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Legal Services

Trial Procedure

Headquarters
Department of the Army
Washington, DC
31 December 1992

UNCLASSIFIED

SUMMARY of CHANGE

DA PAM 27–173
Trial Procedure

This pamphlet contains comments and opinions of individual legal specialists in criminal law. Specifically, it incorporates changes in trial procedure based upon laws, regulations, and court decisions published prior to 1 May 1992.

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Legal Services

Trial Procedure

By Order of the Secretary of the Army:

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History. This UPDATE printing publishes a revision of this publication. Because the publication has been extensively revised, the changed portions have not been highlighted. This publication has been reorganized to make it compatible with the Army electronic publishing database. No content has been changed.

Summary. This pamphlet is intended to provide legal information and reference material, and does not purport to promulgate Department of the Army policy. Comments and suggested legal solutions concerning laws, regulations, decisions, or other matters represent the opinions of individual legal specialists and are in no sense mandatory. Laws, regulations, and decisions published prior to 1 October 1990 generally have been consideredand included in the text.

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Chapter 1
Introduction

1–1. General

This text is designed primarily for the lawyer participating in courts-martial. The text's scope is accordingly limited to court-martial procedural rules. There is, however, no absolute dichotomy between substantive and procedural rules in criminal trials. Consequently, although the text focuses on procedure, it nevertheless touches upon such substantive areas as evidence. The distinction between procedure and substance is somewhat artificial, but the nature of the President's power to promulgate rules for courts-martial requires that we attach considerable weight to the characterization of a rule as procedural or substantive.

1–2. Format

The text has five parts. Part one concerns the qualifications and roles of the various participants in a court-martial, such as the convening authority, the military judge, and the court members. The discussion of these subjects is intended merely as an introductory treatment; other publications analyze the participants' roles in greater detail.[1] Parts two through four focus on court-martial trial procedures. The organization is a chronological approach to processing and adjudicating court-martial charges. Finally, part five is a detailed analysis of professional responsibility matters of interest to the military attorney.

1–3. The rule-making power

a. Source and nature. It is important to understand both the sources of procedural rules and the nature of the rule-making power. The Constitution grants Congress the power "to make Rules for the Government and Regulation of the land and naval Forces."[2] In exercising this power as to courts-martial, Congress has conferred certain authority upon the President.

In article 36 of the Uniform Code of Military Justice,[3] Congress gave the President the power to prescribe procedures in courts-martial. As originally enacted in 1950, article 36 provided that:

> (a) The procedure including modes of proof, in cases before courts-martial … may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this Code.[4]

The President initially exercised his authority under article 36 by promulgating the Manual for Courts-Martial, United States, 1951.[5] Subsequently, the President issued the Manual for Courts-Martial, United States, 1969 (revised edition)[6] and most recently, the Manual for Courts-Martial, United States, 1984.[7]

Courts have recognized these manuals as a valid exercise of the President's rule-making power. In one case, the United States Supreme Court declared that the Manual is the "guidebook that summarizes the rules of evidence applied by court-martial review boards."[8] In another case, the Court commented that "the Manual … has the force of law

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[1] For example, DA Pam 27–9, Military Judges' Benchbook (1 May 1982) (C3, 15 Feb. 1989), [hereinafter Benchbook] provides detailed guidance for the preparation of instructions.

[2] U.S. Const. art. I, § 8, cl. 14.

[3] Uniform Code of Military Justice art. 36, 10 U.S.C. § 836 (1982) [hereinafter UCMJ]. The Uniform Code of Military Justice will be referred to in text as the Code or UCMJ.

[4] Act of May 5, 1950, chap. 169 § 1 (art. 36), 64 Stat. 120. There is some controversy whether, in his capacity as Commander-in-Chief, the President could have promulgated rules for courts-martial even if Congress had not delegated authority to the President. *Compare* Snedeker, Military Justice Under the Uniform Code 39 (1953) *with* Everett, Military Justice in the Armed Forces of the United States 8 (1956). On balance, it seems probable that the Constitution's authors intended to place this power beyond the Executive's reach. *See* Levy v. Resor, 37 C.M.R. 399, 403 (C.M.A. 1967); United States v. Smith, 32 C.M.R. 105, 117 (C.M.A. 1962).

