, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____] without the consent of _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when (he) (she) (knew) (reasonably should have known) that _____ was (asleep) (unconscious) (unaware the sexual contact was occurring due to _____).

(f) *When that person is incapable of consenting.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when _____ was incapable of consenting to the sexual contact because (he) (she) [was impaired by (a drug, to wit:_____) (an intoxicant, to wit:_____) (_____)] [had a (mental disease, to wit:_____) (mental defect, to wit:_____) (physical disability, to wit:_____)] and the accused (knew) (reasonably should have known) of that condition.

61. Article 120a (10 U.S.C. 920a)—Mails: deposit of obscene matter

a. *Text of statute.*

Any person subject to this chapter who, wrongfully and knowingly, deposits obscene matter for mailing and delivery shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused deposited or caused to be deposited in the mails certain matter for mailing and delivery;

(2) That the act was done wrongfully and knowingly; and

(3) That the matter was obscene.

c. *Explanation.* Whether something is obscene is a question of fact. Obscene is synonymous with indecent as the latter is defined in subparagraph 104.c.The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. "Knowingly" means the accused deposited the material with knowledge of its nature. Knowingly depositing obscene matter in the mails is wrongful if it is done without legal justification or authorization.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __ 20____, wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) (_____) mails, for mailing and delivery a (letter) (picture) (_____) (containing) (portraying) (suggesting) (_____) certain obscene matters, to wit: _____.

62. Article 120b (10 U.S.C. 920b)—Rape and sexual assault of a child

[Note: This statute applies to offenses committed on or after 1 January 2019. Previous versions of child sexual offenses are located as follows: for offenses committed on or before 30 September 2007, *see* Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28; for offenses committed during the period 28 June 2012 through 31 December 2018, *see*Appendix 29.]

a. *Text of statute.*

(a) RAPE OF A CHILD.—Any person subject to this chapter who—

(1) commits a sexual act upon a child who has not attained the age of 12 years; or

(2) commits a sexual act upon a child who has attained the age of 12 years by—

(A) using force against any person;

(B) threatening or placing that child in fear;

(C) rendering that child unconscious; or

(D) administering to that child a drug, intoxicant, or other similar substance;

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

(b) SEXUAL ASSAULT OF A CHILD.—Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct.

(c) SEXUAL ABUSE OF A CHILD.—Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.

(d) AGE OF CHILD.—

(1) UNDER 12 YEARS.—In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act. It is not a defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) UNDER 16 YEARS.—In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

(e) PROOF OF THREAT.—In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) MARRIAGE.—In a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), it is a defense, which the accused must prove by a preponderance of the evidence, that the persons engaging in the sexual act or lewd act were at that time married to each other, except where the accused commits a sexual act upon the person when the accused knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring or when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

(g) CONSENT.—Lack of consent is not an element and need not be proven in any prosecution under this section. A child not legally married to the person committing the sexual act, lewd act, or use of force cannot consent to any sexual act, lewd act, or use of force.

(h) DEFINITIONS.—In this section:

(1) SEXUAL ACT AND SEXUAL CONTACT.—The terms "sexual act" and "sexual contact" have the meanings given those terms in section 920(g) of this title (article 120(g)), except that the term "sexual act" also includes the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(2) FORCE.—The term "force" means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a child; or

(C) inflicting physical harm.

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

(3) THREATENING OR PLACING THAT CHILD IN FEAR.—The term "threatening or placing that child in fear" means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.

(4) CHILD.—The term "child" means any person who has not attained the age of 16 years.

(5) LEWD ACT.—The term "lewd act" means—

(A) any sexual contact with a child;

(B) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;

(C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

b. *Elements*

(1) *Rape of a child.*

(a) *Rape of a child who has not attained the age of 12.*

(i) That the accused committed a sexual act upon a child; and

(ii) That at the time of the sexual act the child had not attained the age of 12 years.

(b) *Rape by force of a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by using force against that child or any other person.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by threatening the child or another person or placing that child in fear.

(d) *Rape by rendering unconscious a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by rendering that child unconscious.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by administering to that child a drug, intoxicant, or other similar substance.

(2) *Sexual assault of a child.*

(a) *Sexual assault of a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child; and

(ii) That at the time of the sexual act the child had attained the age of 12 years but

had not attained the age of 16 years.

(3) *Sexual abuse of a child.* That the accused committed a lewd act upon a child.

c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against adults (120), offenses against children (120b), and other offenses (120c).

(2) *Definitions.* Terms not defined in this paragraph are defined in subparagraph 60.a.(g), *supra,* except that the term "sexual act" also includes the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

d. *Maximum punishment.*

(1) *Rape of a child.* Forfeiture of all pay and allowances, and confinement for life without eligibility for parole. Mandatory minimum—Dismissal or dishonorable discharge.

(2) *Sexual assault of a child.* Forfeiture of all pay and allowances, and confinement for 30 years. Mandatory minimum—Dismissal or dishonorable discharge.

(3) *Sexual abuse of a child.*

(a) *Cases involving sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

e. *Sample specifications.*

(1) *Rape of a child.*

(a) *Rape of a child who has not attained the age of 12.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about_____ 20__, commit a sexual act upon _____, a child who had not attained the age of 12 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]].

(b) *Rape by force of a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using force against _____, to wit: _____.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing _____ in fear).

(d) *Rape by rendering unconscious of a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by rendering _____ unconscious by _____.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and_____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by administering to _____ a (drug) (intoxicant) (____), to wit: _____.

(2) *Sexual assault of a child.*

(a) *Sexual assault of a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of

_____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]].

(3) *Sexual abuse of a child.*

(a) *Sexual abuse of a child involving sexual contact.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by (touching) (causing _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit: _____], with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____].

(b) *Sexual abuse of a child involving indecent exposure.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally exposing [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] to _____, with an intent to [(abuse) (humiliate) (degrade) _____] [(arouse) (gratify) the sexual desire of _____].

(c) *Sexual abuse of a child involving indecent communication.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally communicating to _____ indecent language to wit: _____, with an intent to [(abuse) (humiliate) (degrade)_____] [(arouse) (gratify) the sexual desire of _____].

(d) *Sexual abuse of a child involving indecent conduct.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: _____, intentionally done (with) (in the presence of) _____, which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

63. Article 120c (10 U.S.C. 920c)—Other sexual misconduct

[Previous versions of offenses included in Article 120c are located as follows: for the offense of indecent exposure committed on or before 30 September 2007, a previous version of Article 134, indecent exposure, applies and is located at Appendix 27; for the offense of forcible pandering committed on or before 30 September 2007, a previous version of Article 134, pandering and prostitution, applies and is located at Appendix 27; for Article 120c offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28; for Article 120c offenses committed during the period 28 June 2012 through 31 December 2018, the previous version of Article 120c applies and is located at Appendix 29.]

a. *Text of Statute*

(a) INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING.—Any person subject to this chapter who, without legal justification or lawful authorization—

(1) knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy;

(2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; or

(3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2);

is guilty of an offense under this section and shall be punished as a court-martial may direct.

(b) FORCIBLE PANDERING.—Any person subject to this chapter who compels another person to engage in an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(c) INDECENT EXPOSURE.—Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall by punished as a court-martial may direct.

(d) DEFINITIONS.—In this section:

(1) ACT OF PROSTITUTION.—The term "act of prostitution" means a sexual act or sexual contact (as defined in section 920(g) of this title (article 120(g))) on account of which anything of value is given to, or received by, any person.

(2) PRIVATE AREA.—The term "private area" means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

(3) REASONABLE EXPECTATION OF PRIVACY.—The term "under circumstances in which that other person has a reasonable expectation of privacy" means—

(A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or

(B) circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

(4) BROADCAST.—The term "broadcast" means to electronically transmit a visual image with the intent that it be viewed by a person or persons.

(5) DISTRIBUTE.—The term "distribute" means delivering to the actual or constructive possession of another, including transmission by electronic means.

(6) INDECENT MANNER.—The term "indecent manner" means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

b. *Elements.*

(1) *Indecent viewing.*

(a) That the accused knowingly and wrongfully viewed the private area of another person;

(b) That said viewing was without the other person's consent; and

(c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

(2) *Indecent recording.*

(a) That the accused knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;

(b) That said recording was without the other person's consent; and

(c) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(3) *Broadcasting of an indecent recording.*

(a) That the accused knowingly broadcast a certain recording of another person's private area;

(b) That said recording was made without the other person's consent;

(c) That the accused knew or reasonably should have known that the recording was made without the other person's consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(4) *Distribution of an indecent recording.*

(a) That the accused knowingly distributed a certain recording of another person's private area;

(b) That said recording was made without the other person's consent;

(c) That the accused knew or reasonably should have known that said recording was made without the other person's consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(5) *Forcible pandering.*

That the accused compelled another person to engage in an act of prostitution with any person.

(6) *Indecent exposure.*

(a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;

(b) That the exposure was in an indecent manner; and

(c) That the exposure was intentional.

c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against adults (120), offenses against children (120b), and other offenses (120c).

(2) *Definitions.*

(a) *Recording.* A recording is a still or moving visual image captured or recorded by any means.

(b) Other terms are defined in subparagraph 60.a.(g), *supra.*

d. *Maximum punishment.*

(1) *Indecent viewing.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Broadcasting or distribution of an indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(4) *Forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(5) *Indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specifications.*

(1) *Indecent viewing, recording, or broadcasting.*

(a) *Indecent viewing.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, knowingly and wrongfully view the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(b) *Indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, knowingly (photograph) (videotape) (film) (make a recording of) the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(c) *Broadcasting or distributing an indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, knowingly (broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made without the consent of _____ and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(2) *Forcible pandering.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, wrongfully compel _____ to engage in (a sexual act) (sexual contact) with _____, to wit: _____, for the purpose of receiving (money) (other compensation) (_____).

(3) *Indecent exposure.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, intentionally expose [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] in an indecent manner, to wit: _____.

64. Article 121 (10 U.S.C. 921)—Larceny and wrongful appropriation

a. *Text of statute.*

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

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

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

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

b. *Elements.*

(1) *Larceny.*

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

[Note: If the property is alleged to be military property, as defined in subparagraph 64.c.(1)(h), add the following element]

(e) That the property was military property.

(2) *Wrongful appropriation.*

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

c. *Explanation.*

(1) *Larceny.*

(a) *In general.* A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various types of larceny under Article 121 may be charged and proved under a specification alleging that the accused did steal the property in question.

(b) *Taking, obtaining, or withholding.* There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; property is not obtained by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it is sufficient if accompanied by the requisite intent. Thus, if an accused enticed another's horse into the accused's stable without touching the animal, or procured a railroad company to deliver another's trunk by changing the check on it, or obtained the delivery of another's goods to a person or place designated by the accused, or had the funds of another transferred to the accused's bank account, the accused is guilty of larceny if the other elements of the offense have been proved. A person may obtain the property of another by acquiring possession without title,

and one who already has possession of the property of another may obtain it by later acquiring title to it. A withholding may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully. *See* subparagraph c.(1)(f) of this paragraph. However, acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of withholds. Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on that basis alone. The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

(c) *Ownership of the property.*

(i) *In general.* Article 121 requires that the taking, obtaining, or withholding be from the possession of the owner or of any other person. Care, custody, management, and control are among the definitions of possession.

(ii) *Owner.* "Owner" refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which may be involved in the particular case. For instance, an organization is the true owner of its funds as against the custodian of the funds charged with the larceny thereof.

(iii) *Any other person.* "Any other person" means any person—even a person who has stolen the property—who has possession or a greater right to possession than the accused. In pleading a violation of this article, the ownership of the property may be alleged to have been in any person, other than the accused, who at the time of the theft was a general owner or a special owner thereof. A general owner of property is a person who has title to it, whether or not that person has possession of it; a special owner, such as a borrower or hirer, is one who does not have title but who does have possession, or the right of possession, of the property.

(iv) *Person.* Person, as used in referring to one from whose possession property has been taken, obtained, or withheld, and to any owner of property, includes (in addition to a natural person) a government, a corporation, an association, an organization, and an estate. Such a person need not be a legal entity.

(d) *Wrongfulness of the taking, obtaining, or withholding.* The taking, obtaining, or withholding of the property must be wrongful. As a general rule, a taking or withholding of property from the possession of another is wrongful if done without the consent of the other, and an obtaining of property from the possession of another is wrongful if the obtaining is by false pretense. However, such an act is not wrongful if it is authorized by law or apparently lawful superior orders, or, generally, if done by a person who has a right to the possession of the property either equal to or greater than the right of one from whose possession the property is taken, obtained, or withheld. An owner of property who takes or withholds it from the possession of another, without the consent of the other, or who obtains it therefrom by false pretense, does so wrongfully if the other has a superior right—such as a lien—to possession of the property. A person who takes, obtains, or withholds property as the agent of another has the same rights and liabilities as does the principal, but may not be charged with a guilty knowledge or intent of the principal which that person does not share.

(e) *False pretense.* With respect to obtaining property by false pretense, the false pretense may be made by means of any act, word, symbol, or token. The pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth. A false pretense is a false representation of past or existing fact. In addition to other kinds of facts, the fact falsely represented by a person may be that person's or another's power, authority, or intention. Thus, a false representation by a person that the person presently intends to perform a certain act in the future is a false representation of an existing fact—the intention—and thus a false pretense. Although the pretense need not be the sole cause inducing the owner to part with the property, it must be an effective and intentional cause of the obtaining. A false representation made after the property was obtained will not result in a violation of Article 121. A larceny is committed when a person obtains the property of another by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to the property. Thus, a person who gets another's watch by pretending that it will be borrowed briefly and then returned, but who really intends to sell it, is guilty of larceny.

(f) *Intent.*

(i) *In general.* The offense of larceny requires that the taking, obtaining, or withholding by the thief be accompanied by an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to the thief's own use or the use of any person other than the owner. These intents are collectively called an intent to steal. Although a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent. For example, if a person rents another's vehicle, later decides to keep it permanently, and then either fails to return it at the appointed time or uses it for a purpose not authorized by the terms of the rental, larceny has been committed, even though at the time the vehicle was rented, the person intended to return it after using it according to the agreement.

(ii) *Inference of intent.* An intent to steal may be proved by circumstantial evidence. Thus, if a person secretly takes property, hides it, and denies knowing anything about it, an intent to steal may be inferred; if the property was taken openly and returned, this would tend to negate such an intent. Proof of sale of the property may show an intent to steal, and therefore, evidence of such a sale may be introduced to support a charge of larceny. An intent to steal may be inferred from a wrongful and intentional dealing with the property of another in a manner likely to cause that person to suffer a permanent loss thereof.

(iii) *Special situations.*

(A) *Motive does not negate intent.* The accused's purpose in taking an item ordinarily is irrelevant to the accused's guilt as long as the accused had the intent required under subparagraph c.(1)(f)(i) of this paragraph. For example, if the accused wrongfully took property as a joke or "to teach the owner a lesson" this would not be a defense, although if the accused intended to return the property, the accused would be guilty of wrongful appropriation, not larceny. When a person takes property intending only to return it to its lawful owner, as when stolen property is taken from a thief in order to return it to its owner, larceny or wrongful appropriation is not committed.

(B) *Intent to pay for or replace property not a defense.* An intent to pay for or replace the stolen property is not a defense, even if that intent existed at the time of the theft. If, however, the accused takes money or a negotiable instrument having no special value above its

face value, with the intent to return an equivalent amount of money, the offense of larceny is not committed although wrongful appropriation may be.

(C) *Return of property not a defense.* Once a larceny is committed, a return of the property or payment for it is no defense. See subparagraph c.(2) of this paragraph when the taking, obtaining, or withholding is with the intent to return.

(g) *Value.*

(i) *In general.* Value is a question of fact to be determined on the basis of all of the evidence admitted.

(ii) *Government property.* When the stolen property is an item issued or procured from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. *See* Mil. R. Evid. 803(17). However, the stolen item must be shown to have been, at the time of the theft, in the condition upon which the value indicated in the official price list is based. The price listed in the official publication is not conclusive as to the value of the item, and other evidence may be admitted on the question of its condition and value.

(iii) *Other property.* As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft. If this property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States at the time of the theft, or by its replacement cost at that time, whichever is less. Market value may be established by proof of the recent purchase price paid for the article in the legitimate market involved or by testimony or other admissible evidence from any person who is familiar through training or experience with the market value in question. The owner of the property may testify as to its market value if familiar with its quality and condition. The fact that the owner is not an expert of the market value of the property goes only to the weight to be given that testimony, and not to its admissibility. *See* Mil. R. Evid. 701. When the character of the property clearly appears in evidence—for instance, when it is exhibited to the court-martial—the court-martial, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of $1,000, the court-martial may find a value of more than $1,000. Writings representing value may be considered to have the value—even though contingent—which they represented at the time of the theft.

(iv) *Limited interest in property.* If an owner of property or someone acting in the owner's behalf steals it from a person who has a superior, but limited, interest in the property, such as a lien, the value for punishment purposes shall be that of the limited interest.

(h) *Military property.* Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. Military property is a term of art, and should not be confused with Government property. The terms are not interchangeable. While all military property is Government property, not all Government property is military property. An item of Government property is not military property unless the item in question meets the definition provided in this paragraph. Retail merchandise of Service exchange stores is not military property under this article.

(i) *Miscellaneous considerations.*

(i) *Lost property.* A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the general or special owner, or

through which such identity may be traced, is furnished by the character, location, or marketing of the property, or by other circumstances.

(ii) *Multiple article larceny.* When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

(iii) *Special kinds of property which may also be the subject of larceny.* Included in property which may be the subject of larceny is property which is taken, obtained, or withheld by severing it from real estate and writings which represent value such as commercial paper.

(iv) *Services.* Theft of services may not be charged under this paragraph. *But see* paragraph 66.

(v) *Credit, debit, and electronic transactions.* Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money ordinarily should be charged under paragraph 65.

(2) *Wrongful appropriation.*

(a) *In general.* Wrongful appropriation requires an intent to temporarily—as opposed to permanently—deprive the owner of the use and benefit of, or appropriate to the use of another, the property wrongfully taken, withheld, or obtained. In all other respects wrongful appropriation and larceny are identical.

(b) *Examples.* Wrongful appropriation includes: taking another's automobile without permission or lawful authority with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty with intent to use it on a hunting trip and later return it; and while driving a Government vehicle on a mission to deliver supplies, withholding the vehicle from Government service by deviating from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use. An inadvertent exercise of control over the property of another will not result in wrongful appropriation. For example, a person who fails to return a borrowed boat at the time agreed upon because the boat inadvertently went aground is not guilty of this offense.

d. *Maximum punishment.*

(1) *Larceny.*

(a) *Property of a value of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Military property of a value of more than $1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(c) *Property other than military property of a value of more than $1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph e.(1)(b).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Wrongful appropriation.*

(a) *Of a value of $1,000 or less.* Confinement for 3 months, and forfeiture of two-thirds pay per month for 3 months.

(b) *Of a value of more than $1,000.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(c) *Of any motor vehicle, aircraft, vessel, firearm, explosive, or military property of a value of more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

e. *Sample specifications.*

(1) *Larceny.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20___, steal _____, (military property), of a value of (about) $_____, the property of _____.

(2) *Wrongful appropriation.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20___, wrongfully appropriate _____, of a value of (about) $_____, the property of _____.