[5] Exec. Order No. 10,214, 3 C.F.R. 409 (1949–1953 Comp.).

[6] Exec. Order No. 11,476, 34 Fed. Reg. 10,503 (1969). The President also prescribed the Manual for Courts-Martial, United States, 1969, Exec. Order No. 11,430, 33 Fed. Reg. 13,503 (1968). The enactment of the Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335 (1968), however, which made substantial changes to the military justice system, required that the new Manual be immediately revised. The Military Justice Act of 1968 and Manual for Courts-Martial, 1969 (rev. ed.) became effective 1 August 1969.

[7] Exec. Order No. 12,473, 49 Fed. Reg. 17152 (1984). The Manual for Courts-Martial will be referred to in text as the Manual or MCM. When necessary to clarify the particular edition of the Manual being cited the following forms will be used: MCM, 1951; MCM, 1969 (rev. ed.); MCM, 1984. The Rules for Courts-Martial in the 1984 Manual will be cited as R.C.M.

[8] United States v. Augenblick, 393 U.S. 348 (1969).

unless it is contrary to or inconsistent with the Uniform Code… "[9] United States Court of Military Appeals decisions likewise have given the Manual's provisions binding effect. The Court of Military Appeals pointed out that Congress' delegation to the President in article 36 is "[s]imilar to its grant of authority to the Supreme Court to prescribe rules of practice and procedure in Federal civilian cases, which have the force of statutory law…"[10]

During the middle 1970's, the issue arose as to whether article 36 gave the President the power to prescribe rules for pretrial and post-trial procedures as well as "trial procedures." In *United States v. Ware*,[11] the court noted that the issue before it did not require the court to address whether the Manual provision involved concerned a "procedure *before courts-martial*, to which the President's power to promulgate procedure is restricted."[12] Chief Judge Fletcher, dissenting in *United States v. Newcomb*,[13] stated that "Article 36 evidences no intention by the Congress to dilute its legislative judgment concerning pretrial procedures."[14] In response to these pronouncements, Congress amended article 36 to specifically give the President power to promulgate rules for pretrial, trial, and post-trial procedures.[15] This broad grant of authority to the President was acknowledged by the court in United States v. Matthews.[16]

In determining the validity of a particular exercise of the President's rule-making power under article 36, it is necessary to distinguish between substance and procedure. Only rules which relate to "procedural" matters are within the President's authority. A rule relating to a "substantive" matter, such as the definition of a crime, is in excess of this authority. Only Congress can define crimes or establish affirmative defenses to crimes. If the President attempts to usurp Congress' power by promulgating a substantive rule, the rule may be invalid. Therefore, the mere inclusion of a rule in the Manual does not necessarily make it a valid exercise of the President's power. As the Court of Military Appeals has noted:"The inclusion [in the Manual] of any such statement of substantive law generates no validity for the same. Such is quite unlike the Executive promulgation of a mode of proof therein, pursuant to the authority conferred by Congress in the Uniform Code."[17] Of course, the Manual contains substantive rules such as the elements of offenses and the definitions of affirmative defenses. Inclusion in the Manual neither adds to nor detracts from the rule's validity. The validity of a substantive rule must be predicated on a basis other than the President's delegated power to make procedural rules.[18]

b. Conflict between the Code and the Manual. In its delegation to the President, Congress provided that the rules the President makes may not be "contrary to or inconsistent with this Chapter [the Code]."[19] So long as a procedural rule prescribed by the President is "neither contrary to or inconsistent with the Code, [it] has the force of law and is of binding application in trials by courts-martial…"[20] If a Manual rule conflicts with the Code, the Code prevails.[21] The Code itself contains some procedural rules. For example, article 41 governs challenges and article 51 prescribes rules for voting. If a Manual provision were contrary to or inconsistent with a procedural rule prescribed by the Code, the Manual provision would be invalid.