65. Article 121a (10 U.S.C. 921a)—Fraudulent use of credit cards, debit cards, and other access devices

a. *Text of statute.*

(a) IN GENERAL.—Any person subject to this chapter who, knowingly and with intent to defraud, uses—

(1) a stolen credit card, debit card, or other access device;

(2) a revoked, cancelled, or otherwise invalid credit card, debit card, or other access device; or

(3) a credit card, debit card, or other access device without the authorization of a person whose authorization is required for such use;

to obtain money, property, services, or anything else of value shall be punished as a court-martial may direct.

(b) ACCESS DEVICE DEFINED.—In this section (article), the term "access device" has the meaning given that term in section 1029 of title 18.

b. *Elements.*

(1) That the accused knowingly used a stolen credit card, debit card, or other access device; or

(2) That the accused knowingly used a revoked, cancelled, or otherwise invalid credit card, debit card; or

(3) That the accused knowingly used a credit card, debit card, or other access device without the authorization of a person whose authorization was required for such use;

(4) That the use was to obtain money, property, services, or anything else of value; and

(5) The use by the accused was with the intent to defraud.

c. *Explanation.*

(1) *In general.* This offense focuses on the intent of the accused and the technology used by the accused.

(2) *Intent to defraud. See* subparagraph 70.c.(14).

(3) *Inference of intent.* An intent to defraud may be proved by circumstantial evidence.

(4) *Use of a credit card, debit card, or other access device without the authorization of a person whose authorization was required for such use.* This provision applies to situations where an accused has no authorization to use the access device from a person whose authorization is required for such use, as well as situations where an accused exceeds the authorization of a person whose authorization is required for such use.

d. *Maximum punishment.*

(1) *Fraudulent use of a credit card, debit card, or other access device to obtain property of a value of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Fraudulent use during any 1-year period of a credit card, debit card, or other access device to obtain property the aggregate value of which is more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, knowingly and with the intent to defraud, use a (debit card) (credit card) (access device, to wit:_____) (that was stolen) (that was revoked, cancelled, or otherwise invalid) (without the authorization of _____, a person whose authorization was required for such use), to obtain (money) (property) (services) (_____) (of a value of about $_____).

66. Article 121b (10 U.S.C. 921b)—False pretenses to obtain services

a. *Text of statute.*

Any person subject to this chapter who, with intent to defraud, knowingly uses false pretenses to obtain services shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused wrongfully obtained certain services;

(2) That the obtaining was done by using false pretenses;

(3) That the accused then knew of the falsity of the pretenses;

(4) That the obtaining was with intent to defraud; and

(5) That the services were of a certain value, or of some value.

c. *Explanation.* This offense is similar to the offenses of larceny and wrongful appropriation by false pretenses, except that the object of the obtaining is services (for example, telephone service) rather than money, personal property, or articles of value of any kind as under Article 121. *See* paragraph 64.c. See paragraph 70.c.(14) for a definition of intent to defraud.

d. *Maximum punishment.* Obtaining services under false pretenses.

(1) *Of a value of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Of a value of more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, with intent to defraud, falsely pretend to _____ that _____, then knowing that the pretenses were false, and by means thereof did wrongfully obtain from_____ services, of a value of (about) $_____, to wit: _____.

67. Article 122 (10 U.S.C. 922)—Robbery

a. *Text of statute.*

Any person subject to this chapter who takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a

relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

(2) That the taking was against the will of that person;

(3) That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;

(4) That the property belonged to a person named or described; and

(5) That the property was of a certain or of some value.

[Note: If the robbery was committed with a dangerous weapon, add the following element]

(6) That the means of force or violence or of putting the person in fear was a dangerous weapon.

c. *Explanation.*

(1) *Taking in the presence of the victim.* It is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery.

(2) *Force or violence.* For a robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against the person's will, and it is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, puts the person in such a position that no resistance is made, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. The offense is not robbery if an article is merely snatched from the hand of another or a pocket is picked by stealth, no other force is used, and the owner is not put in fear. But if resistance is overcome in snatching the article, there is sufficient violence, as when an earring is torn from a person's ear. There is sufficient violence when a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch, even though the person had no knowledge of the act; or when a person is knocked insensible and that person's pockets rifled; or when a guard steals property from the person of a prisoner in the guard's charge after handcuffing the prisoner on the pretext of preventing escape.

(3) *Fear.* For a robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be a demonstration of force or menace by which the victim is placed in such fear that the victim is warranted in making no resistance. The fear must be a reasonable apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury apprehended may be death or bodily injury to the person or to a relative or family member, or to anyone in the person's company at the time, or it may be the destruction of the person's habitation or other property or that of a relative or family member or anyone in the person's company at the time of sufficient gravity to warrant giving up the property demanded by the assailant.

(4) *Multiple-victim robberies.* Robberies of different persons at the same time and place are separate offenses and each such robbery should be alleged in a separate specification.

(5) *Dangerous weapon.* For purposes of qualifying for the maximum punishment for this offense as specified in subparagraph d.(1), the term "dangerous weapon" has the same meaning as that ascribed to the term in subparagraph 77.c.(5)(a)(iii).

d. *Maximum punishment.*

(1) *When committed with a dangerous weapon.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *All other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, by means of (force) (violence) (force and violence) (and) (putting (him) (her) in fear) [with a dangerous weapon, to wit: _____] seize from the (person) (presence) of _____, against (his) (her) will, (a watch) (_____) of value of (about) $_____, the property of _____.

68. Article 122a (10 U.S.C. 922a)—Receiving stolen property

a. *Text of statute.*

Any person subject to this chapter who wrongfully receives, buys, or conceals stolen property, knowing the property to be stolen property, shall be punished as a court-martial may direct.

b. *Elements.*

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

(2) That the property belonged to another person;

(3) That the property had been stolen; and

(4) That the accused knew that the property had been stolen.

c. *Explanation.*

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

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

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

d. *Maximum punishment.*

(1) *Receiving, buying, or concealing stolen property of a value of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Receiving, buying, or concealing stolen property of a value of more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully

(receive) (buy) (conceal) _____, of a value of (about) $_____, the property of _____ which property, as (he) (she), the said _____, then knew, had been stolen.

69. Article 123 (10 U.S.C. 923)—Offenses concerning Government computers

a. *Text of statute.*

(a) IN GENERAL.—Any person subject to this chapter who—

(1) knowingly accesses a Government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe such information could be used to the injury of the United States, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted such information to any person not entitled to receive it;

(2) intentionally accesses a Government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any such Government computer; or

(3) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization to a Government computer;

shall be punished as a court-martial may direct.

(b) DEFINITIONS.—In this section:

(1) The term "computer" has the meaning given that term in section 1030 of title 18.

(2) The term "Government computer" means a computer owned or operated by or on behalf of the United States Government.

(3) The term "damage" has the meaning given that term in section 1030 of title 18.

b. *Elements.*

(1) *Unauthorized distribution of classified information obtained from a Government computer.*

(a) That the accused knowingly accessed a Government computer with an unauthorized purpose;

(b) That the accused obtained classified information;

(c) That the accused had reason to believe the information could be used to injure the United States or benefit a foreign nation; and

(d) That the accused intentionally communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, such information to any person not entitled to receive it.

(2) *Unauthorized access of a Government computer and obtaining classified or other protected information.*

(a) That the accused intentionally accessed a Government computer with an unauthorized purpose; and

(b) That the accused thereby obtained classified or other protected information from any such Government computer.

(3) *Causing damage to a Government computer.*

(a) That the accused knowingly caused the transmission of a program, information, code, or command; and

(b) That the accused, as a result, intentionally and without authorization caused damage to a Government computer.

c. *Explanation.*

(1) *Access.* "Access" means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer.

(2) *With an unauthorized purpose.* The phrase "with an unauthorized purpose" may refer to more than one unauthorized purpose, or an unauthorized purpose in conjunction with an authorized purpose. The phrase covers persons accessing Government computers without any authorization, i.e., "outsiders," as well as persons with authorization who access Government computers for an improper purpose or who exceed their authorization, i.e., "insiders." The key criterion to determine criminality is whether the person intentionally used the computer for a purpose that was clearly contrary to the interests or intent of the authorizing party.

(3) *Classified Information. See* 10 U.S.C. § 801(15).

(4) *Protected Information.* Non-classified protected information includes Personally Identifiable Information (PII), as well as information designated as Controlled Unclassified Information (CUI) by the Secretary of Defense, and information designated as For Official Use Only (FOUO), Law Enforcement Sensitive (LES), Unclassified Nuclear Information (UCNI), and Limited Distribution.

(5) *Damage.* The definition of "damage" is taken from 18 U.S.C. § 1030 and means any impairment to the integrity or availability of data, a program, a system, or information.

(6) *Computer.* The definition of "computer" is taken from 18 U.S.C. § 1030 and means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device. A portable computer, including a smartphone, is a computer.

d. *Maximum punishment.*

(1) *Unauthorized distribution of classified information obtained from a Government computer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Unauthorized access of a Government computer and obtaining classified or other protected information.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Causing damage to a Government computer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specification*

(1) *Unauthorized distribution of classified information obtained from a Government computer.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), knowingly access a government computer with an unauthorized purpose and obtained classified information, to wit:_____, with reason to believe the information could be used to injure the United States or benefit a foreign nation, and intentionally (communicated)

(delivered) (transmitted) (caused to be communicated/delivered/transmitted) such information to _____, a person not entitled to receive it.

(2) *Accessing a computer and obtaining information.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), intentionally access a government computer with an unauthorized purpose and thereby knowingly obtained (classified) (protected) information, to wit:_____ from such government computer.

(3) *Causing damage by computer contaminant.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), knowingly cause the transmission of a program, information, code, or command, and as a result, intentionally and without authorization caused damage to a government computer.

70. Article 123a (10 U.S.C. 923a)—Making, drawing, or uttering check, draft, or order without sufficient funds

a. *Text of statute.*

Any person subject to this chapter who—

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

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive;

makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word "credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

b. *Elements.*

(1) *For the procurement of any article or thing of value, with intent to defraud.*

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose of procuring an article or thing of value;

(c) That the act was committed with intent to defraud; and

(d) That at the time of making, drawing, uttering, or delivery of the instrument the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

(2) *For the payment of any past due obligation, or for any other purpose, with intent to deceive.*

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose;

(c) That the act was committed with intent to deceive; and

(d) That at the time of making, drawing, uttering, or delivering of the instrument, the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

c. *Explanation.*

(1) *Written instruments.* The written instruments covered by this article include any check, draft (including share drafts), or order for the payment of money drawn upon any bank or other depository, whether or not the drawer bank or depository is actually in existence. It may be inferred that every check, draft, or order carries with it a representation that the instrument will be paid in full by the bank or other depository upon presentment by a holder when due.

(2) *Bank or other depository.* Bank or other depository includes any business regularly but not necessarily exclusively engaged in public banking activities.

(3) *Making or drawing.* Making and drawing are synonymous and refer to the act of writing and signing the instrument.

(4) *Uttering or delivering.* Uttering and delivering have similar meanings. Both mean transferring the instrument to another, but uttering has the additional meaning of offering to transfer. A person need not personally be the maker or drawer of an instrument in order to violate this article if that person utters or delivers it. For example, if a person holds a check which that person knows is worthless, and utters or delivers the check to another, that person may be guilty of an offense under this article despite the fact that the person did not personally draw the check.

(5) *For the procurement.* "For the procurement" means for the purpose of obtaining any article or thing of value. It is not necessary that an article or thing of value actually be obtained, and the purpose of the obtaining may be for the accused's own use or benefit or for the use or benefit of another.

(6) *For the payment.* "For the payment" means for the purpose or purported purpose of satisfying in whole or in part any past due obligation. Payment need not be legally effected.

(7) *For any other purpose.* For any other purpose includes all purposes other than the payment of a past due obligation or the procurement of any article or thing of value. For example, it includes paying or purporting to pay an obligation which is not yet past due. The check, draft, or order, whether made or negotiated for the procurement of an article or thing of value or for the payment of a past due obligation or for some other purpose, need not be intended or represented as payable immediately. For example, the making of a postdated check, delivered at the time of entering into an installment purchase contract and intended as payment for a future installment, would, if made with the requisite intent and knowledge, be a violation of this article.

(8) *Article or thing of value.* Article or thing of value extends to every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future.

(9) *Past due obligation.* A past due obligation is an obligation to pay money, which obligation has legally matured before making, drawing, uttering, or delivering the instrument.

(10) *Knowledge.* The accused must have knowledge, at the time the accused makes, draws, utters, or delivers the instrument, that the maker or drawer, whether the accused or another, has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of the instrument in full upon its presentment. Such knowledge may be proved by circumstantial evidence.

(11) *Sufficient funds.* "Sufficient funds" refers to a condition in which the account balance of the maker or drawer in the bank or other depository at the time of the presentment of the instrument for payment is not less than the face amount of the instrument and has not been rendered unavailable for payment by garnishment, attachment, or other legal procedures.

(12) *Credit.* "Credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of the check, draft, or order. An absence of credit includes those situations in which an accused writes a check on a nonexistent bank or on a bank in which the accused has no account.

(13) *Upon its presentment.* "Upon its presentment" refers to the time the demand for payment is made upon presentation of the instrument to the bank or other depository on which it was drawn.

(14) *Intent to defraud.* "Intent to defraud" means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily.

(15) *Intent to deceive.* "Intent to deceive" means an intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage for oneself or for a third person, or of bringing about a disadvantage to the interests of the person to whom the representation was made or to interests represented by that person.

(16) *The relationship of time and intent.* Under this article, two times are involved: (a) when the accused makes, draws, utters, or delivers the instrument; and (b) when the instrument is presented to the bank or other depository for payment. With respect to (a), the accused must possess the requisite intent and must know that the maker or drawer does not have or will not have sufficient funds in, or credit with, the bank or the depository for payment of the instrument in full upon its presentment when due. With respect to (b), if it can otherwise be shown that the accused possessed the requisite intent and knowledge at the time the accused made, drew, uttered, or delivered the instrument, neither proof of presentment nor refusal of payment is necessary, as when the instrument is one drawn on a nonexistent bank.

(17) *Statutory rule of evidence.* The provision of this article with respect to establishing prima facie evidence of knowledge and intent by proof of notice and nonpayment within 5 days is a statutory rule of evidence. The failure of an accused who is a maker or drawer to pay the holder the amount due within 5 days after receiving either oral or written notice from the holder of a check, draft, or order, or from any other person having knowledge that such check, draft, or order was returned unpaid because of insufficient funds, is prima facie evidence (a) that the accused had the intent to defraud or deceive as alleged; and (b) that the accused knew at the time the accused made, drew, uttered, or delivered the check, draft, or order that the accused did not have or would not have sufficient funds in, or credit with, the bank or other depository for the payment of such check, draft, or order upon its presentment for payment. Prima facie evidence is that evidence from which the accused's intent to defraud or deceive and the accused's knowledge of insufficient funds in or credit with the bank or other depository may be inferred, depending on all the circumstances. The failure to give notice referred to in the article, or payment by the accused, maker, or drawer to the holder of the amount due within 5 days after such notice has

been given, precludes the prosecution from using the statutory rule of evidence but does not preclude conviction of this offense if all the elements are otherwise proved.

(18) *Affirmative defense.* Honest mistake is an affirmative defense to offenses under this article. *See* R.C.M. 916(j).

d. *Maximum punishment.*

(1) *For the procurement of any article or thing of value, with intent to defraud, in the face amount of:*

(a) *$1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *More than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *For the payment of any past due obligation, or for any other purpose, with intent to deceive.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specifications.*

(1) *For the procurement of any article or thing of value, with intent to defraud.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20___, with intent to defraud and for the procurement of (lawful currency) (and) (_____ (an article) (a thing) of value), wrongfully and unlawfully ((make (draw)) (utter) (deliver) to _____,) a certain (check) (draft) (money order) upon the (_____ Bank) (_____ depository) in words and figures as follows, to wit: _____, then knowing that (he) (she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

(2) *For the payment of any past due obligation, or for any other purpose, with intent to deceive.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, with intent to deceive and for the payment of a past due obligation, to wit: _____ (for the purpose of _____) wrongfully and unlawfully ((make) (draw)) (utter) (deliver) to _____, a certain (check) (draft) (money order) for the payment of money upon (_____ Bank) (_____ depository), in words and figures as follows, to wit: _____, then knowing that (he) (she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

71. Article 124 (10 U.S.C. 924)—Frauds against the United States

a. *Text of statute.*

Any person subject to this chapter—

(1) who, knowing it to be false or fraudulent—

(A) makes any claim against the United States or any officer thereof; or

(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof;

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—

(A) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;

(B) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;

(3) who, having charge, possession, custody or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct.

b. *Elements.*

(1) *Making a false or fraudulent claim.*

(a) That the accused made a certain claim against the United States or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(2) *Presenting for approval or payment a false or fraudulent claim.*

(a) That the accused presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(3) *Making or using a false writing or other paper in connection with a claim.*

(a) That the accused made or used a certain writing or other paper;

(b) That certain material statements in the writing or other paper were false or fraudulent;

(c) That the accused then knew the statements were false or fraudulent; and

(d) That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(4) *False oath in connection with a claim.*

(a) That the accused made an oath to a certain fact or to a certain writing or other paper;

(b) That the oath was false in certain particulars;

(c) That the accused then knew it was false; and

(d) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(5) *Forgery of signature in connection with a claim.*

(a) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper; and

(b) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(6) *Using forged signature in connection with a claim.*

(a) That the accused used the forged or counterfeited signature of a certain person;

(b) That the accused then knew that the signature was forged or counterfeited; and

(c) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(7) *Delivering less than amount called for by receipt.*

(a) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the armed forces thereof;

(b) That the accused obtained a certificate or receipt for a certain amount or quantity of that money or property;

(c) That for the certificate or receipt the accused knowingly delivered to a certain person having authority to receive it, an amount or quantity of money or property less than the amount or quantity thereof specified in the certificate or receipt; and

(d) That the undelivered money or property was of a certain value.

(8) *Making or delivering receipt without having full knowledge that it is true.*

(a) That the accused was authorized to make or deliver a paper certifying the receipt from a certain person of certain property of the United States furnished or intended for the armed forces thereof;

(b) That the accused made or delivered to that person a certificate or receipt;

(c) That the accused made or delivered the certificate without having full knowledge of the truth of a certain material statement or statements therein;

(d) That the act was done with intent to defraud the United States; and

(e) That the property certified as being received was of a certain value.

c. *Explanation.*

(1) *Making a false or fraudulent claim.*

(a) *Claim.* A claim is a demand for a transfer of ownership of money or property and does not include requisitions for the mere use of property. This article applies only to claims against the United States or any officer thereof as such, and not to claims against an officer of the United States in that officer's private capacity.

(b) *Making a claim.* Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The mere writing of a paper in the form of a claim, without any further act to cause the paper to become a demand against the United States or an officer thereof, does not constitute making a claim. However, any act placing the claim in official channels constitutes making a claim, even if that act does not amount to presenting a claim. It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. *See also* subparagraph c.(2).

(c) *Knowledge.* The claim must be made with knowledge of its fictitious or dishonest character. This article does not proscribe claims, however groundless they may be, that the maker believes to be valid, or claims that are merely made negligently or without ordinary prudence.

(2) *Presenting for approval or payment a false or fraudulent claim.*

(a) *False and fraudulent.* False and fraudulent claims include not only those containing some material false statement, but also claims that the claimant knows to have been paid or for some other reason the claimant knows the claimant is not authorized to present or upon which the claimant knows the claimant has no right to collect.

(b) *Presenting a claim.* The claim must be presented, directly or indirectly, to some person having authority to pay it. The person to whom the claim is presented may be identified by

position or authority to approve the claim, and need not be identified by name in the specification. A false claim may be tacitly presented, as when a person who knows that there is no entitlement to certain pay accepts it nevertheless without disclosing a disqualification, even though the person may not have made any representation of entitlement to the pay. For example, a person cashing a pay check that includes an amount for a dependency allowance, knowing at the time that the entitlement no longer exists because of a change in that dependency status, has tacitly presented a false claim. *See also* subparagraph (1) of this paragraph.

(3) *Making or using a false writing or other paper in connection with a claim.* The false or fraudulent statement must be material, that is, it must have a tendency to mislead governmental officials in their consideration or investigation of the claim. The offense of making a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented. See also the explanation in subparagraphs (1) and (2) of this paragraph.

(4) *False oath in connection with a claim. See* subparagraphs (1) and (2) of this paragraph.

(5) *Forgery of signature in connection with a claim.* Any fraudulent making of the signature of another is forging or counterfeiting, whether or not an attempt is made to imitate the handwriting. *See* subparagraph 37.c. and subparagraphs (1) and (2) of this paragraph.

(6) *Delivering less than amount called for by receipt.* It is immaterial by what means—whether deceit, collusion, or otherwise—the accused effected the transaction, or what was the accused's purpose.

(7) *Making or delivering receipt without having full knowledge that it is true.* When an officer or other person subject to military law is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, and a receipt or other paper is presented for signature stating that a certain amount of supplies has been furnished by a certain contractor, it is that person's duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If the person signs the paper with intent to defraud the United States and without that knowledge, that person is guilty of a violation of this section of the article. If the person signs the paper with knowledge that the full amount was not received, it may be inferred that the person intended to defraud the United States.

d. *Maximum punishment.*

(1) *Article 124 (1) and (2).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Article 124 (3) and (4).*

(a) *When amount is $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *When amount is more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Making false claim.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20___, (by preparing (a voucher) (_____) for presentation for approval or payment) (_____), make a claim against the

(United States) (finance officer at _____) (_____) in the amount of $_____ for (private property alleged to have been (lost) (destroyed) in the military service) (_____), which claim was (false) (fraudulent) (false and fraudulent) in the amount of $_____ in that _____ and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(2) *Presenting false claim.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20___, by presenting (a voucher) (_____) to _____, an officer of the United States duly authorized to (approve) (pay) (approve and pay) such claim, present for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer at _____) (_____) in the amount of $_____ for (services alleged to have been rendered to the United States by _____ during _____) (_____), which claim was (false) (fraudulent) (false and fraudulent) in the amount of $_____ in that _____, and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(3) *Making or using false writing.*

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States in the amount of $_____, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (make) (use) (make and use) a certain (writing) (paper), to wit:_____, which said (writing) (paper), as (he) (she), the said _____, then knew, contained a statement that _____, which statement was (false) (fraudulent) (false and fraudulent) in that _____, and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(4) *Making false oath.*

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, make an oath (to the fact that _____) (to a certain (writing) (paper), to wit: _____), to the effect that _____, which said oath was false in that _____, and was then known by the said _____ to be false.

(5) *Forging or counterfeiting signature.*

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (forge) (counterfeit) (forge and counterfeit) the signature of _____ upon a _____in words and figures as follows: _____.

(6) *Using forged signature.*

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, use the signature of _____ on a certain (writing) (paper), to wit: _____, then knowing such signature to be (forged) (counterfeited) (forged and counterfeited).

(7) *Paying amount less than called for by a receipt.*

In that _____ (personal jurisdiction data), having (charge) (possession) (custody) (control) of (money) (_____) of the United States, (furnished) (intended) (furnished

and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, knowingly deliver to _____, the said _____ having authority to receive the same, (an amount) (_____), which, as (he) (she), _____, then knew, was ($_____) (_____) less than the (amount) (_____) for which (he) (she) received a (certificate) (receipt) from the said _____.

(8) *Making receipt without knowledge of the facts.*

In that _____ (personal jurisdiction data), being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, without having full knowledge of the statement therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to _____, such a writing, in words and figures as follows: _____, the property therein certified as received being of a value of about $_____.

72. Article 124a (10 U.S.C. 924a)—Bribery

a. *Text of statute.*

(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

(1) who occupies an official position or who has official duties; and

(2) who wrongfully asks, accepts, or receives a thing of value with the intent to have the person's decision or action influenced with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, with the intent to influence the decision or action of the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Asking, accepting, or receiving.*

(a) That the accused wrongfully asked, accepted, or received a thing of value from a certain person or organization;

(b) That the accused then occupied a certain official position or had certain official duties;

(c) That the accused asked, accepted, or received this thing of value with the intent to have the accused's decision or action influenced with respect to a certain matter; and

(d) That this certain matter was an official matter in which the United States was interested.

(2) *Promising, offering, or giving.*

(a) That the accused wrongfully promised, offered, or gave a thing of value to a certain person;

(b) That this person then occupied a certain official position or had certain official duties;

(c) That this thing of value was promised, offered, or given with the intent to influence the decision or action of this person; and

(d) That this matter was an official matter in which the United States was interested.

c. *Explanation.* Bribery requires an intent to influence or be influenced in an official matter.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Asking, accepting, or receiving.*

In that _____ (personal jurisdiction data), being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), (with intent to have (his) (her) (decision) (action) influenced with respect to) ((as compensation for) (in recognition of)) service (rendered) (to be rendered).

(2) *Promising, offering, or giving.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (promise) (offer) (give) to _____, ((his) (her) commanding officer) (the claims officer of _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), (with intent to influence the (decision) (action) of the said _____ with respect to) ((as compensation for) (in recognition of)) services (rendered) (to be rendered).

73. Article 124b (10 U.S.C. 924b)—Graft

a. *Text of statute.*

(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

(1) who occupies an official position or who has official duties; and

(2) who wrongfully asks, accepts, or receives a thing of value as compensation for or in recognition of services rendered or to be rendered by the person with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, as compensation for or in recognition of services rendered or to be rendered by the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Asking, accepting, or receiving.*

(a) That the accused wrongfully asked, accepted, or received a thing of value from a certain person or organization;

(b) That the accused then occupied a certain official position or had certain official duties;

(c) That the accused asked, accepted, or received this thing of value as compensation for or in recognition of services rendered, to be rendered, or both, by the accused in relation to a certain matter; and

(d) That this certain matter was an official matter in which the United States was interested.

(2) *Promising, offering, or giving.*

(a) That the accused wrongfully promised, offered, or gave a thing of value to a certain person;

(b) That this person then occupied a certain official position or had certain official duties;

(c) That this thing of value was promised, offered, or given as compensation for or in recognition of services rendered, to be rendered, or both, by this person in relation to a certain matter; and

(d) That this matter was an official matter in which the United States was interested.

c. *Explanation.* Graft does not require an intent to influence or be influenced in an official matter. Graft involves compensation for services performed in an official matter when no compensation is due.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications.*

(1) *Asking, accepting, or receiving.*

In that _____ (personal jurisdiction data), being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did,(at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), (rendered or to be rendered) by (him) (her) the said _____ in relation to) an official matter in which the United States was interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

(2) *Promising, offering, or giving.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (promise) (offer) (give) to _____, ((his) (her) commanding officer) (the claims officer of _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____, (rendered or to be rendered) by the said _____ in relation to) an official matter in which the United States was interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

74. Article 125 (10 U.S.C. 925)—Kidnapping

a. *Text of statute.*

Any person subject to this chapter who wrongfully—

(1) seizes, confines, inveigles, decoys, or carries away another person; and

(2) holds the other person against that person's will;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

(2) That the accused then held such person against that person's will; and

(3) That the accused did so wrongfully.

c. *Explanation.*

(1) *Inveigle, decoy.* "Inveigle" means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain destination has inveigled the passenger into the car. "Decoy" means to entice or lure by means of some fraud, trick, or temptation. For example, one who lures a child into a trap with candy has decoyed the child.

(2) *Held.* "Held" means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

(3) *Against the will.* "Against that person's will" means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. If the victim is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the victim's parents or legal guardian. Evidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

(4) *Financial or personal gain.* The holding need not have been for financial or personal gain or for any other particular purpose. It may be an aggravating circumstance that the kidnapping was for ransom, however. *See* R.C.M. 1001(b)(4).

(5) *Wrongfully.* "Wrongfully" means without justification or excuse. For example, a law enforcement official may justifiably apprehend and detain, by force if reasonably necessary *(see* R.C.M. 302(d)(3)), a person reasonably believed to have committed an offense. An official who unlawfully uses the official's authority to apprehend someone is not guilty of kidnapping, but may be guilty of unlawful detention. *See* paragraph 25.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

e. *Sample specification.*

In that _____, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (seize) (confine) (inveigle) (decoy) (carry away) and hold _____ (a minor whose parent or legal guardian the accused was not) (a person not a minor) against (his) (her) will.

75. Article 126 (10 U.S.C. 926)—Arson; burning property with intent to defraud

a. *Text of statute.*

(a) AGGRAVATED ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein, to the knowledge of that person, there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

(b) SIMPLE ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets fire to the property of another is guilty of simple arson and shall be punished as a court-martial may direct.

(c) BURNING PROPERTY WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, willfully, maliciously, and with intent to defraud, burns or sets fire to any property shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Aggravated arson.*

(a) *Inhabited dwelling.*

(i) That the accused burned or set on fire an inhabited dwelling; and

(ii) That the act was willful and malicious.

(b) *Structure.*

(i) That the accused burned or set on fire a certain structure;

(ii) That the act was willful and malicious;

(iii) That there was a human being in the structure at the time; and

(iv) That the accused knew that there was a human being in the structure at the time.

(2) *Simple arson.*

(a) That the accused burned or set fire to certain property of another; and

(b) That the act was willful and malicious.

[Note: if the property is of a value of more than $1,000, add the following element:]

(c) That the property is of a value of more than $1,000.

(3) *Burning with the intent to defraud.*

(a) That the accused burned or set fire to certain property; and

(b) That the act was willful and malicious; and

(c) That such burning or setting on fire was with the intent to defraud a certain person or organization.

c. *Explanation.*

(1) *In general.* In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident. In burning with intent to defraud, it is the fraudulent intent motivating the burning of any property that is the essential element. It is immaterial to whom the property belonged; the focus is that the burning of that property was for a fraudulent purpose (e.g., the intent to file a false insurance claim for the property burned by the accused).

(2) *Aggravated arson.*

(a) *Inhabited dwelling.* "An inhabited dwelling" means the structure must be used for habitation, not that a human being must be present therein at the time the dwelling is burned or set on fire. It includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or that has been temporarily abandoned. A person may be guilty of aggravated arson of the person's dwelling, whether as owner or tenant.

(b) *Structure.* Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, when the offender knows that there is a human being inside at the time. It may be that the offender had this knowledge when the nature of the structure—as a department store or theater during hours of business, or other circumstances—are shown to have been such that a reasonable person would have known that a human being was inside at the time.

(c) *Damage to property.* It is not necessary that the dwelling or structure be consumed or materially injured; it is enough if fire is actually communicated to any part thereof. Any actual burning or charring is sufficient, but a mere scorching or discoloration by heat is not.

(d) *Value and ownership of property.* For the offense of aggravated arson, the value and ownership of the dwelling or other structure are immaterial, but may be alleged and proved to permit the finding in an appropriate case of the included offense of simple arson.

(3) *Simple arson.* Simple arson is the willful and malicious burning or setting fire to the property of another under circumstances not amounting to aggravated arson. The offense

includes burning or setting fire to real or personal property of someone other than the offender. See subparagraph 75.c.(1) for discussion of willful and malicious.

(4) *Burning with the intent to defraud.* See subparagraph 70.c.(14) for a discussion of intent to defraud.

d. *Maximum punishment.*

(1) *Aggravated arson.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 25 years.

(2) *Simple arson—*

(a) *Where the property is of some value.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(b) *Where the property is of a value of more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) *Burning with intent to defraud.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specifications.*

(1) *Aggravated arson.*

(a) Inhabited dwelling.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully and maliciously (burn) (set on fire) an inhabited dwelling, to wit: (a house) (an apartment) (_____).

(b) *Structure.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully and maliciously (burn) (set on fire), knowing that a human being was therein at the time, (the Post Theater) (_____).

(2) *Simple arson.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully and maliciously (burn) (set fire to) (an automobile) (_____), (of some value) (of a value of more than $1,000), the property of another.

(3) *Burning with intent to defraud.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile) (_____), with intent to defraud (the insurer thereof, to wit: _____) (_____).

76. Article 127 (10 U.S.C. 927)—Extortion

a. *Text of statute.*

Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused communicated a certain threat to another; and

(2) That the accused intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity.

c. *Explanation.*

(1) *In general.* Extortion is complete upon communication of the threat with the requisite intent. The actual or probable success of the extortion need not be proved.

(2) *Threat.* A threat may be communicated by any means but must be received by the intended victim. The threat may be: a threat to do any unlawful injury to the person or property of the person threatened or to any member of that person's family or any other person held dear to that person; a threat to accuse the person threatened, or any member of that person's family or any other person held dear to that person, of any crime; a threat to expose or impute any deformity or disgrace to the person threatened or to any member of that person's family or any other person held dear to that person; a threat to expose any secret affecting the person threatened or any member of that person's family or any other person held dear to that person; or a threat to do any other harm.

(3) *Acquittance.* An acquittance is a release or discharge from an obligation.

(4) *Advantage or immunity.* Unless it is clear from the circumstances, the advantage or immunity sought should be described in the specification. An intent to make a person do an act against that person's will is not, by itself, sufficient to constitute extortion.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, with intent unlawfully to obtain (something of value, to wit: _____) (an acquittance) (an advantage, to wit: _____) (an immunity, to wit: _____), communicate to _____ a threat to (here describe the threat).

77. Article 128 (10 U.S.C. 928)—Assault

a. *Text of statute.*

(a) ASSAULT.—Any person subject to this chapter who, unlawfully and with force or violence—

(1) attempts to do bodily harm to another person;

(2) offers to do bodily harm to another person; or

(3) does bodily harm to another person;

is guilty of assault and shall be punished as a court-martial may direct.

(b) AGGRAVATED ASSAULT.—Any person subject to this chapter—

(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or

(2) who, in committing an assault, inflicts substantial bodily harm or grievous bodily harm on another person;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

(c) ASSAULT WITH INTENT TO COMMIT SPECIFIED OFFENSES.—

(1) IN GENERAL.—Any person subject to this chapter who commits assault with intent to commit an offense specified in paragraph (2) shall be punished as a court-martial may direct.

(2) OFFENSES SPECIFIED.—The offenses referred to in paragraph (1) are murder, voluntary manslaughter, rape, sexual assault, rape of a child, sexual assault of a child, robbery, arson, burglary, and kidnapping.

b. *Elements.*

(1) *Simple assault.*

(a) That the accused attempted to do or offered to do bodily harm to a certain person;

(b) That the attempt or offer was done unlawfully; and

(c) That the attempt or offer was done with force or violence.

(2) *Assault consummated by a battery.*

(a) That the accused did bodily harm to a certain person;

(b) That the bodily harm was done unlawfully; and

(c) That the bodily harm was done with force or violence.

(3) *Assaults permitting increased punishment based on status of victim.*

(a) *Assault upon a commissioned, warrant, noncommissioned, or petty officer.*

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the attempt, offer, or bodily harm was done unlawfully;

(iii) That the attempt, offer, or bodily harm was done with force or violence;

(iv) That the person was a commissioned, warrant, noncommissioned, or petty officer; and

(v) That the accused then knew that the person was a commissioned, warrant, noncommissioned, or petty officer.

(b) *Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties.*

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the attempt, offer, or bodily harm was done unlawfully;

(iii) That the attempt, offer, or bodily harm was done with force or violence;

(iv) That the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties; and

(v) That the accused then knew that the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.

(c) *Assault consummated by a battery upon a child under 16 years, a spouse, intimate partner, or immediate family member.*

(i) That the accused did bodily harm to a certain person;

(ii) That the bodily harm was done unlawfully;

(iii) That the bodily harm was done with force or violence; and

(iv) That the person was then a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(4) *Aggravated assault.*

(a) *Assault with a dangerous weapon.*

(i) That the accused offered to do bodily harm to a certain person;

(ii) The offer was made with the intent to do bodily harm; and

(iii) That the accused did so with a dangerous weapon.

[Note: Add any of the following elements as applicable:]

(iv) That the dangerous weapon was a loaded firearm.

(v) That the person was a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(b) *Assault in which substantial bodily harm is inflicted.*

(i) That the accused assaulted a certain person; and

(ii) That substantial bodily harm was thereby inflicted upon such person.

[Note: Add any of the following elements as applicable:]

(iii) That the injury was inflicted with a loaded firearm.

(iv) That the person was a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(c) *Assault in which grievous bodily harm is inflicted.*

(i) That the accused assaulted a certain person; and

(ii) That grievous bodily harm was thereby inflicted upon such person.

[Note: Add any of the following elements as applicable:]

(iii) That the injury was inflicted with a loaded firearm.

(iv) That the person was a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(5) *Assault with intent to commit specified offenses.*

(a) That the accused assaulted a certain person; and

(b) That the accused, at the time of the assault, intended to: kill (as required for murder or voluntary manslaughter), or commit rape, rape of a child, sexual assault, sexual assault of a child, robbery, arson, burglary, or kidnapping.

c. *Explanation.*

(1) *Definitions of bodily harm.*

(a) "Bodily harm" means an offensive touching of another, however slight.

(b) "Substantial bodily harm" means a bodily injury that involves:

(i) a temporary but substantial disfigurement, or

(ii) a temporary but substantial loss or impairment of function of any bodily member, organ, or mental faculty.

(c) "Grievous bodily harm" means a bodily injury that involves:

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) protracted and obvious disfigurement; or

(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(2) *Simple assault.*

(a) *Definition of assault.* An assault is an unlawful attempt or offer, made with force or violence, to do bodily harm to another, whether or not the attempt or offer is consummated. It must be done without legal justification or excuse and without the lawful consent of the person affected.

(b) *Difference between attempt and offer type assaults.*

(i) *Attempt-type assault.* An attempt-type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt-type assault may be committed even though the victim had no knowledge of the incident at the time.

(ii) *Offer-type assault.* An offer-type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

(iii) *Examples.*

(A) If Doe swings a fist at Roe's head intending to hit Roe but misses, Doe has committed an attempt-type assault, whether or not Roe is aware of the attempt.

(B) If Doe swings a fist in the direction of Roe's head either intentionally or as a result of culpable negligence, and Roe sees the blow coming and is thereby put in apprehension of being struck, Doe has committed an offer-type assault whether or not Doe intended to hit Roe.

(C) If Doe swings at Roe's head, intending to hit it, and Roe sees the blow coming and is thereby put in apprehension of being struck, Doe has committed both on offer- and an attempt-type assault.