Determining the existence of a conflict requires interpretation of both the Code and the Manual. It should be remembered that many provisions of both documents contain broad language, which may be susceptible to several interpretations. It will sometimes be possible to resolve a conflict by reconciling interpretations of the Code and Manual provisions.[22] Of course, the Court of Military Appeals will invalidate any portion of the Manual it interprets as inconsistent with the Code. Thus, that portion of paragraph 67*f* of the Manual for Courts-Martial, 1969 (rev. ed.) which required the military judge to accede to the convening authority on questions of law was declared invalid as inconsistent with the clear language of article 62(a) of the Code.[23] Where neither the Code nor the Manual has addressed a procedural question, the court will apply the Federal civilian rules unless it is incompatible with military law or the military establishment's special requirements.[24]

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[9] Noyd v. Bond, 395 U.S. 683, 692 (1969).
[10] United States v. Phare, 45 C.M.R. 18, 21 (C.M.A. 1972); Levy v. Resor, 37 C.M.R. 399, 403 (C.M.A. 1967).
[11] 1 M.J. 282 (C.M.A. 197).
[12] *Id.* at 285 n.10.
[13] 5 M.J. 4 (C.M.A 1978).
[14] *Id.* at 13 (Fletcher, C.., dissenting).
[15] Act of Nov. 9, 1979, Pub. L. No. 96–107, Title VIII § 801(b), 93 Stat. 811 (1979).*See generally* S. Rep. No. 197, 96th Cong., 1st Sess. 123 (1979),*reprinted in* 1979 U.S. Code Cong. & Admin. News 1818, 1828.
[16] 16 M.J. 354, 380 (C.M.A. 1983).
[17] United States v. Smith, 33 C.M.R. 3, 6–7 (C.M.A. 1963); *see* United States v. Johnson, 17 M.J. 251, 252 (C.M.A. 1984) (President lacks power to create or define crimes).
[18] United States v. Smith, 32 C.M.R. 105, 119 (C.M.A. 1962).
[19] UCMJ art. 36.
[20] United States v. Boland, 42 C.M.R. 275, 277 (C.M.A. 1970).
[21] United States v. Smith, 32 C.M.R. 105 (C.M.A. 1962).
[22] Whenever possible, courts attempt to harmonize seemingly conflicting provisions. Crawford, Statutory Construction § 166 (1940).
[23] United States v. Ware, 1 .J. 282 (C..A. 1976).
[24] In United States v. Knudson, 16 C.M.R. 161, 164 (C.M.A. 1954), the Court of Military Appeals stated"[w]e have repeatedly held that Federal practice applies to courts-martial procedures if not incompatible with military law or the special requirements of the military establishment." *See*Chenoweth v. VanArsdall, 46 C.M.R. 183, 186 (C.M.A. 1973).

Chapter 2
The Convening Authority/Command Influence

2–1. General

The convening authority, the officer empowered to initiate a court-martial, is necessarily one of the principal participants in the court-martial process. While it may be true that courts-martial were once viewed as the convening authority's personal instrument for the maintenance of discipline, under the UCMJ the court-martial is now an independent court of law. As the Powell Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army emphasized, the convening authority retains general power over the responsibility for discipline within his command but may not use the court-martial as a personal instrument for achieving discipline:

> Correction and discipline are command responsibilities in the broadest sense, but some types of corrective action are so severe that under time-honored principles they are not entrusted solely to the discretion of a commander. At some point, he must bring into play judicial processes. It is his responsibility to select the cases which he thinks deserve sterner corrective action than he is paratext permitted to impose by himself. When he has done this, it is not intended that he be able to influence judicial decisions… Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline. The interests of discipline do not require that he [the commander] have any power to interfere with the independent judgment of persons who are by law responsible for judicial actions.[1]

The commanding officer, as convening authority, has a large number of nonjudicial disciplinary devices to address misconduct. If these devices are inadequate to deal with a certain offender, the convening authority can consider trial by court-martial.[2] In exercising this option, the convening authority can convene the court-martial but may not unlawfully influence the court's proceedings. In reaching its findings and sentence, the court must be permitted to exercise its independent, unfettered judgment.