(D) If Doe swings at Roe's head simply to frighten Roe, not intending to hit Roe, and Roe does not see the blow and is not placed in fear, then no assault of any type has been committed.

(c) *Situations not amounting to assault.*

(i) *Mere preparation.* Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault.

(ii) *Threatening words.* The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a menacing act or gesture, there may be an assault, since the combination constitutes a demonstration of violence.

(iii) *Circumstances negating intent to harm.* If the circumstances known to the person menaced clearly negate an intent to do bodily harm, there is no assault. Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike, there is no assault. For example, if Doe raises a stick and shakes it at Roe within striking distance saying, "If you weren't an old man, I would knock you down," Doe has committed no assault. However, an offer to inflict bodily injury upon another instantly if that person does not comply with a demand that the assailant has no lawful right to make is an assault. Thus, if Doe points a pistol at Roe and says, "If you don't hand over your watch, I will shoot you," Doe has committed an assault upon Roe. *See also* paragraph 67 (Robbery) of this Part.

(d) *Situations not constituting defenses to assault.*

(i) *Assault attempt fails.* It is not a defense to a charge of assault that for some reason unknown to the assailant, an assault attempt was bound to fail. Thus, if a person loads a rifle with what is believed to be a good cartridge and, pointing it at another, pulls the trigger, that person may be guilty of assault although the cartridge was defective and did not fire. Likewise, if a person in a house shoots through the roof at a place where a policeman is believed to be, that person may be guilty of assault even though the policeman is at another place on the roof.

(ii) *Retreating victim.* An assault is complete if there is a demonstration of violence and an apparent ability to inflict bodily injury causing the person at whom it was directed to reasonably apprehend that unless the person retreats bodily harm will be inflicted. This is true even though the victim retreated and was never within actual striking distance of the assailant. There must, however, be an apparent present ability to inflict the injury. Thus, to aim a pistol at a person at such a distance that it clearly could not injure would not be an assault.

(3) *Battery.*

(a) *In general.* A battery is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm.

(b) *Application of force.* The force applied in a battery may have been directly or indirectly applied. Thus, a battery can be committed by inflicting bodily injury on a person through striking

the horse on which the person is mounted causing the horse to throw the person, as well as by striking the person directly.

(c) *Examples of battery.* It may be a battery to spit on another, push a third person against another, set a dog at another that bites the person, cut another's clothes while the person is wearing them though without touching or intending to touch the person, shoot a person, cause a person to take poison, or drive an automobile into a person. A person who, although excused in using force, uses more force than is required, commits a battery. Throwing an object into a crowd may be a battery on anyone whom the object hits.

(d) *Situations not constituting battery.* If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery. It is also not a battery to touch another to attract the other's attention or to prevent injury.

(4) *Assaults permitting increased punishment based on status of victims.*

(a) *Assault upon a commissioned, warrant, noncommissioned, or petty officer.* The maximum punishment is increased when assault is committed upon a commissioned officer of the armed forces of the United States, or of a friendly foreign power, or upon a warrant, noncommissioned, or petty officer of the armed forces of the United States. Knowledge of the status of the victim is an essential element of the offense and may be proved by circumstantial evidence. It is not necessary that the victim be superior in rank or command to the accused, that the victim be in the same armed force, or that the victim be in the execution of office at the time of the assault.

(b) *Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties.* The maximum punishment is increased when assault is committed upon a sentinel or lookout in the execution of duty or upon a person who was then performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties. Knowledge of the status of the victim is an essential element of this offense and may be proved by circumstantial evidence. See subparagraph 22.c.(1)(d) for the definition of sentinel or lookout.

(c) *Assault consummated by a battery upon a child under 16 years of age.* The maximum punishment is increased when assault consummated by a battery is committed upon a child under 16 years of age. Knowledge that the person assaulted was under 16 years of age is not an element of this offense.

(d) *Assault consummated by a battery against a spouse, intimate partner, or an immediate family member.* The maximum punishment is increased when assault consummated by a battery is committed upon an immediate family member; spouse; or intimate partner. For purposes of this paragraph, the terms immediate family member and intimate partner have the same meaning as in subparagraph 80.a.(b)(4) and (5) (Stalking) and include a spouse, a former spouse, or a former intimate partner.

(5) *Aggravated assault.*

(a) *Assault with a dangerous weapon.*

(i) *In general.* It must be proved that the accused specifically intended to do bodily harm. Culpable negligence will not suffice.

(ii) *Proving intent.* Specific intent may be proved by circumstantial evidence. When bodily harm has been inflicted by means of intentionally using force in a manner capable of achieving that result, it may be inferred that bodily harm was intended.

(iii) *Dangerous weapon.* A weapon is dangerous when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on

the nature of the object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm. Thus, a bottle, beer glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner capable of inflicting death or grievous bodily harm. Furthermore, under the appropriate circumstances, fists, teeth, feet, elbows, etc. may be considered a dangerous weapon when employed in a manner capable of inflicting death or grievous bodily harm.

(iv) *Injury not required.* It is not necessary that bodily harm be actually inflicted to prove assault with a dangerous weapon.

(v) *When committed upon a child under 16 years of age.* The maximum punishment is increased when assault with a dangerous weapon is committed upon a child under 16 years of age. Knowledge that the person assaulted was under the age of 16 years is not an element of the offense.

(vi) *When committed upon a spouse, intimate partner, or an immediate family member.* The maximum punishment is increased when assault with a dangerous weapon is committed upon a spouse; an immediate family member; or intimate partner. For purposes of this paragraph, the terms immediate family member and intimate partner have the same meaning as in subparagraph 80.a.(b)(4) and (5) (Stalking).

(b) *Assault in which substantial or grievous bodily harm is inflicted.*

(i) *In general.* Assault in which substantial or grievous bodily harm is inflicted is a general intent crime which requires that the accused assaulted another person and that the assault resulted in substantial or grievous bodily harm. The offense does not require specific intent to cause substantial or grievous bodily harm. The focus of the offense is the degree of bodily harm resulting from an assault. This contrasts with the offense of assault with a dangerous weapon, where the focus of the offense is the accused's intent to do bodily harm and the use of a dangerous weapon, regardless of whether any bodily harm results.

(ii) *When committed on a child under 16 years of age.* The maximum punishment is increased when assault involving infliction of substantial or grievous bodily harm is inflicted upon a child under 16 years of age. Knowledge that the person assaulted was under the age of 16 years is not an element of the offense.

(iii) *When committed on a spouse, intimate partner, or an immediate family member.* The maximum punishment is increased when assault involving infliction of substantial or grievous bodily harm is committed upon a spouse; an immediate family member; or intimate partner. For purposes of this paragraph, the terms immediate family member and intimate partner have the same meaning as in subparagraph 80.a.(b)(4) and (5) (Stalking).

(6) *Assault with intent to commit specified offenses.*

(a) *In general.* An assault with intent to commit any of the offenses referenced below is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that proximity to consummation of an intended offense that is essential to an attempt. *See* paragraph 4 of this Part.

(b) *Assault with intent to murder.* Assault with intent to commit murder is assault with the specific intent to kill. Actual infliction of injury is not necessary. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged. When the intent to kill exists, the fact that for some unknown reason the actual consummation of the murder by the means employed is impossible is not a defense if the means are apparently adapted to the end in view. The intent to kill need not be directed against the person assaulted if the assault is committed with intent to kill some person. For example, if a person, intending to kill

Jones, shoots Smith, mistaking Smith for Jones, that person is guilty of assaulting Smith with intent to murder. If a person fires into a group with intent to kill anyone in the group, that person is guilty of an assault with intent to murder each member of the group.

(c) *Assault with intent to commit voluntary manslaughter.* Assault with intent to commit voluntary manslaughter is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for it is not a crime capable of being intentionally committed.

(d) *Assault with intent to commit rape, rape of a child, sexual assault, and sexual assault of a child.* In assault with intent to commit any rape or sexual assault, the accused must have intended to complete the offense. Any lesser intent will not suffice. No actual touching is necessary. Once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted.

(e) *Assault with intent to rob.* For assault with intent to rob, the fact that the accused intended to take money and that the person the accused intended to rob had none is not a defense.

d. *Maximum Punishment.*

(1) *Simple assault.*

(a) *Generally.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) *When committed with an unloaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *Battery.*

(a) *Assault consummated by a battery.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Assault upon a commissioned officer of the armed forces of the United States or of a friendly foreign power, not in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(c) *Assault upon a warrant officer, not in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(d) *Assault upon a noncommissioned or petty officer, not in the execution of office.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(e) *Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(f) *Assault consummated by a battery upon a child under 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Aggravated assault.*

(a) *Aggravated assault with a dangerous weapon.*

(i) *When committed with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(ii) *When committed upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, total forfeitures, and confinement for 5 years.

(iii) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(b) *Aggravated assault in which substantial bodily harm is inflicted.*

(i) *When the injury is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(ii) *When the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 6 years.

(iii) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(c) *Aggravated assault in which grievous bodily harm is inflicted.*

(i) *When the injury is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(ii) *When the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, total forfeitures, and confinement for 8 years.

(iii) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years

(4) *Assault with intent to commit specified offenses.*

(a) *Assault with intent to commit murder, rape, or rape of a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b) *Assault with intent to commit voluntary manslaughter, robbery, arson, burglary, and kidnapping.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specifications.*

(1) *Simple assault.*

In that _____ (personal jurisdiction data), did, (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 __, assault _____ by (striking at (him) (her) with a _____) (_____).

(2) *Assault consummated by a battery.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, unlawfully (strike) (_____) _____ (on) (in) the _____ with _____.

(3) *Assault upon a commissioned officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, assault _____, who then was and was then known by the accused to be a commissioned officer of (_____, a friendly foreign power) [the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard) (_____)] by _____.

(4) *Assault upon a warrant, noncommissioned, or petty officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, assault _____, who then was and was then known by the accused to be a (warrant) (noncommissioned) (petty) officer of the [the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard) (_____)] by _____.

(5) *Assault upon a sentinel or lookout.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, assault _____, who then was and was then known by the accused to be a (sentinel) (lookout) in the execution of (his) (her) duty, ((in) (on) the _____) by _____.

(6) *Assault upon a person in the execution of law enforcement duties.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, assault _____, who then was and was then known by the accused to be a person then having and in the execution of (Air Force security police) (military police) (shore patrol) (master at arms) ((military) (civilian) law enforcement)) duties, by _____.

(7) *Assault consummated by a battery upon a child under 16 years, or the spouse, intimate partner or immediate family member of the accused.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, unlawfully (strike) (_____) _____ (a child under the age of 16 years) (the spouse of the accused) (the intimate partner of the accused) (an immediate family member of the accused), (in) (on) the _____ with _____.

(8) *Assault, aggravated—with a dangerous weapon.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, with the intent to inflict bodily harm, commit an assault upon _____ [(a child under the age of 16 years) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (pointing) (striking) (cutting) (_____) (at (him) (her)) with a dangerous weapon to wit: a (loaded firearm) (pickax) (bayonet) (club) (_____).

(9) *Assault, aggravated—inflicting substantial bodily harm.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, did commit an assault upon _____ [(a child under the age of 16 years) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (striking) (cutting) (___) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby inflict substantial bodily harm upon (him) (her), to wit: (severe bruising of the face) (head concussion) (temporary blindness) (_____).

(10) *Assault, aggravated—inflicting grievous bodily harm.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, did commit an assault upon _____ [(a child under the age of 16 years) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (striking) (cutting) (___) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby inflict grievous bodily harm upon (him) (her), to wit: a (broken leg) (deep cut) (fractured skull) (_____).

(11) *Assault with intent to commit specified offenses*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, with intent to commit (murder) (voluntary manslaughter) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (robbery) (arson) (burglary) (kidnapping), assault_____ by (striking at (him) (her) with a _____) (_____).

78. Article 128a (10 U.S.C. 928a)—Maiming

a. *Text of statute.*

Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

(1) seriously disfigures his person by any mutilation thereof;

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused inflicted a certain injury upon a certain person;

(2) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

(3) That the accused inflicted this injury with an intent to cause some injury to a person.

c. *Explanation.*

(1) *Nature of offense.* It is maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

(2) *Means of inflicting injury.* To prove the offense it is not necessary to prove the specific means by which the injury was inflicted. However, such evidence may be considered on the question of intent.

(3) *Intent.* Maiming requires a specific intent to injure generally but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about _____ 20 __, maim _____ by (crushing (his) (her) foot with a sledge hammer) (_____).

79. Article 129 (10 U.S.C. 929)—Burglary; unlawful entry

a. *Text of statute.*

(a) BURGLARY.—Any person subject to this chapter who, with intent to commit an offense under this chapter, breaks and enters the building or structure of another shall be punished as a court-martial may direct.

(b) UNLAWFUL ENTRY.—Any person subject to this chapter who unlawfully enters—

(1) the real property of another; or

(2) the personal property of another which amounts to a structure usually used for habitation or storage;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Burglary.*

(a) That the accused unlawfully broke and entered the building or structure of another; and

(b) That the breaking and entering were done with the intent to commit an offense punishable under the UCMJ.

[Note: If the breaking and entering were with the intent to commit an offense punishable under sections 918-920, 920b-921, 922, 925-928a, and 930 of this title (Article 118-120, 120b-121, 122, 125-128a, and 130), add the following element:]

(c) That the breaking and entering were with the intent to commit an offense punishable under Article 118-120, 120b-121, 122, 125-128a, and 130.

(2) *Unlawful entry.*

(a) That the accused entered—

(i) the real property of another; or

(ii) certain personal property of another which amounts to a structure usually used for habitation or storage; and

(b) That the entry was unlawful.

c. *Explanation.*

(1) *In general.* This article combines and consolidates the crimes of burglary, housebreaking, and unlawful entry. There is no requirement that an accused break and enter in the nighttime or that the structure entered constitute the dwelling house of another to commit the offense of burglary.

(2) *Breaking.* There must be a breaking, actual or constructive. Merely entering through a hole left in the wall or roof or through an open window or door will not constitute a breaking; but if a person moves any obstruction to entry of the house without which movement the person could not have entered, the person has committed a breaking. Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a person lawfully within the house who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with the requisite intent, burglary is not committed. There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; under false pretense, such as impersonating a gas or telephone inspector; by intimidating the occupants through violence or threats into opening the door; through collusion with a confederate, an occupant of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

(3) *Entry.* An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the house of a tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the breaking or entry. An entry is

unlawful if made without consent of any person authorized to consent to entry or without other lawful authority.

(4) *Building, structure.* Building includes room, shop, store, office, or apartment in a building. Structure refers only to those structures that are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an enclosed truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry.

(5) *Intent to commit offense.*

(a) *Burglary.* Both the breaking and entry must be done with the intent to commit an offense punishable under the UCMJ in the building or structure. If, after the breaking and entering, the accused commits one or more of these offenses, it may be inferred that the accused intended to commit the offense or offenses at the time of the breaking and entering. If the evidence warrants, the intended offense may be separately charged. It is immaterial whether the offense intended is committed or even attempted. If the offense is intended, it is no defense that its commission was impossible. For example, if an accused enters a house with intent to murder a resident, but the resident is not present in the house, the accused may still be found guilty of burglary.

(b) *Unlawful entry.* Neither specific intent to commit an offense, nor breaking is required for this offense.

(6) *Property protected from unlawful entry.* The property protected against unlawful entry includes real property and the sort of personal property that amounts to a structure usually used for habitation or storage, which would usually include vehicles expressly used for habitation, such as mobile homes and recreational vehicles. It would usually not include an aircraft, automobile, tracked vehicle, or a person's locker, even though used for storage purposes. However, depending on the circumstances, an intrusion into such property may be punishable under Article 134, UCMJ as conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

(7) *Unlawfulness of entry.* An entry is unlawful if made without the consent of any person authorized to consent to entry or without other lawful authority.

d. *Maximum punishment.*

(1) *Burglary (with the intent to commit an offense punishable under Article 118-120, 120b-121, 122, 125-128a, or 130).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Burglary (with intent to commit any other offense punishable under the UCMJ).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Unlawful entry.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specifications.*

(1) *Burglary*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, unlawfully break and enter the (building) (structure) of _____, to wit _____, with intent to commit an offense under the Uniform Code of Military Justice therein, to wit: _____.

(2) *Unlawful entry.*

In that _____, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, unlawfully enter the (real

property) (personal property) (a structure usually used for habitation or storage) of _____, to wit _____.

80. Article 130 (10 U.S.C. 930)—Stalking

a. *Text of statute.*

(a) IN GENERAL.—Any person subject to this chapter—

(1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

(2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

(3) whose conduct induces reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

is guilty of stalking and shall be punished as a court-martial may direct.

(b) DEFINITIONS.—In this section:

(1) The term "conduct" means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

(2) The term "course of conduct" means—

(A) a repeated maintenance of visual or physical proximity to a specific person;

(B) a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person; or

(C) a pattern of conduct composed of repeated acts evidencing a continuity of purpose.

(3) The term "repeated", with respect to conduct, means two or more occasions of such conduct.

(4) The term "immediate family", in the case of a specific person, means—

(A) that person's spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

(B) any other person living in his or her household and related to him or her by blood or marriage.

(5) The term "intimate partner", in the case of a specific person, means—

(A) a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or

(B) a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

b. *Elements.*

(1) That the accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

(2) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

(3) That the accused's conduct induced reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner.

c. *Explanation.*

(1) *Bodily Harm.* "Bodily harm" means any offensive touching of another, however slight, including sexual assault. *See* subparagraph 77.c.(1).

(2) *Threat.* "Threat" means a communication, by words or conduct, of a present determination or intent to cause bodily harm to a specific person, an immediate family member of that person, or intimate partner of that person, presently or in the future. The threat may be made directly to or in the presence of the person it is directed at or towards, or the threat may be conveyed to such person in some manner. Actual intent to cause bodily harm is not required.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), engage in a course of conduct directed at _____, that would cause a reasonable person to fear (death) (bodily harm, to wit:_____), to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner); that the accused knew or should have known that the course of conduct would place _____ in reasonable fear of (death) (bodily harm, to wit _____) to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner); and that the accused's conduct placed _____ in reasonable fear of (death) (bodily harm, to wit:_____) to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner).

81. Article 131 (10 U.S.C. 931)—Perjury

a. *Text of statute.*

Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly—

(1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, subscribes any false statement material to the issue or matter of inquiry;

is guilty of perjury and shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Giving false testimony.*

(a) That the accused took an oath or affirmation in a certain judicial proceeding or course of justice;

(b) That the oath or affirmation was administered to the accused in a matter in which an oath or affirmation was required or authorized by law;

(c) That the oath or affirmation was administered by a person having authority to do so;

(d) That upon the oath or affirmation that accused willfully gave certain testimony;

(e) That the testimony was material;

(f) That the testimony was false; and

(g) That the accused did not then believe the testimony to be true.

(2) *Subscribing false statement.*

(a) That the accused subscribed a certain statement in a judicial proceeding or course of justice;

(b) That in the declaration, certification, verification, or statement under penalty of perjury, the accused declared, certified, verified, or stated the truth of that certain statement;

(c) That the accused willfully subscribed the statement;

(d) That the statement was material;

(e) That the statement was false; and

(f) That the accused did not then believe the statement to be true.

c. *Explanation.*

(1) *In general.* Judicial proceeding includes a trial by court-martial, and course of justice includes preliminary hearings conducted under Article 32. If the accused is charged with having committed perjury before a court-martial, it must be shown that the court-martial was duly constituted.

(2) *Giving false testimony.*

(a) *Nature.* The testimony must be false and must be willfully and corruptly given; that is, it must be proved that the accused gave the false testimony willfully and did not believe it to be true. A witness may commit perjury by testifying to the truth of a matter when in fact the witness knows nothing about it at all or is not sure about it, whether the thing is true or false in fact. A witness may also commit perjury in testifying falsely as to a belief, remembrance, or impression, or as to a judgment or opinion. It is no defense that the witness voluntarily appeared, that the witness was incompetent as a witness, or that the testimony was given in response to questions that the witness could have declined to answer.

(b) *Material matter.* The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving false testimony with respect to the credibility of a material witness or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue.

(c) *Proof.* The falsity of the allegedly perjured statement cannot be proved by circumstantial evidence alone, except with respect to matters which by their nature are not susceptible of direct proof. The falsity of the statement cannot be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if: the document is an official record shown to have been well known to the accused at the time the oath was taken; or the documentary evidence originated from the accused—or had in any manner been recognized by the accused as containing the truth—before the allegedly perjured statement was made.

(d) *Oath.* The oath must be one recognized or authorized by law and must be duly administered by one authorized to administer it. When a form of oath has been prescribed, a literal following of that form is not essential; it is sufficient if the oath administered conforms in substance to the prescribed form. Oath includes an affirmation when the latter is authorized in lieu of an oath.

(e) *Belief of accused.* The fact that the accused did not believe the statement to be true may be proved by testimony of one witness without corroboration or by circumstantial evidence.

(3) *Subscribing false statement.* See subparagraphs (1) and (2), above, as applicable. Section 1746 of title 28, United States Code, provides for subscribing to the truth of a document by signing it expressly subject to the penalty for perjury. The signing must take place in a judicial proceeding or course of justice—for example, if a witness signs under penalty of perjury summarized testimony given at an Article 32 preliminary hearing. It is not required that the document be sworn before a third party. Section 1746 does not change the requirement that a deposition be given under oath or alter the situation where an oath is required to be taken before a specific person.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Giving false testimony.*

In that _____ (personal jurisdiction data), having taken a lawful (oath) (affirmation) in a (trial by _____ court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____) that (he) (she) would (testify) (depose) truly, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, willfully, corruptly, and contrary to such (oath) (affirmation), (testify) (depose) falsely in substance that _____, which (testimony) (deposition) was upon a material matter and which (he) (she) did not then believe to be true.

(2) *Subscribing false statement.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, in a (judicial proceeding) (course of justice), and in a (declaration) (certification) (verification) (statement) under penalty of perjury pursuant to section 1746 of title 28, United States Code, willfully and corruptly subscribed a false statement material to the (issue) (matter of inquiry), to wit: _____, which statement was false in that _____, and which statement (he) (she) did not then believe to be true.

82. Article 131a (10 U.S.C. 931a)—Subornation of perjury

a. *Text of statute.*

(a) IN GENERAL.—Any person subject to this chapter who induces and procures another person—

(1) to take an oath; and

(2) to falsely testify, depose, or state upon such oath;

shall, if the conditions specified in subsection (b) are satisfied, be punished as a court-martial may direct.

(b) CONDITIONS.—The conditions referred to in subsection (a) are the following:

(1) The oath is administered with respect to a matter for which such oath is required or authorized by law.

(2) The oath is administered by a person having authority to do so.

(3) Upon the oath, the other person willfully makes or subscribes a statement.

(4) The statement is material.

(5) The statement is false.

(6) When the statement is made or subscribed, the person subject to this chapter and the other person do not believe that the statement is true.

b. *Elements.*

(1) That the accused induced and procured a certain person to take an oath or its equivalent and to falsely testify, depose, or state upon such oath or its equivalent concerning a certain matter;

(2) That the oath or its equivalent was administered to said person in a matter in which an oath or its equivalent was required or authorized by law;

(3) That the oath or its equivalent was administered by a person having authority to do so;

(4) That upon the oath or its equivalent said person willfully made or subscribed a certain statement;

(5) That the statement was material;

(6) That the statement was false; and

(7) That the accused and the said person did not then believe that the statement was true.

c. *Explanation.*

(1) See subparagraph 81.c for applicable principles.

(2) "Induce and procure" means to influence, persuade, or cause.

(3) The word "oath" includes affirmation, and sworn includes affirmed. *See* 1 U.S.C. § 1.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, procure _____ to commit perjury by inducing (him) (her), the said _____, to take a lawful (oath) (affirmation) in a (trial by court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____) that (he) (she), the said _____, would (testify) (depose) (_____) truly, and to (testify) (depose) (_____) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that _____, which (testimony) (deposition) (_____) was upon a material matter and which the accused and the said _____ did not then believe to be true.

83. Article 131b (10 U.S.C. 931b)—Obstructing justice

a. *Text of statute.*

Any person subject to this chapter who engages in conduct in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending, with intent to influence, impede, or otherwise obstruct the due administration of justice shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending; and

(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice.

c. *Explanation.*

This offense may be based on conduct that occurred before preferral of charges. Actual obstruction of justice is not an element of this offense. Criminal proceedings include general courts-martial, special courts-martial, and all other criminal proceedings. For purposes of this paragraph, disciplinary proceedings include summary courts-martial as well as nonjudicial punishment proceedings under Part V of this Manual. Examples of obstruction of justice include wrongfully influencing, intimidating, impeding, or injuring a witness, a person acting on charges under this chapter, a preliminary hearing officer, or a party; and by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to a violation of any criminal statute of the United States to a person authorized by a department, agency, or armed force of the United States to conduct or engage in investigations or prosecutions of such offenses; or endeavoring to do so. *See also* paragraph 87 and Article 37.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully do a certain act, to wit: _____, with intent to (influence) (impede) (obstruct) the due administration of justice in the case of _____, against whom the accused had reason to believe that there were or would be (criminal) (disciplinary) proceedings pending.

84. Article 131c (10 U.S.C. 931c)—Misprision of serious offense

a. *Text of statute.*

IN GENERAL.—Any person subject to this chapter—

(1) who knows that another person has committed a serious offense; and

(2) wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That a certain serious offense was committed by a certain person;

(2) That the accused knew that the said person had committed the serious offense; and

(3) That, thereafter, the accused wrongfully concealed the serious offense and failed to make it known to civilian or military authorities as soon as possible.

c. *Explanation.*

(1) *In general.* Misprision of a serious offense is the offense of concealing a serious offense committed by another but without such previous concert with or subsequent assistance to the principal as would make the accused an accessory. *See* paragraph 2. An intent to benefit the principal is not necessary to this offense.

(2) *Serious offense.* For purposes of this paragraph, a serious offense is any offense punishable under the authority of the UCMJ by death or by confinement for a term exceeding 1 year.

(3) *Positive act of concealment.* A mere failure or refusal to disclose the serious offense without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a theft committed by another is an example of a positive act of concealment.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), having knowledge that _____ had actually committed a serious offense to wit: (the murder of _____) (_____), did, (at/on board—location) (subject-matter jurisdiction data, if required), from about _____ 20 __, to about _____ 20 __, wrongfully conceal such serious offense by _____ and fail to make the same known to the civil or military authorities as soon as possible.

85. Article 131d (10 U.S.C. 931d)—Wrongful refusal to testify

a. *Text of statute.*

Any person subject to this chapter who, in the presence of a court-martial, a board of officers, a military commission, a court of inquiry, preliminary hearing, or an officer taking a deposition, of or for the United States, wrongfully refuses to qualify as a witness or to answer a question after having been directed to do so by the person presiding shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused was in the presence of a court-martial, board of officers, military commission, court of inquiry, an officer conducting a preliminary hearing under Article 32, or an officer taking a deposition, of or for the United States, at which a certain person was presiding;

(2) That the said person presiding directed the accused to qualify as a witness or, having so qualified, to answer a certain question;

(3) That the accused refused to qualify as a witness or answer said question; and

(4) That the refusal was wrongful.

c. *Explanation.* "To qualify as a witness" means that the witness declares that the witness will testify truthfully. *See* R.C.M. 807; Mil. R. Evid. 603. A good faith but legally incorrect belief in the right to remain silent does not constitute a defense to a charge of wrongful refusal to testify. *See also* Mil. R. Evid. 301 and Section V of the Military Rules of Evidence.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), being in the presence of (a) (an) ((general) (special) (summary) court-martial) (board of officers) (military commission) (court of inquiry) (officer conducting a preliminary hearing under Article 32, Uniform Code of Military Justice) (officer taking a deposition) (_____) (of) (for) the United States, of which _____ was (military judge) (president), (_____), (and having been directed by the said _____ to qualify as a witness) (and having qualified as a witness and having been directed by the said _____ to answer the following question(s) put to (him) (her) as a witness, "_____"), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, wrongfully refuse (to qualify as a witness) (to answer said question(s)).

86. Article 131e (10 U.S.C. 931e)—Prevention of authorized seizure of property

a. *Text of statute.*

Any person subject to this chapter who, knowing that one or more persons authorized to make searches and seizures are seizing, are about to seize, or are endeavoring to seize property, destroys, removes, or otherwise disposes of the property with intent to prevent the seizure thereof shall be punished as a court-martial may direct.

b. *Elements.*

(1) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;

(2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof; and

(3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property.

c. *Explanation.* See Mil. R. Evid. 316 concerning military personnel who may make seizures. It is not a defense that a search or seizure was technically defective.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, with intent to prevent its seizure, (destroy) (remove) (dispose of) _____, property which, as _____ then knew, (a) person(s) authorized to make searches and seizures were (seizing) (about to seize) (endeavoring to seize).

87. Article 131f (10 U.S.C. 931f)—Noncompliance with procedural rules

a. *Text of statute.*

Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Unnecessary delay in disposing of case.*

(a) That the accused was charged with a certain duty in connection with the disposition of a case of a person accused of an offense under the UCMJ;

(b) That the accused knew that the accused was charged with this duty;

(c) That delay occurred in the disposition of the case;

(d) That the accused was responsible for the delay; and

(e) That, under the circumstances, the delay was unnecessary.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the UCMJ.*

(a) That the accused failed to enforce or comply with a certain provision of the UCMJ regulating a proceeding before, during, or after a trial;

(b) That the accused had the duty of enforcing or complying with that provision of the UCMJ;

(c) That the accused knew that the accused was charged with this duty; and

(d) That the accused's failure to enforce or comply with that provision was intentional.

c. *Explanation.*

(1) *Unnecessary delay in disposing of case.* The purpose of section (1) of Article 131f is to ensure expeditious disposition of cases of persons accused of offenses under the UCMJ. A person may be responsible for delay in the disposition of a case only when that person's duties require action with respect to the disposition of that case.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the UCMJ.* Section (2) of Article 131f does not apply to errors made in good faith before, during, or after trial. It is designed to punish intentional failure to enforce or comply with the provisions of the UCMJ regulating the proceedings before, during, and after trial. Unlawful command influence under Article 37 may be prosecuted under this Article. *See also* Article 31 and R.C.M. 104.

d. *Maximum punishment.*

(1) *Unnecessary delay in disposing of case.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the UCMJ.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Unnecessary delay in disposing of case.*

In that _____ (personal jurisdiction data), being charged with the duty of ((investigating) (taking immediate steps to determine the proper disposition of) charges preferred against _____, a person accused of an offense under the Uniform Code of Military Justice) (_____), was, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges (_____), in that (he) (she) (did _____) (failed to _____) (_____).

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the UCMJ.*

In that _____ (personal jurisdiction data), being charged with the duty of _____, did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, knowingly and intentionally fail to (enforce) (comply with) Article _____, Uniform Code of Military Justice, in that (he) (she) _____.

88. Article 131g (10 U.S.C. 931g)—Wrongful interference with adverse administrative proceeding

a. *Text of statute.*

Any person subject to this chapter who, having reason to believe that an adverse administrative proceeding is pending against any person subject to this chapter, wrongfully acts with the intent—

(1) to influence, impede, or obstruct the conduct of the proceeding; or

(2) otherwise to obstruct the due administration of justice;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there was or would be an adverse administrative proceeding pending; and

(3) That the act was done with the intent to influence, impede, or obstruct the conduct of such administrative proceeding, or otherwise obstruct the due administration of justice.

c. *Explanation.* For purposes of this paragraph an adverse administrative proceeding includes any administrative proceeding or action, initiated against a Servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. Examples of wrongful interference include wrongfully influencing, intimidating, impeding, or injuring a witness, an investigator, or other person acting on an adverse administrative action; by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information

relating to such administrative proceeding; and the wrongful destruction or concealment of information relevant to such adverse administrative proceeding.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (wrongfully endeavor to) [impede (an adverse administrative proceeding) (an investigation) (_____)] [influence the actions of _____, (an officer responsible for making a recommendation concerning the adverse administrative action) (an individual responsible for making a decision concerning an adverse administrative proceeding) (an individual responsible for processing an adverse administrative proceeding) (_____)] [(influence) (alter) the testimony of _____ a witness before (a board established to consider an administrative proceeding or elimination) (an investigating officer) (_____)] in the case of _____, by](promising) (offering) (giving) to the said _____, (the sum of $_____) (_____, of a value of (about) $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) the said _____, would [recommend dismissal of the action against said _____] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such administrative proceeding) (before such investigating officer) (before such administrative board)] [_____].

89. Article 132 (10 U.S.C. 932)—Retaliation

a. *Text of statute.*

(a) IN GENERAL.—Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or making or planning to make a protected communication, or with the intent to discourage any person from reporting a criminal offense or making or planning to make a protected communication—

(1) wrongfully takes or threatens to take an adverse personnel action against any person; or

(2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person;

shall be punished as a court-martial may direct.

(b) DEFINITIONS.—In this section:

(1) The term "protected communication" means the following:

(A) A lawful communication to a Member of Congress or an Inspector General.

(B) A communication to a covered individual or organization in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(i) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.

(ii) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(2) The term "Inspector General" has the meaning given that term in section 1034(j) of this title.

(3) The term "covered individual or organization" means any recipient of a communication specified in clauses (i) through (v) of section 1034(b)(1)(B) of this title.

(4) The term "unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.

b. *Elements.*

(1) *Retaliation*

(a) That the accused wrongfully

(i) took or threatened to take an adverse personnel action against any person, or

(ii) withheld or threatened to withhold a favorable personnel action with respect to any person; and

(b) That, at the time of the action, the accused intended to retaliate against any person for reporting or planning to report a criminal offense, or for making or planning to make a protected communication.

(2) *Discouraging a report of criminal offense or protected communication.*

(a) That the accused wrongfully

(i) took or threatened to take an adverse personnel action against any person, or

(ii) withheld or threatened to withhold a favorable personnel action with respect to any person; and

(b) That, at the time of the action, the accused intended to discourage any person from reporting a criminal offense or making a protected communication.

c. *Explanation.*

(1) *In general.* This offense focuses upon the abuse of otherwise lawful military authority for the purpose of retaliating against any person for reporting or planning to report a criminal offense or for making or planning to make a protected communication or to discourage any person from reporting a criminal offense or for making or planning to make a protected communication. The offense prohibits personnel actions, either favorable or adverse, taken or withheld, or threatened to be taken or withheld, with the specific intent to retaliate against any person for reporting or planning to report a criminal offense or for making or planning to make a protected communication or to discourage any person from reporting a criminal offense or for making or planning to make a protected communication. The offense may be committed by any person subject to the UCMJ with the authority to initiate, forward, recommend, decide, or otherwise act on a favorable or adverse personnel action who takes such action wrongfully and with the requisite specific intent. This offense does not prohibit the lawful and appropriate exercise of command authority to discipline or reward Servicemembers.

(2) *Personnel action.* For purposes of this offense, "personnel action" means any action taken on a Servicemember that affects, or has the potential to affect, that Servicemember's current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards, or training, relief and removal, separation, discharge, referral for mental health evaluations, and any other personnel actions as defined by law or regulation, such as 5 U.S.C. § 2302 and DoD Directive 7050.06 (17 April 2015).

(3) *Intent to retaliate.* An action is taken with the intent to retaliate when the personnel action taken or withheld, or threatened to be taken or withheld, is done for the purpose of reprisal, retribution, or revenge for reporting or planning to report a criminal offense or for making or planning to make a protected communication.

(4) *Threatens to take or withhold.* This offense requires that the accused had the intent to retaliate, but proof that the accused actually intended to take an adverse personnel action, or to withhold a favorable personnel action, is not required. A declaration made under circumstances

which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving a favorable or adverse personnel action.

(5) *Criminal offense.* Criminal offense for purposes of this offense includes violations of the UCMJ, the United States Code, or state law.

(6) *Wrongful.* Taking or threatening to take adverse personnel action, or withholding or threatening to withhold favorable personnel action, is wrongful when used for the purpose of reprisal, rather than for purposes of lawful personnel administration.

(7) *Other retaliatory actions.* This offense does not prohibit the Secretary of Defense and Secretaries of the Military Services from proscribing other types or categories of prohibited retaliatory actions by regulation, which may be punished as violations of Article 92.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications.*

(1) *Retaliation*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, with intent to retaliate against _____for [(reporting) (planning to report) a criminal offense] [(making) (planning to make) a protected communication], wrongfully [(took) (threatened to take) an adverse personnel action against _____ to wit:_____][(withheld) (threatened to withhold) a favorable personnel action with respect to _____ to wit:_____].

(2) *Discouraging a report of criminal offense or protected communication*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, with intent to discourage _____ from (reporting a criminal offense) (making a protected communication), wrongfully [(took) (threatened to take) an adverse personnel action against _____, to wit :_____][(withheld) (threatened to withhold) a favorable personnel action with respect to _____, to wit:_____].

90. Article 133 (10 U.S.C. 933)—Conduct unbecoming an officer and a gentleman

a. *Text of statute.*

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused did or omitted to do a certain act;

(2) That, under the circumstances, the act or omission constituted conduct unbecoming an officer and gentleman.

c. *Explanation.*

(1) *Gentleman.* As used in this article, gentleman includes both male and female commissioned officers, cadets, and midshipmen. The term "gentleman" connotes failings in an officer's personal character, regardless of gender.

(2) *Nature of offense.* Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing

as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

(3) *Examples of offenses.* Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

d. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.

e. *Sample specifications.*

(1) *Copying or using examination paper.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, while undergoing a written examination on the subject of _____, wrongfully and dishonorably (receive) (request) unauthorized aid by ((using) (copying) the examination paper of __)).

(2) *Drunk or disorderly.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, in a public place, to wit: _____, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

91. Article 134 (10 U.S.C. 934)—General article

a. *Text of statute.*

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. As used in the preceding sentence, the term "crimes and offenses not capital" includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the

conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.

b. *Elements.* The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. All offenses under Article 134 require proof of a single terminal element.