When Congress enacted the UCMJ, it attempted to balance military necessity and individual rights.[3] On the one hand, Congress recognized that the commander has a legitimate interest in the process of military justice, devolving from command responsibilities, including the duty to maintain good order and discipline within the command.[4] On the other hand, Congress realized that military forces have a long tradition of obedience and a strong sense of community, and that these traits pose a danger to the accused's individual rights. In balancing the interests of the military and the individual, Congress struck a sound compromise: It permitted the commanding officer to retain the role and judicial functions of convening authority but also created procedural safeguards to ensure that the court-martial would "no longer [be] subject to the direction of the commander*while* exercising its fact finding powers."[5]

The UCMJ permits the convening authority to play a dominant role in the court-martial process before and after trial. Before trial, the convening authority decides whether to convene a court-martial,[6] selects court members,[7] and refers the case to trial.[8] After trial, the convening authority has broad powers of clemency.[9] Accordingly, he acts both as the court-martial creator and the first step in the process of appeal from the court-martial.

While the convening authority plays a dominant role before and after trial, the UCMJ has provisions to assure the independence of the court-martial during trial. The UCMJ provides that:

> No authority convening a … court-martial, nor any other commanding officer, may censure, reprimand or admonish the court or any member, military judge, or counsel thereof, with respect to … any … exercise of its or his functions … No person subject to this [Code] … may attempt to coerce or, by any unauthorized means, influence the action of a court-martial … *in reaching the findings or sentence in any case*, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.[10]

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[1] Report to Hon. Wilber M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, at 11–12 (18 Jan. 1960).

[2] MCM, 1984, R.C.M. 401.

[3] Hansen, *Judicial Functions for the Commander*, 4 Mil. L. Rev. 1, 19 (1968).

[4] *Id.* at 53.

[5] Id. at 50–51.

[6] R.C.M. 401(c).

[7] R.C.M. 503(a).

[8] R.C.M. 601. During sentencing argument, the trial counsel may not direct the court members' attention to the fact that the convening authority referred the case to trial by general court-martial rather than special or summary court to influence the court's sentence. United States v. Carpenter, 29 C.M.R. 234 (C.M.A. 1960); United States v. Lackey, 25 C.M.R. 222 (C.M.A. 1958). *But see* United States v. Eaves, 35 C.M.R. 176 (C.M.A. 1964).

[9] R.C.M. 1107. *See*table 2–1 for a summary of the commander's lawful controls and problem areas in the area of command control and the military justice system.

[10] Article 37 (emphasis added).*See also* United States v. White, 50 C.M.R. 77 (N.C.M.R. 1975) (Navy Court of Military Review interpreted the prohibitions in Article 37 of the UCMJ as not preventing the multiple roles of the convening authority before and after trial—not a deprivation of due process).

While the convening authority may convene a trial by court-martial, he may not direct the trial's outcome.

When the convening authority improperly attempts to affect the trial's outcome, "unlawful command influence" exists. In each case involving unlawful command influence by the convening authority, there are two critical questions: (1) Did the convening authority's conduct constitute unlawful command influence? and (2) What effect did this conduct have upon the trial's outcome? In answering these questions, the courts consider several factors, including: (1) the nature of the act or statement;[11] (2) the proximity in time of the act or statement to the trial;[12] (3) the rank and position of the person acting or making the statement;[13] (4) the specificity of the act's or statement's reference to the trial;[14] and (5) the extent to which the act or statement was addressed to personnel participating in the trial.[15]

Table 2–1
Commander's lawful and unlawful influences in the military justice system

Process Action	Lawful Influence	Unlawful Influence
Pretrial	Power to gatherfacts.	Pretrial punishment.
	Commander's preliminary inquiry.	Ordering a disposition.
	Law enforcement agencies.	Accusers taking further action.
	Art. 32 pretrial investigation.	Impinging upon a subordinate's exercise of discretion.
	Power to affect a disposition.	Categoric exclusion of potential court members.
	Nonpunitive options.	
	Preferral of charges.	
	Forward with recommendations.	
	Power to select court members.	Select or remove court members to obtain a particular result.
	Referral to courts-martial.	
	Overrule a subordinate's disposition.	
	Select best qualified personnel.	
	Replace panels.	
Trial	Provide facility and personnel support.	Attempting to influence actions of a court-martial in arriving at findings or a sentence.
	Grant immunity to witnesses.	Intimidating or discouraging witnesses from testifying.
		Usurping GCMCA/DOJ authority.
Post-trial	Take action in the case.	Inflexible attitude regarding clemency.
	Seek reconsideration; appeal; rehearing.	Censuring, reprimanding, admonishing, or giving unfavorable efficiency ratings for performance as court personnel.
		Directly question or seek justification of a judge's decision or sentence.