(1) For clause 1 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts; and

(b) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces

(2) For clause 2 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts; and

(b) That, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

(3) For clause 3 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts that satisfy each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. § 13, each element of the assimilated State, Territory, Possession, or District law); and

(b) That the offense charged was an offense not capital.

c. *Explanation.*

(1) *In general.* Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ. These are referred to as "clauses 1, 2, and 3" of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate federal civilian law including law made applicable through the Federal Assimilative Crimes Act, *see* subparagraph c.(4). If any conduct of this nature is specifically made punishable by another article of the UCMJ, it must be charged as a violation of that article. *See* subparagraph c.(5)(a). However, see subparagraph 90.c for offenses committed by commissioned officers, cadets, and midshipmen.

(2) *Disorders and neglects to the prejudice of good order and discipline in the armed forces (clause 1).*

(a) *To the prejudice of good order and discipline.* To the prejudice of good order and discipline refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces. However, see R.C.M. 203 concerning subject-matter jurisdiction.

(b) *Breach of custom of the Service.* A breach of a custom of the Service may result in a violation of clause 1 of Article 134. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to

exist when its observance has been generally abandoned. Many customs of the Service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive. *See* subparagraph 18.b.(1).

(3) *Conduct of a nature to bring discredit upon the armed forces (clause 2).* "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. However, see R.C.M. 203 concerning subject-matter jurisdiction.

(4) *Crimes and offenses not capital (Article 134, clause 3).*

(a) *In general.* For the purpose of court-martial jurisdiction, the laws that may be applied under clause 3 of Article 134 are divided into two categories:

(1) Federal crimes and offenses according to the terms of jurisdiction set forth in the applicable federal criminal statute.

(i) Noncapital crimes and offenses prohibited by the United States Code that are punishable regardless where the wrongful act or omission occurred.

(ii) Noncapital crimes and offenses prohibited by the United States Code within a limited jurisdiction that are punishable when committed within a specified area.

(iii) The Federal Assimilative Crimes Act (18 U.S.C. § 13) is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after passage of the Act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the State wherein the military installation is located and applies it as though it were federal law. The text of the Act is as follows: "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

(2) Conduct engaged in outside the United States that would constitute a noncapital federal crime or offense if the conduct had been engaged in "within the special maritime and territorial jurisdiction of the United States." For purposes of this provision, the term "United States" is defined in section 5 of title 18, United States Code, and the term "special maritime and territorial jurisdiction of the United States" is defined in section 7 of title 18, United States Code.

(5) *Limitations on Article 134.*

(a) *Preemption doctrine.* The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134

cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

(b) *Capital offense.* A capital offense may not be tried under Article 134.

(6) *Drafting specifications for Article 134 offenses.*

(a) *Specifications under clause 1 or 2.* When alleging a clause 1 or 2 violation, the specification must expressly allege that the conduct was "to the prejudice of good order and discipline" or that it was "of a nature to bring discredit upon the armed forces." The same conduct may be prejudicial to good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces. Both clauses may be alleged; however, only one must be proven to satisfy the terminal element. If conduct by an accused does not fall under any of the enumerated Article 134 offenses (paragraphs 92 through 109 of this Part), a specification not listed in this Manual may be used to allege the offense.

(b) *Specifications under clause 3.* When alleging a clause 3 violation, each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. § 13, each element of the assimilated State, Territory, Possession, or District law) must be alleged expressly or by necessary implication, and the specification must expressly allege that the conduct was "an offense not capital." In addition, any applicable statutes should be identified in the specification.

92. Article 134—(Animal abuse)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) *Abuse, neglect, or abandonment of an animal.*

(a) That the accused wrongfully abused, neglected, or abandoned a certain (public*) animal (and the accused caused serious injury or death of the animal*); and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

[Note: Add these elements as applicable.]

(2) *Sexual act with an animal.*

(a) That the accused engaged in a sexual act with a certain animal; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* This offense prohibits intentional abuse, culpable neglect, and abandonment of an animal. This offense does not include legal hunting, trapping, or fishing; reasonable and recognized acts of training, handling, or disciplining of an animal; normal and accepted farm or veterinary practices; research or testing conducted in accordance with approved governmental protocols; protection of person or property from an unconfined animal; or authorized military operations or military training.

(2) *Definitions.* As used in this paragraph:

(a) "Abuse" means intentionally and unjustifiably overdriving, overloading, overworking, tormenting, beating, depriving of necessary sustenance, allowing to be housed in a manner that results in chronic or repeated serious physical harm, carrying or confining in or upon any vehicles

in a cruel or reckless manner, or otherwise mistreating an animal. Abuse may include any sexual touching of an animal if not included in the definition of sexual act with an animal below.

(b) "Neglect" means knowingly allowing another to abuse an animal, or, having the charge or custody of any animal, knowingly, or through culpable negligence, failing to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved.

(c) "Abandon" means, while having the charge or custody of an animal, knowingly or through culpable negligence leaving of that animal at a location without providing minimum care for the animal.

(d) "Animal" means pets and animals of the type that are raised by individuals for resale to others, including: cattle, horses, sheep, pigs, goats, chickens, dogs, cats, and similar animals owned or under the control of any person. Animal does not include reptiles, insects, arthropods, or any animal defined or declared to be a pest by the administrator of the United States Environmental Protection Agency.

(e) "Public animal" means any animal owned or used by the United States or any animal owned or used by a local or State government in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the Government.

(f) "Sexual act with an animal" means

(i) contact between the sex organ or anus of a person and the sex organ, anus, or mouth of an animal; or

(ii) contact between the sex organ or anus of an animal and a person or object manipulated by a person, if done with an intent to arouse or gratify the sexual desire of any person.

(g) "Serious injury of an animal" means physical harm that involves a temporary but substantial disfigurement; causes a temporary but substantial loss or impairment of the function of any bodily part or organ; causes a fracture of any bodily part; causes permanent maiming; causes acute pain of a duration that results in suffering; or carries a substantial risk of death. Serious injury includes burning, torturing, poisoning, or maiming.

d. *Maximum punishment.*

(1) *Abuse, neglect, or abandonment of an animal.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Abuse, neglect, or abandonment of a public animal.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Sexual act with an animal or cases where the accused caused the serious injury or death of the animal.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ (date), (wrongfully [abuse] [neglect] [abandon]) (*engage in a sexual act, to wit: _____, with) a certain (*public) animal (*and caused [serious injury to] [the death of] the animal), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

93. Article 134—(Bigamy)

a. *Text of statute. See* paragraph 91.

b. *Elements.*
(1) That the accused had a living lawful spouse;
(2) That while having such spouse the accused wrongfully married another person; and
(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.
c. *Explanation.* Bigamy is contracting another marriage by one who already has a living lawful spouse. If a prior marriage was void, it will have created no status of "lawful spouse." A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a mistake of fact defense only if the belief was reasonable. *See* R.C.M. 916(j)(1).
d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.
e. *Sample specification.*

In that _____ (personal jurisdiction data), did, at, (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully marry _____, having at the time of (his) (her) said marriage to a lawful spouse then living, to wit:_____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

94. Article 134—(Check, worthless making and uttering – by dishonorably failing to maintain funds)
a. *Text of statute. See* paragraph 91.
b. *Elements.*
(1) That the accused made and uttered a certain check;
(2) That the check was made and uttered for the purchase of a certain thing, in payment of a debt, or for a certain purpose;
(3) That the accused subsequently failed to place or maintain sufficient funds in or credit with the drawee bank for payment of the check in full upon its presentment for payment;
(4) That this failure was dishonorable; and
(5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.
c. *Explanation.* This offense differs from an Article 123a offense (paragraph 70) in that there need be no intent to defraud or deceive at the time of making, drawing, uttering, or delivery, and that the accused need not know at that time that the accused did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument. Mere negligence in maintaining one's bank balance is insufficient for this offense, for the accused's conduct must reflect bad faith or gross indifference in this regard. As in the offense of dishonorable failure to pay debts (*see* paragraph 96), dishonorable conduct of the accused is necessary, and the other principles discussed in paragraph 96 also apply here.
d. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, make and utter to _____ a certain check, in words and figures as follows, to wit: _____, (for the purchase of _____) (in payment of a debt) (for the purpose of _____), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the _____ Bank for payment of such check in full upon its presentment for payment, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

95. Article 134—(Child pornography)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) *Possessing, receiving, or viewing child pornography.*

(a) That the accused knowingly and wrongfully possessed, received, or viewed child pornography; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(2) *Possessing child pornography with intent to distribute.*

(a) That the accused knowingly and wrongfully possessed child pornography;

(b) That the possession was with the intent to distribute; and

(c) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(3) *Distributing child pornography.*

(a) That the accused knowingly and wrongfully distributed child pornography to another; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(4) *Producing child pornography.*

(a) That the accused knowingly and wrongfully produced child pornography; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* The Article 134 offense of child pornography is broader than the federal and state statutes referenced below and extends to visual depictions of what appear to be minors. That is, the images include sexually explicit images that may not actually involve minors, but either resemble or are staged to appear so. Article 134—Child pornography is not intended to preempt

prosecution of other federal and state law child pornography and obscenity offenses which may be amenable to courts-martial via Article 134 clauses 2 and 3.

(2) *Federal "Child pornography" and "Obscenity" offenses.* Practitioners are advised that the Title 18, United States Code, criminalizes the production, distribution, possession with intent to distribute, possession, and receipt of sexually explicit images of actual children under the age of 18. *See* 18 U.S.C. §§ 2251; 2252A. Practitioners may charge these offenses utilizing Article 134, clause 3 (crimes and offenses not capital). Practitioners are further advised that Title 18 United States Code, Chapter 71, criminalizes the production of "obscene images," that is, visual depictions of any kind, including a drawing, cartoon, sculpture, or painting. Such images are considered obscene under federal law when they depict minors involved in sexually explicit activity, and/or engaging in bestiality, sadistic or masochistic abuse. *See* 18 U.S.C. § 1466A. These federal obscenity offenses may likewise be prosecuted at courts-martial via Article 134, clause 3.

(3) *State "child pornography" and "obscenity" offenses.* If a Servicemember violates an applicable state child pornography or obscenity statute within the jurisdiction of a given state, the substance of that state child pornography and obscenity law may be charged via Article 134, clause 2 as conduct "of a nature to bring discredit upon the armed forces." When so charged, the Article 134 charge should recite every applicable element under the state statute. The maximum punishment for such offenses is the applicable maximum punishment prescribed for such an offense under state law.

(4) "Child pornography" means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.

(5) An accused may not be convicted of possessing, receiving, viewing, distributing, or producing child pornography if he was not aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. Awareness may be inferred from circumstantial evidence such as the name of a computer file or folder, the name of the host website from which a visual depiction was viewed or received, search terms used, and the number of images possessed.

(6) "Distributing" means delivering to the actual or constructive possession of another.

(7) "Minor" means any person under the age of 18 years.

(8) "Possessing" means exercising control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides something in a locker or a car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item.

(9) "Producing" means creating or manufacturing. As used in this paragraph, it refers to making child pornography that did not previously exist. It does not include reproducing or copying.

(10) "Sexually explicit conduct" means actual or simulated:

(a) sexual intercourse or sodomy, including genital to genital, oral to genital, anal to genital, or oral to anal, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person.

(11) Visual depiction includes any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

(12) *Wrongfulness*. Any facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness, including, but not limited to, the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement.

(13) On motion of the Government, in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from the absence of such evidence.

d. *Maximum punishment.*

(1) *Possessing, receiving, or viewing child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Possessing child pornography with intent to distribute*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(3) *Distributing child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Producing child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ knowingly and wrongfully (possess) (receive) (view) (distribute) (produce) child pornography, to wit: a (photograph) (picture) (film) (video) (digital image) (computer image) of a minor, or what appears to be a minor, engaging in sexually explicit conduct (with intent to distribute the said child pornography), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

96. Article 134—(Debt, dishonorably failing to pay)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) That this debt became due and payable on or about a certain date;

(3) That while the debt was still due and payable the accused dishonorably failed to pay this debt; and

(4) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation. More than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. For a debt to form the basis of this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused's belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment. The length of the period of nonpayment and any denial of indebtedness which the accused may have made may tend to prove that the accused's conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that the conduct was in fact dishonorable.

d. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), being indebted to _____ in the sum of $_____ for _____, which amount became due and payable (on) (about) (on or about) _____ 20 __, did (at/on board—location) (subject-matter jurisdiction data, if required), from _____ 20 __, to _____ 20 __, dishonorably fail to pay said debt, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

97. Article 134—(Disloyal statements)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused made a certain statement;

(2) That the statement was communicated to another person;

(3) That the statement was disloyal to the United States;

(4) That the statement was made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the armed forces; and

(5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.* Certain disloyal statements by military personnel may not constitute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but may, under the circumstances, be punishable under this article. Examples include praising the enemy, attacking the war aims of the United States, or denouncing our form of government with the intent to promote disloyalty or disaffection among members of the armed Services. A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is a part of its administration.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction), on or about _____ 20 __, with intent to (promote (disloyalty) (disaffection) (disloyalty and disaffection)) ((interfere with) (impair) the (loyalty) (good order and discipline)) of any member of the armed forces of the United States communicate to _____, a statement, to wit: "_____," or words to that effect, which statement was disloyal to the United States, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

98. Article 134—(Disorderly conduct, drunkenness)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and

(2) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Drunkenness.* See subparagraph 49.c.(1)(a) for a discussion of drunk.

(2) *Disorderly.* Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.

(3) *Service discrediting.* Conduct of a nature to bring discredit upon the armed forces must be included in the specification and proved in order to authorize the higher maximum punishment when the offense is Service discrediting.

d. *Maximum punishment.*

(1) *Disorderly conduct.*

(a) *Under such circumstances as to bring discredit upon the military Service.* Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

(b) *Other cases.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) *Drunkenness.*

(a) *Aboard ship or under such circumstances as to bring discredit upon the military Service.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) *Other cases.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(3) *Drunk and disorderly.*

(a) *Aboard ship.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Under such circumstances as to bring discredit upon the military Service.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) *Other cases.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (drunk) (disorderly) (drunk and disorderly) (which conduct was of a nature to bring discredit upon the armed forces), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

99. Article 134—(Extramarital sexual conduct)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused wrongfully engaged in extramarital conduct as described in subparagraph c.(2) with a certain person;

(2) That, at the time, the accused knew that the accused or the other person was married to someone else; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the UCMJ, the extramarital conduct must either be directly prejudicial to good order and discipline or service discrediting or both. Extramarital conduct that is directly prejudicial to good order and discipline includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a Servicemember, or both. Extramarital conduct may be Service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. "Discredit" means to injure the reputation of the armed forces and includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem. While extramarital conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether extramarital conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, or both:

(a) The accused's marital status, military rank, grade, or position

(b) The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces

(c) The military status of the accused's spouse or the spouse of the co-actor, or their relationship to the armed forces;

(d) The impact, if any, of the extramarital conduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;

(e) The misuse, if any, of Government time and resources to facilitate the commission of the conduct;

(f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the extramarital conduct was accompanied by other violations of the UCMJ;

(g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;

(h) Whether the accused's or co-actor's marriage was pending legal dissolution, which is defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce; and

(i) Whether the extramarital conduct involves an ongoing or recent relationship or is remote in time.

(2) *Extramarital conduct.* The conduct covered under this paragraph means any of the following acts engaged in by persons of the same or opposite sex:

(a) genital to genital sexual intercourse;

(b) oral to genital sexual intercourse;

(c) anal to genital sexual intercourse; and

(d) oral to anal sexual intercourse.

(3) *Marriage.* A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(4) *Legal Separation.* It is an affirmative defense to the offense of Extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction. The affirmative defense does not apply unless all parties to the conduct are either legally separated or unmarried at the time of the conduct.

(5) *Mistake of fact:* A defense of mistake of fact exists if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried or legally separated, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon the United States to establish that the accused's belief was unreasonable or not honest.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specification.*

In that _____ (personal jurisdiction data), (a married person), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 ___, wrongfully engage in extramarital conduct, (to wit: _____) with _____, (a person the accused knew was married to a person other than the accused) (a person the accused knew was not the accused's spouse), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

100. Article 134—(Firearm, discharging—through negligence)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused discharged a firearm;

(2) That such discharge was caused by the negligence of the accused; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.* For a discussion of negligence, *see* subparagraph 103.c.(2).

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, through negligence, discharge a (service rifle) (__) in the (squadron) (tent) (barracks) (_____) of _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

101. Article 134—(Fraternization)

a. *Text of statute.* *See* paragraph 91.

b. *Elements.*

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's Service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The facts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) *Regulations.* Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a Service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. *See* paragraph 18.

d. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, knowingly fraternize with _____, an enlisted person, on terms of military equality, to wit: _____, in violation of the custom of (the Naval Service of the United States) (the United States Army) (the United States Air Force) (the United States Coast Guard) that officers shall not fraternize with enlisted persons on terms of military equality, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

102. Article 134—(Gambling with subordinate)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused gambled with a certain Servicemember;

(2) That the accused was then a noncommissioned or petty officer;

(3) That the Servicemember was not then a noncommissioned or petty officer and was subordinate to the accused;

(4) That the accused knew that the Servicemember was not then a noncommissioned or petty officer and was subordinate to the accused; and

(5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.* This offense can only be committed by a noncommissioned or petty officer gambling with an enlisted person of less than noncommissioned or petty officer rank. Gambling by an officer with an enlisted person may be a violation of Article 133. *See also* paragraph 90.

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, gamble with _____, then knowing that the said _____ was not a noncommissioned or petty officer and was subordinate to the said _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

103. Article 134—(Homicide, negligent)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That a certain person is dead;

(2) That this death resulted from the act or failure to act of the accused;

(3) That the killing by the accused was unlawful;

(4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and

(5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Nature of offense.* Negligent homicide is any unlawful homicide which is the result of simple negligence. An intent to kill or injure is not required.

(2) *Simple negligence.* Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances. Simple negligence is a lesser degree of carelessness than culpable negligence. *See* subparagraph 57.c.(2)(a).

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, unlawfully kill _____, (by negligently _____ the said _____ (in) (on) the _____ with a _____) (by driving a (motor vehicle) (_____) against the said _____ in a negligent manner) (_____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

104. Article 134—(Indecent conduct)

a. *Text of Statute. See* paragraph 91.

b. *Elements.*

(1) That the accused engaged in certain conduct;

(2) That the conduct was indecent; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) "Indecent" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

(2) Indecent conduct includes offenses previously proscribed by "Indecent acts with another" except that the presence of another person is no longer required. For purposes of this offense, the words "conduct" and "act" are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c). *See* subparagraph 91.c.(5)(a).

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20___ , commit indecent conduct, to wit:

_____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

105. Article 134—(Indecent language)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused orally or in writing communicated to another person certain language;

(2) That such language was indecent; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

[Note: If applicable, add the following additional element:]

(4) That the person to whom the language was communicated was a child under the age of 16.

c. *Explanation.* Indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. See paragraph 62 if the communication was made in the physical presence of a child.

d. *Maximum punishment.*

(1) *Communicated to any child under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Other cases.* Bad-conduct discharge; forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (orally) (in writing) communicate to _____, (a child under the age of 16 years), certain indecent language, to wit: _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

106. Article 134—(Pandering and prostitution)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) *Prostitution.*

(a) That the accused engaged in a sexual act with another person not the accused's spouse;

(b) That the accused did so for the purpose of receiving money or other compensation;

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(2) *Patronizing a prostitute.*

(a) That the accused engaged in a sexual act with another person not the accused's spouse;

(b) That the accused compelled, induced, enticed, or procured such person to engage in a sexual act in exchange for money or other compensation;

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(3) *Pandering by inducing, enticing, or procuring act of prostitution.*

(a) That the accused induced, enticed, or procured a certain person to engage in a sexual act for hire and reward with a person to be directed to said person by the accused;

(b) That this inducing, enticing, or procuring was wrongful;

(c) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(4) *Pandering by arranging or receiving consideration for arranging for a sexual act.*

(a) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in a sexual act;

(b) That the arranging (and receipt of consideration) was wrongful; and

(c) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Sexual act.* Sexual act as used in this paragraph shall be as defined in paragraph 60.a.(g)(1).

(2) *Other regulations.* This offense does not preempt any other lawful regulations or orders prescribed by a proper authority that proscribe other forms of sexual conduct for compensation by military personnel. Violations of such regulations or orders may be punishable under Article 92. *See* paragraph 18.

d. *Maximum punishment.*

(1) *Prostitution and patronizing a prostitute.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Prostitution.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully engage in (a sexual act) (sexual acts), to wit:_____, with _____, a person not (his) (her) spouse, for the purpose of receiving (money) (_____), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

(2) *Patronizing a prostitute.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (compel) (induce) (entice) (procure) _____, a person not (his) (her) spouse, to engage in (a sexual act) (sexual acts), to wit:_____, with the accused in exchange for (money) (_____), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

(3) *Inducing, enticing, or procuring act of prostitution.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (induce) (entice) (procure) _____ to engage in (a sexual act) (sexual acts), to wit:_____, for hire and reward with persons to be directed to (him) (her) by the said _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

(4) *Arranging, or receiving consideration for arranging for a sexual act.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (arrange for) (receive valuable consideration, to wit: _____ on account of arranging for) _____ to engage in (a sexual act) (sexual acts) to wit:_____, with _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

107. Article 134—(Self-injury without intent to avoid service)

a. *Text of statute.* *See* paragraph 91.

b. *Elements.*

(1) That the accused intentionally inflicted injury upon himself or herself;

(2) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element:]

(3) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. *Explanation.*

(1) *Nature of offense.* This offense differs from malingering (*see* paragraph 7) in that for this offense, the accused need not have harbored a design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. This offense is characterized by intentional self-injury under such circumstances as prejudice good order and discipline or discredit the armed forces. It is not required that the accused be unable to perform duties, or that the accused actually be absent from his or her place of duty as a result of the injury. For example, the accused may inflict the injury while on leave or pass. The circumstances and extent of injury, however, are relevant to a determination that the accused's conduct was prejudicial to good order and discipline, or Service discrediting.

(2) *How injury inflicted.* The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission that produces, prolongs, or aggravates a sickness or disability. Thus, voluntary starvation that results in debility is a self-inflicted injury. Similarly, the injury may be inflicted by another at the accused's request.

d. *Maximum punishment.*

(1) *Intentional self-inflicted injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Intentional self-inflicted injury in time of war or in a hostile fire pay zone.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) (in a hostile fire pay zone) on or about _____ 20 __, (a time of war,) intentionally injure (himself) (herself) by _____ (nature and circumstances of injury), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

108. Article 134—(Straggling)

a. *Text of statute. See* paragraph 91.

b. *Elements.*

(1) That the accused, while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled;

(2) That the straggling was wrongful; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.* "Straggle" means to wander away, to stray, to become separated from, or to lag or linger behind.

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction data, if required), did, at _____, on or about _____ 20 __, while accompanying (his) (her) organization on (a march) (maneuvers) (_____), wrongfully straggle, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Sec. 5. Part V of the Manual for Courts-Martial, United States is amended to read as follows:

1. General

a. *Authority.* Nonjudicial punishment in the United States Armed Forces is authorized by Article 15.

b. *Nature.* Nonjudicial punishment is a disciplinary measure more serious than the administrative corrective measures discussed in paragraph 1g, but less serious than trial by court-martial.
c. *Purpose.* Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in Servicemembers without the stigma of a court-martial conviction.
d. *Policy.*

(1) *Commander's responsibility.* Commanders are responsible for good order and discipline in their commands. Generally, discipline can be maintained through effective leadership including, when necessary, administrative corrective measures. Nonjudicial punishment is ordinarily appropriate when administrative corrective measures are inadequate due to the nature of the minor offense or the record of the Servicemember, unless it is clear that only trial by court-martial will meet the needs of justice and discipline. Nonjudicial punishment shall be considered on an individual basis. Commanders considering nonjudicial punishment should consider the nature of the offense, the record of the Servicemember, the needs for good order and discipline, and the effect of nonjudicial punishment on the Servicemember and the Servicemember's record.

(2) *Commander's discretion.* A commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate, and, if so, as to the nature and amount of punishment appropriate. No superior may direct that a subordinate authority impose nonjudicial punishment in a particular case, issue regulations, orders, or "guides" which suggest to subordinate authorities that certain categories of minor offenses be disposed of by nonjudicial punishment instead of by court-martial or administrative corrective measures, or that predetermined kinds or amounts of punishments be imposed for certain classifications of offenses that the subordinate considers appropriate for disposition by nonjudicial punishment.

(3) *Commander's suspension authority.* Commanders should consider suspending all or part of any punishment selected under Article 15, particularly in the case of first offenders or when significant extenuating or mitigating matters are present. Suspension provides an incentive to the offender and gives an opportunity to the commander to evaluate the offender during the period of suspension.

e. *Minor offenses.* Nonjudicial punishment may be imposed for acts or omissions that are minor offenses under the punitive article (*see* Part IV). Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment, but nonjudicial punishment for an offense other than a minor offense (even though thought by the commander to be minor) is not a bar to trial by court-martial for the same offense. *See* R.C.M. 907(b)(2)(D)(iii). However, the accused may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in determining an appropriate sentence. *See* Article 15(f); R.C.M. 1001(d)(1)(B).
f. *Limitations on nonjudicial punishment.*

(1) *Double punishment prohibited.* When nonjudicial punishment has been imposed for an offense, punishment may not again be imposed for the same offense under Article 15. *But see* paragraph 1e concerning trial by court-martial.

(2) *Increase in punishment prohibited.* Once nonjudicial punishment has been imposed, it may not be increased, upon appeal or otherwise.

(3) *Multiple punishment prohibited.* When a commander determines that nonjudicial punishment is appropriate for a particular Servicemember, all known offenses determined to be appropriate for disposition by nonjudicial punishment and ready to be considered at that time, including all such offenses arising from a single incident or course of conduct, shall ordinarily be considered together, and not made the basis for multiple punishments.

(4) *Statute of limitations.* Except as provided in Article 43(d), nonjudicial punishment may not be imposed for offenses which were committed more than 2 years before the date of imposition, unless knowingly and voluntarily waived by the member. *See* Article 43(c).

(5) *Civilian courts.* Nonjudicial punishment may not be imposed for an offense tried by a court which derives its authority from the United States. Nonjudicial punishment may not be imposed for an offense tried by a State or foreign court unless authorized by regulations of the Secretary concerned.

g. *Relationship of nonjudicial punishment to administrative corrective measures.* Article 15 and Part V of this Manual do not apply to, include, or limit use of administrative corrective measures that promote efficiency and good order and discipline such as counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges. *See also* R.C.M. 306. Administrative corrective measures are not punishment and they may be used for acts or omissions which are not offenses under the code and for acts or omissions which are offenses under the code.

h. *Applicable standards.* Unless otherwise provided, the Service regulations and procedures of the Servicemember shall apply.

i. *Effect of errors.* Failure to comply with any of the procedural provisions of Part V of this Manual shall not invalidate a punishment imposed under Article 15, unless the error materially prejudiced a substantial right of the Servicemember on whom the punishment was imposed.

2. Who may impose nonjudicial punishment

The following persons may serve as a nonjudicial punishment authority for the purposes of administering nonjudicial punishment proceedings under this Part:

a. *Commander.* As provided by regulations of the Secretary concerned, a commander may impose nonjudicial punishment upon any military personnel of that command. "Commander" means a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a "command." "Commander" includes a commander of a joint command. Subject to subparagraph 1d(2) and any regulations of the Secretary concerned, the authority of a commander to impose nonjudicial punishment as to certain types of offenses, certain categories of persons, or in specific cases, or to impose certain types of punishment, may be limited or withheld by a superior commander or by the Secretary concerned.

b. *Officer in charge.* If authorized by regulations of the Secretary concerned, an officer in charge may impose nonjudicial punishment upon enlisted persons assigned to that unit.

c. *Principal assistant.* If authorized by regulations of the Secretary concerned, a commander exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate that commander's powers under Article 15 to a principal assistant. The Secretary concerned may define "principal assistant."

3. Right to demand trial

Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of nonjudicial punishment, demanded trial by court-martial in lieu of nonjudicial punishment. This right may also be granted to a person attached to or embarked in a vessel if so authorized by regulations of the Secretary concerned. A person is "attached to" or "embarked in" a vessel if, at the time nonjudicial punishment is imposed, that person is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

4. Procedure

a. *Notice.* If, after a preliminary inquiry (*see* R.C.M. 303), the nonjudicial punishment authority determines that disposition by nonjudicial punishment proceedings is appropriate (*see* R.C.M. 306; paragraph 1 of this Part), the nonjudicial punishment authority shall cause the Servicemember to be notified. The notice shall include:

(1) a statement that the nonjudicial punishment authority is considering the imposition of nonjudicial punishment;

(2) a statement describing the alleged offenses— including the article of the code—which the member is alleged to have committed;

(3) a brief summary of the information upon which the allegations are based or a statement that the member may, upon request, examine available statements and evidence;

(4) a statement of the rights that will be accorded to the Servicemember under subparagraphs 4c(1) and (2) of this Part;

(5) unless the right to demand trial is not applicable (*see* paragraph 3 of this Part), a statement that the member may demand trial by court-martial in lieu of nonjudicial punishment, a statement of the maximum punishment which the nonjudicial punishment authority may impose by nonjudicial punishment; a statement that, if trial by court-martial is demanded, charges could be referred for trial by summary, special, or general court-martial; that the member may not be tried by summary court-martial over the member's objection; and that at a special or general court-martial the member has the right to be represented by counsel.

b. *Decision by Servicemember.*

(1) *Demand for trial by court-martial.* If the Servicemember demands trial by court-martial (when this right is applicable), the nonjudicial proceedings shall be terminated. It is within the discretion of the commander whether to forward or refer charges for trial by court-martial (*see* R.C.M. 306; 307; 401–407) in such a case, but in no event may nonjudicial punishment be imposed for the offenses affected unless the demand is voluntarily withdrawn.

(2) *No demand for trial by court-martial.* If the Servicemember does not demand trial by court-martial within a reasonable time after notice under paragraph 4a of this Part, or if the right to demand trial by court-martial is not applicable, the nonjudicial punishment authority may proceed under paragraph 4c of this Part.

c. *Nonjudicial punishment proceeding accepted.*

(1) *Personal appearance requested; procedure.* Before nonjudicial punishment may be imposed, the Servicemember shall be entitled to appear personally before the nonjudicial punishment authority who offered nonjudicial punishment, except when appearance is prevented by the unavailability of the nonjudicial punishment authority or by extraordinary circumstances, in which case the Servicemember shall be entitled to appear before a person designated by the nonjudicial punishment authority who shall prepare a written summary of any proceedings before that person and forward it and any written matter submitted by the Servicemember to the nonjudicial punishment authority. If the Servicemember requests personal appearance, the Servicemember shall be entitled to:

(A) Be informed in accordance with Article 31(b);

(B) Be accompanied by a spokesperson provided or arranged for by the member unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand. Such a spokesperson need not be qualified under R.C.M. 502(d); such spokesperson is not entitled to travel or similar expenses, and the proceedings need not be delayed to permit the presence of a spokesperson; the spokesperson may speak for the Servicemember, but may not question witnesses except as the nonjudicial punishment authority may allow as a matter of discretion;

(C) Be informed orally or in writing of the information against the Servicemember and relating to the offenses alleged;

(D) Be allowed to examine documents or physical objects against the Servicemember that the nonjudicial punishment authority has examined in connection with the case and on which the nonjudicial punishment authority intends to rely in deciding whether and how much nonjudicial punishment to impose;

(E) Present matters in defense, extenuation, and mitigation orally, or in writing, or both;

(F) Have present witnesses, including those adverse to the Servicemember, upon request, if their statements will be relevant and they are reasonably available. For purposes of this subparagraph, a witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties;

(G) Have the proceeding open to the public unless the nonjudicial punishment authority determines that the proceeding should be closed for good cause, such as military exigencies or security interests, or unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand; however, nothing in this subparagraph requires special arrangements to be made to facilitate access to the proceeding.

(2) *Personal appearance waived; procedure.* Subject to the approval of the nonjudicial punishment authority, the Servicemember may request not to appear personally under subparagraph 4c(1) of this Part. If such request is granted, the Servicemember may submit written matters for consideration by the nonjudicial punishment authority before such authority's decision under subparagraph 4c(4) of this Part. The Servicemember shall be informed of the right to remain silent and that matters submitted may be used against the member in a trial by court-martial.

(3) *Evidence.* The Military Rules of Evidence (Part III), other than with respect to privileges, do not apply at nonjudicial punishment proceedings. Any relevant matter may be considered, after compliance with subparagraphs 4c(1)(C) and (D) of this Part.

(4) *Decision.* After considering all relevant matters presented, if the nonjudicial punishment authority—

(A) does not conclude that the Servicemember committed the offenses alleged, the nonjudicial punishment authority shall so inform the member and terminate the proceedings;

(B) concludes that the Servicemember committed one or more of the offenses alleged, the nonjudicial punishment authority shall:

(i) so inform the Servicemember;

(ii) inform the Servicemember of the punishment imposed; and

(iii) inform the Servicemember of the right to appeal (*see* paragraph 7 of this Part).

d. *Nonjudicial punishment based on record of court of inquiry or other investigative body.* Nonjudicial punishment may be based on the record of a court of inquiry or other investigative body, in which proceeding the member was accorded the rights of a party. No additional proceeding under subparagraph 4c(1) of this Part is required. The Servicemember shall be informed in writing that nonjudicial punishment is being considered based on the record of the proceedings in question, and given the opportunity, if applicable, to refuse nonjudicial punishment. If the Servicemember does not demand trial by court-martial or has no option, the Servicemember may submit, in writing, any matter in defense, extenuation, or mitigation, to the officer considering imposing nonjudicial punishment, for consideration by that officer to determine whether the member committed the offenses in question, and, if so, to determine an appropriate punishment.

5. Punishments

a. *General limitations.* The Secretary concerned may limit the power granted by Article 15 with respect to the kind and amount of the punishment authorized. Subject to paragraphs 1 and 4 of this Part and to regulations of the Secretary concerned, the kinds and amounts of punishment authorized by Article 15(b) may be imposed upon Servicemembers as provided in this paragraph.

b. *Authorized maximum punishments.* In addition to or in lieu of admonition or reprimand, the following disciplinary punishments, subject to the limitation of paragraph 5d of this Part, may be imposed upon Servicemembers:

(1) *Upon commissioned officers and warrant officers—*

(A) By any commanding officer—restriction to specified limits, with or without suspension from duty for not more than 30 consecutive days;

(B) If imposed by an officer exercising general court-martial jurisdiction, an officer of general or flag rank in command, or a principal assistant as defined in paragraph 2c of this Part—

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for 2 months;

(iii) restriction to specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(2) *Upon other military personnel of the command—*

(A) By any nonjudicial punishment authority—

(i) if imposed upon a person attached to or embarked in a vessel, confinement for not more than 3 consecutive days;

(ii) correctional custody for not more than 7 consecutive days;

(iii) forfeiture of not more than 7 days' pay;

(iv) reduction to the next inferior grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(v) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(vi) restriction to specified limits with or without suspension from duty, for not more than 14 consecutive days;

(B) If imposed by a commanding officer of the grade of major or lieutenant commander or above or a principal assistant as defined in paragraph 2c of this Part—

(i) if imposed upon a person attached to or embarked in a vessel, confinement for not more than 3 consecutive days;

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of 1 month's pay per month for 2 months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but enlisted members in pay grades above E-4 may not be reduced more than one pay grade, except that during time of war or national emergency this category of persons may be reduced two grades if the Secretary concerned determines that circumstances require the removal of this limitation;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restrictions to specified limits, with or without suspension from duty, for not more than 60 consecutive days.

c. *Nature of punishment.*

(1) *Admonition and reprimand.* Admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person's conduct. A reprimand is a more severe form of censure than an admonition. When imposed as nonjudicial punishment, the admonition or reprimand is considered to be punitive, unlike the nonpunitive admonition and reprimand provided for in paragraph 1g of this Part. In the case of commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing. In other cases, unless otherwise prescribed by the Secretary concerned, they may be administered either orally or in writing.

(2) *Restriction.* Restriction is the least severe form of deprivation of liberty. Restriction involves moral rather than physical restraint. The severity of this type of restraint depends on its duration and the geographical limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if reasonably necessary to ensure that the punishment is being properly executed. Unless otherwise specified by the nonjudicial punishment authority, a person in restriction may be required to perform any military duty.

(3) *Arrest in quarters.* As in the case of restriction, the restraint involved in arrest in quarters is enforced by a moral obligation rather than by physical means. This punishment may be imposed only on officers. An officer undergoing this punishment may be required to perform those duties prescribed by the Secretary concerned. However, an officer so punished is required to remain within that officer's quarters during the period of punishment unless the limits of arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of a military residence, whether a tent, stateroom, or other quarters assigned, or a private residence when government quarters have not been provided.

(4) *Correctional custody.* Correctional custody is the physical restraint of a person during duty or nonduty hours, or both, imposed as a punishment under Article 15, and may include extra

duties, fatigue duties, or hard labor as an incident of correctional custody. A person may be required to serve correctional custody in a confinement facility, but, if practicable, not in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial. A person undergoing correctional custody may be required to perform those regular military duties, extra duties, fatigue duties, and hard labor which may be assigned by the authority charged with the administration of the punishment. The conditions under which correctional custody is served shall be prescribed by the Secretary concerned. In addition, the Secretary concerned may limit the categories of enlisted members upon whom correctional custody may be imposed. The authority competent to order the release of a person from correctional custody shall be as designated by the Secretary concerned.

(5) *Confinement.* Confinement may be imposed upon a person attached to or embarked on a vessel. Confinement involves confinement for not more than three consecutive days in places where the person so confined may communicate only with authorized personnel. The categories of enlisted personnel upon whom this type of punishment may be imposed may be limited by the Secretary concerned.

(6) *Extra duties.* Extra duties involve the performance of duties in addition to those normally assigned to the person undergoing the punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by customs of the Service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grades or positions.

(7) *Reduction in grade.* Reduction in grade is one of the most severe forms of nonjudicial punishment and it should be used with discretion. As used in Article 15, the phrase "if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction," does not refer to the authority to promote the person concerned but to the general authority to promote to the grade held by the person to be punished.

(8) *Forfeiture of pay.* "Forfeiture" means a permanent loss of entitlement to the pay forfeited. "Pay," as used with respect to forfeiture of pay under Article 15, refers to the basic pay of the person or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, plus any sea or hardship duty pay. "Basic pay" includes no element of pay other than the basic pay fixed by statute for the grade and length of service of the person concerned and does not include special pay for a special qualification, incentive pay for the performance of hazardous duties, proficiency pay, subsistence and quarters allowances, and similar types of compensation. If the punishment includes both reduction, whether or not suspended, and forfeiture of pay, the forfeiture must be based on the grade to which reduced. The amount to be forfeited will be expressed in whole dollar amounts only and not in a number of day's pay or fractions of monthly pay. If the forfeiture is to be applied for more than 1 month, the amount to be forfeited per month and the number of months should be stated. Forfeiture of pay may not extend to any pay accrued before the date of its imposition.

d. *Limitations on combination of punishments.*

(1) Arrest in quarters may not be imposed in combination with restriction;

(2) Confinement may not be imposed in combination with correctional custody, extra duties, or restriction;

(3) Correctional custody may not be imposed in combination with restriction or extra duties;

(4) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties;

(5) Subject to the limits in subparagraphs 5d(1) through (4) all authorized punishments may be imposed in a single case in the maximum amounts.

e. *Punishments imposed on reserve component personnel while on inactive-duty training.* When a punishment under Article 15 amounting to a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters) is imposed on a member of a reserve component during a period of inactive-duty training, the punishment may be served during one or both of the following:

(1) A normal period of inactive-duty training; or

(2) A subsequent period of active duty (not including a period of active duty under Article 2(d)(1), unless such active duty was approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

f. *Punishments imposed on reserve component personnel when ordered to active duty for disciplinary purposes.* When a punishment under Article 15 is imposed on a member of a reserve component during a period of active duty to which the reservist was ordered pursuant to R.C.M. 204 and which constitutes a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters), the punishment may be served during any or all of the following:

(1) That period of active duty to which the reservist was ordered pursuant to Article 2(d), but only where the order to active duty was approved by the Secretary concerned;

(2) A subsequent normal period of inactive-duty training; or

(3) A subsequent period of active duty (not including a period of active duty pursuant to R.C.M. 204 which was not approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

g. *Effective date and execution of punishments.* Reduction and forfeiture of pay, if unsuspended, take effect on the date the commander imposes the punishments. Other punishments, if unsuspended, will take effect and be carried into execution as prescribed by the Secretary concerned.

6. Suspension, mitigation, remission, and setting aside

a. *Suspension.* The nonjudicial punishment authority who imposed nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command over the person punished, may, at any time, suspend any part or amount of the unexecuted punishment imposed and may suspend a reduction in grade or a forfeiture, whether or not executed, subject to the following rules:

(1) An executed punishment of reduction or forfeiture of pay may be suspended only within a period of 4 months after the date of execution.

(2) Suspension of a punishment may not be for a period longer than 6 months from the date of the suspension, and the expiration of the current enlistment or term of service of the Servicemember involved automatically terminates the period of suspension.

(3) Unless the suspension is sooner vacated, suspended portions of the punishment are remitted, without further action, upon the termination of the period of suspension.

(4) Unless otherwise stated, an action suspending a punishment includes a condition that the Servicemember not violate any punitive article of the code. The nonjudicial punishment authority may specify in writing additional conditions of the suspension.

(5) A suspension may be vacated by any nonjudicial punishment authority or commander competent to impose upon the Servicemember concerned punishment of the kind and amount involved in the vacation of suspension. Vacation of suspension may be based only on a violation of the conditions of suspension which occurs within the period of suspension. Before a suspension may be vacated, the Servicemember ordinarily shall be notified and given an opportunity to respond. Although a hearing is not required to vacate a suspension, if the punishment is of the kind set forth in Article 15(e)(1)-(7), the Servicemember should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to present any matters in defense, extenuation, or mitigation of the violation on which the vacation action is to be based. Vacation of a suspended nonjudicial punishment is not itself nonjudicial punishment, and additional action to impose nonjudicial punishment for a violation of a punitive article of the code upon which the vacation action is based is not precluded thereby.

b. *Mitigation.* Mitigation is a reduction in either the quantity or quality of a punishment, its general nature remaining the same. Mitigation is appropriate when the offender's later good conduct merits a reduction in the punishment, or when it is determined that the punishment imposed was disproportionate. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may, at any time, mitigate any part or amount of the unexecuted portion of the punishment imposed. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may also mitigate reduction in grade, whether executed or unexecuted, to forfeiture of pay, but the amount of the forfeiture may not be greater than the amount that could have been imposed by the officer who initially imposed the nonjudicial punishment. Reduction in grade may be mitigated to forfeiture of pay only within 4 months after the date of execution.

When mitigating—

(1) arrest in quarters to restriction;

(2) confinement to correctional custody;

(3) correctional custody or confinement to extra duties or restriction, or both; or

(4) extra duties to restriction, the mitigated punishment may not be for a greater period than the punishment mitigated. As restriction is the least severe form of deprivation of liberty, it may not be mitigated to a lesser period of another form of deprivation of liberty, as that would mean an increase in the quality of the punishment.

c. *Remission.* Remission is an action whereby any portion of the unexecuted punishment is cancelled. Remission is appropriate under the same circumstances as mitigation. The nonjudicial punishment authority who imposes punishment, the commander who imposes nonjudicial punishment, or a successor in command may, at any time, remit any part or amount of the unexecuted portion of the punishment imposed. The expiration of the current enlistment or term of service of the Servicemember automatically remits any unexecuted punishment imposed under Article 15.

d. *Setting aside.* Setting aside is an action whereby the punishment, or any part or amount thereof, whether executed or unexecuted, is set aside and any property, privileges, or rights affected by the portion of the punishment set aside are restored. The nonjudicial punishment authority who imposed punishment, the commander who imposes nonjudicial punishment, or a successor in command may set aside punishment. The power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised only when the authority considering the case believes that, under all circumstances of the case, the punishment has resulted in clear injustice. Also, the power to set aside an executed punishment should ordinarily be exercised only within a reasonable time after the punishment has been executed. In this connection, 4 months is a reasonable time in the absence of unusual circumstances.

7. Appeals

a. *In general.* Any Servicemember punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority.

b. *Who may act on appeal.* A "superior authority," as prescribed by the Secretary concerned, may act on an appeal. When punishment has been imposed under delegation of a commander's authority to administer nonjudicial punishment (*see* paragraph 2c of this Part), the appeal may not be directed to the commander who delegated the authority.

c. *Format of appeal.* Appeals shall be in writing and may include the appellant's reasons for regarding the punishment as unjust or disproportionate.

d. *Time limit.* An appeal shall be submitted within 5 days of imposition of punishment, or the right to appeal shall be waived in the absence of good cause shown. A Servicemember who has appealed may be required to undergo any punishment imposed while the appeal is pending, except that if action is not taken on the appeal within 5 days after the appeal was submitted, and if the Servicemember so requests, any unexecuted punishment involving restraint or extra duty shall be stayed until action on the appeal is taken.

e. *Legal review.* Before acting on an appeal from any punishment of the kind set forth in Article 15(e)(1)-(7), the authority who is to act on the appeal shall refer the case to a judge advocate or to a lawyer of the Department of Homeland Security for consideration and advice, and may so refer the case upon appeal from any punishment imposed under Article 15. When the case is referred, the judge advocate or lawyer is not limited to an examination of any written matter comprising the record of proceedings and may make any inquiries and examine any additional matter deemed necessary.

f. *Action by superior authority.*

(1) *In general.* In acting on an appeal, the superior authority may exercise the same power with respect to the punishment imposed as may be exercised under Article 15(d) and paragraph 6 of this Part by the officer who imposed the punishment. The superior authority may take such action even if no appeal has been filed.

(2) *Matters considered.* When reviewing the action of an officer who imposed nonjudicial punishment, the superior authority may consider the record of the proceedings, any matters submitted by the Servicemember, any matters considered during the legal review, if any, and any other appropriate matters.

(3) *Additional proceedings.* If the superior authority sets aside a nonjudicial punishment due to a procedural error, that authority may authorize additional proceedings under Article 15, to be

conducted by the officer who imposed the nonjudicial punishment, the commander, or a successor in command, for the same offenses involved in the original proceedings. Any punishment imposed as a result of these additional proceedings may be no more severe than that originally imposed.

(4) *Notification.* Upon completion of action by the superior authority, the Servicemember upon whom punishment was imposed shall be promptly notified of the result.

(5) *Delegation to principal assistant.* If authorized by regulation of the Secretary concerned a superior authority who is a commander exercising general court-martial jurisdiction, or is an officer of general or flag rank in command, may delegate the power under Article 15(e) and this paragraph to a principal assistant.

8. Records of nonjudicial punishment

The content, format, use, and disposition of records of nonjudicial punishment may be prescribed by regulations of the Secretary concerned.

Sec. 6. Appendix 12A of the Manual for Courts-Martial, United States is amended to read as follows:

APPENDIX 12A

This Appendix contains the list of lesser included offenses prescribed by the President in EO XXXXX under Article 79(b)(2) as "reasonably included" in the greater offense. See Part IV, paragraph 3.b. of this Manual for an explanation regarding the offenses designated under Article 79(b)(2). This is not an exhaustive list of lesser included offenses. For offenses that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative.

PRESIDENTIALLY-PRESCRIBED LESSER INCLUDED OFFENSES

Article	*Offense*	**Lesser Included Offense**
84	Breach of medical quarantine	Art. 87b – Breach of restriction
85	Desertion	
	-Desertion with intent to remain away permanently	Art. 86 – Absence without leave
	-Desertion with intent to avoid hazardous duty or shirk important service	Art. 86 – Absence without leave
	-Desertion before notice of acceptance of resignation	Art. 86 – Absence without leave
	-Attempted desertion	Art. 86 – Absence without leave
87	Missing movement; jumping from vessel	
	-Missing movement by design	Art. 86 – Absence without leave Art. 87 – Missing movement by neglect
	-Missing movement by neglect	Art. 86 – Absence without leave
87b	Offenses against correctional custody and restriction	
	-Escape from correctional custody	Art. 87b – Breach of correctional custody
89	Disrespect toward superior commissioned officer; assault of superior commissioned officer	
	-Striking or assaulting superior commissioned officer	Art. 128 – Simple assault Art. 128 – Assault consummated by a battery Art. 128 – Assault upon a commissioned officer not in the execution of office

90	Willfully disobeying superior commissioned officer	Art. 89 – Disrespect toward superior commissioned officer Art. 92 – Failure to obey lawful order
91	Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	
	-Striking or assaulting a warrant, noncommissioned, or petty officer in the execution of office	Art. 128 – Simple assault Art. 128 – Assault consummated by a battery Art. 128 – Assault upon a warrant, noncommissioned, or petty officer not in the execution of office
	-Disobeying a warrant, noncommissioned, or petty officer	Art. 92 – Failure to obey lawful order
94	Mutiny or sedition	
	-Mutiny by creating violence or disturbance	Art. 94 – Attempted mutiny Art. 116 – Breach of peace
	-Mutiny by refusing to obey orders or perform duty	Art. 92 – Failure to obey order or regulation Art. 92 – Dereliction of duty Art. 94 – Attempted mutiny
	-Sedition	Art. 116 –Breach of peace
95	Offenses by sentinel or lookout	
	-Drunk on post	Art. 92 – Dereliction of duty Art. 112 – Drunk on duty
	-Sleeping on post	Art. 92 – Dereliction of duty
	-Leaving post	Art. 86 – Going from appointed place of duty Art. 92 – Dereliction of duty
	-Loitering or wrongfully sitting on post	Art. 92 – Dereliction of duty
96	Release of prisoner without authority; drinking with prisoner	
	-Allowing a prisoner to escape through design	Art. 96 – Allowing a prisoner to escape through neglect
99	Misbehavior before the enemy	

	-Running away	Art. 86 – Absence without leave; going from appointed place of duty
	-Endangering safety of a command, unit, place, ship, or military property through disobedience	Art. 92 – Failure to obey lawful order Art. 92 – Dereliction in the performance of duties
	-Endangering safety of a command, unit, place, ship, or military property through neglect or intentional misconduct	Art. 92 – Dereliction in the performance of duties
	-Casting away arms or ammunition	Art. 108 – Military property of the United States – loss or wrongful disposition
	-Cowardly conduct	
	-Quitting place of duty to plunder or pillage	Art. 86 – Going from appointed place of duty
100	Subordinate compelling surrender	
	-Compelling surrender	Art. 100 – Attempting to compel surrender
103a	Espionage	Art. 103a – Attempted espionage
103b	Aiding the enemy	
	-Aiding the enemy	Art. 103b – Attempting to aid the enemy
105a	False or unauthorized pass offenses	
	-Wrongful making, altering, counterfeiting, or tampering with a military or official pass, permit, discharge certificate, or identification card	Art. 105a – Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card
	-Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card	Art. 105a – Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card
	-Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card, with the intent to defraud or deceive	Art. 105a – Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card without the intent to defraud or deceive
108	Military property of the United States – Loss, damage, destruction, or wrongful disposition	

	-Willfully damaging military property	Art. 108 – Damaging military property through neglect Art. 109 – Willfully damaging non-military property
	-Willfully destroying military property	Art. 108 – Destroying military property through neglect Art. 108 – Damaging military property through neglect Art. 108 – Willfully damaging military property Art. 109 – Willfully destroying non-military property Art. 109 – Willfully damaging non-military property
	-Willfully losing military property	Art. 108 – Through neglect, losing military property
	-Willfully suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of	Art. 108 – Through neglect, suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of
109a	Mail matter: wrongful taking, opening, etc.	
	-Taking	Art. 121 – Larceny; wrongful appropriation
	-Opening, secreting, destroying, or stealing	Art. 121 – Larceny; wrongful appropriation
110	Improper hazarding of vessel or aircraft	
	-Willfully and wrongfully causing or suffering a vessel or aircraft to be hazarded	Art. 110 – Negligently causing or suffering a vessel or aircraft to be hazarded
112	Drunkenness and other incapacitation offenses	
	-Drunk on duty	Art. 92 – Dereliction of duty
	-Incapacitation for duty from drunkenness or drug use	Art. 92 – Dereliction of duty
112a	Wrongful use, possession, etc., of controlled substances	

	-Wrongful use of controlled substance	Art. 112a – Wrongful possession of controlled substance
	-Wrongful distribution of controlled substance	Art. 112a – Wrongful possession of controlled substance Art. 112a – Wrongful possession with intent to distribute
	-Wrongful introduction of a controlled substance	Art. 112a – Wrongful possession of controlled substance
	-Wrongful manufacture of a controlled substance	Art. 112a – Wrongful possession of controlled substance
	-Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute	Art. 112a – Wrongful possession, manufacture, or introduction of controlled substance
115	Communicating threats	
	-Threat to use explosive, etc.	Art. 115 – Communicating threats generally
116	Riot or breach of peace	
	-Riot	Art. 116 – Breach of peace
118	Murder	
	-Premeditated murder	Art. 118 – Intent to kill or inflict great bodily harm Art. 118 – Act inherently dangerous to another Art. 119 –Voluntary manslaughter
	-Intent to kill or inflict great bodily harm	Art. 119 –Voluntary manslaughter
	-During certain offenses	Art. 119 –Voluntary manslaughter
119	Manslaughter	
	-Voluntary manslaughter	Art. 119 – Involuntary manslaughter
119a	Death or injury of an unborn child	
	-Killing an unborn child	Art. 119a – Injuring an unborn child Art. 119a – Attempting to kill an unborn child
	-Intentionally killing an unborn child	Art. 119a – Killing an unborn child Art. 119a – Injuring an unborn child Art. 119a – Attempting to kill an unborn child

119b	Child endangerment	
	-Child endangerment by design	Art. 119b – Child endangerment by culpable negligence
120	Rape and sexual assault generally	
	Rape	Art. 128 – Assault with intent to commit rape
	-By unlawful force	Art. 128 – Simple assault
	-By force causing or likely to cause death or grievous bodily harm	Art. 128 – Simple assault
	-By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping	Art. 120(a)(1) – Rape by unlawful force Art. 120(b)(1)(A) – Sexual assault by threatening or placing that other person in fear
	-By first rendering that other person unconscious	Art. 120(b)(2)(B) – Sexual assault of a person who is asleep, unconscious, or otherwise unaware the act is occurring
	-By administering a drug, intoxicant, or other similar substance	Art. 128 – Simple assault Art. 128 – Assault consummated by a battery
	Sexual Assault	Art. 128 – Assault with intent to commit sexual assault
	-Without consent	Art. 128 – Assault consummated by a battery
120b	Rape and sexual assault of a child	
	Rape of a child	
	-Rape of a child who has not attained the age of 12	Art. 128 – Assault consummated by a battery
	-Rape by force of a child who has attained the age of 12	Art. 128 – Assault consummated by a battery
	-Rape by threatening or placing in fear a child who has attained the age of 12	Art. 120(b)(1)(A) – Sexual assault by threatening or placing that other person in fear
	-Rape by rendering unconscious a child who has attained the age of 12	Art. 120(b)(2)(B) – Sexual assault of a person who is asleep, unconscious, or otherwise unaware the act is occurring
	-Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12	Art. 128 – Simple assault Art. 128 – Assault consummated by a battery
121	Larceny and wrongful appropriation	

	-Larceny	Art. 121 – Wrongful appropriation
122	Robbery	
	-Robbery where the taking was by means of force, violence, or force and violence	Art. 121 – Larceny; wrongful appropriation Art. 128 – Assault consummated by a battery Art. 128 – Simple assault Art. 128 – Assault with intent to commit robbery
	-Robbery where the taking was by means of putting the person in fear	Art. 121 – Larceny; wrongful appropriation Art. 128 – Simple assault Art. 128 – Assault with intent to commit robbery
123	Offenses concerning Government computers	
	-Unauthorized distribution of classified information obtained from a Government computer	Art. 123 – Unauthorized access of a Government computer and obtaining classified or other protected information
124a	Bribery	Art. 124b – Graft
128	Assault	
	-Assault consummated by a battery upon a child under 16 years, a spouse, intimate partner, or immediate family member	Art. 128 – Assault consummated by a battery
	-Assault in which substantial bodily harm is inflicted	Art. 128 – Assault consummated by a battery
	-Assault in which grievous bodily harm is inflicted	Art. 128 – Assault consummated by a battery Art. 128 – Assault in which substantial bodily harm is inflicted
	-Assault with intent to murder	Art. 128 – Simple assault Art. 128 – Assault with intent to commit voluntary manslaughter
	-Assault with intent to commit voluntary manslaughter	Art. 128 – Simple assault

	-Assault with intent to commit rape or rape of a child	Art. 128 – Simple assault
	-Assault with intent to commit sexual assault or sexual assault of a child	Art. 128 – Simple assault
	-Assault with intent to commit robbery, arson, burglary, or kidnapping	Art. 128 – Simple assault
128a	Maiming	Art. 128 – Assault consummated by a battery Art. 128 – Assault in which substantial bodily harm is inflicted Art. 128 – Assault in which grievous bodily harm is inflicted
129	Burglary; unlawful entry	
	-Burglary	Art. 129 – Unlawful entry
134 (95)	Child pornography	
	-Possessing child pornography with intent to distribute	Art. 134(95) – Possessing child pornography
	-Distributing child pornography	Art. 134(95) – Possessing child pornography Art. 134(95) – Possessing child pornography with intent to distribute
	-Producing child pornography	Art. 134(95) – Possessing child pornography

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