2–2. The existence and effect of unlawful command influence

An act of unlawful command influence may affect any participant in the court-martial process.

a. Court members. Court members determine the trial's outcome. They may acquit, or find guilt, and adjudge a sentence. Court members, therefore, are a potential target for unlawful command influence. An appellate court may find unlawful command influence if the commander's attempt to influence court members is blatant or gross.[16]

[11] United States v. Kitchens, 31 C.M.R. 175 (C.M.A. 1961); United States v. Zagar, 18 C.M.R. 34 (C.M.A. 1955); United States v. Littrice, 13 C.M.R. 43 (C.M.A. 1953).

[12] United States v. Brice, 19 M.J. 170 (C.M.A. 1985).*Compare* United States v. Wright, 37 C.M.R. 374 (C.M.A. 1967) *with* United States v. Davis, 31 C.M.R. 162 (C.M.A. 1961) *and* United States v. Dazine, 30 C.M.R. 350 (C.M.A. 1961).

[13] United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957); United States v. Estrada, 23 C.M.R. 99 (C.M.A. 1957); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (en banc); United States v. Cruz, 25 M.J. 326 (C.M.A. 1987).

[14] United States v. Rosser, 6 M.J. 267 (C.M.A. 1979); United States v. Cole, 38 C.M.R. 94 (C.M.A. 1967); United States v. Olson, 29 C.M.R. 102 (C.M.A.

Appellate courts also seek to protect the accused against more subtle forms of unlawful command influence. In *United States v. McLaughlin*,[17] the convening authority appointed a large panel of court members and, subsequently by memorandum, designated the members who were to attend particular court sessions. Even though the convening authority probably did not intend to affect the trial's outcome, the Court of Military Appeals held that the convening authority's action was unlawful. The court emphasized that the convening authority's action was"the kind of command control over the day-to-day functioning of a particular court-martial that we cannot sanction."[18] In itself, the use of the large panel did not affect the trial's outcome, but this procedure could have facilitated improper command influence. The court decided to deprive the convening authority of even the opportunity to exercise unlawful influence.

Three of the subtler forms of unlawful command influence merit discussion. The first form is the disciplinary or moral policy statement. The commander obviously has a legitimate interest in preventing misconduct within the command. A commander may properly issue a policy statement which generally discusses the necessity for and the means of preventing misconduct, and such a policy statement may not result in unlawful command influence.[19] If the statement tends to intimidate court members or suggests a certain "proper" disposition of offenders, however, the statement can amount to unlawful command influence.[20] Even when the commander does not address the statement to court members, a staff officer's, subordinate commander's, or trial counsel's actions might convert the statement into a form of unlawful command influence. In one case the trial counsel read a Secretary of the Navy policy directive concerning drug abuse to the court members during the sentencing argument. The Court of Military Appeals held that the sentence was tainted by unlawful command influence.[21]

The second form is the pretrial orientation lecture. Convening authorities or their staff judge advocates sometimes have lectured prospective court members on their duties. Such lectures are a dangerous practice. Such a lecture necessarily is close in time to the trial and is specifically addressed to court members. Ambiguous statements during the lectures can easily be interpreted as a desire for a specific outcome in a particular trial or class of cases.[22] One former judge of the Court of Military Appeals expressed the opinion that orientation lectures were unlawful command influence per se.[23] One jurisdiction distributed a small booklet to every member selected for court-martial duty. This "Handbook for Members of Court-Martial Panel" contained general guidance on the duties of members and the procedures of courts-martial. It was determined on appeal that such a handbook was "an outside source of information on the law which cannot be countenanced."[24] The UCMJ and Manual contemplate that the military judge (or president of a special court-martial when there is no judge) will perform the function of orienting the court members by instructing them on their findings and sentence.[25] To eliminate this form of unlawful command influence, the Army by regulation now generally prohibits pretrial orientation lectures.[26]

A third possible form is a convening authority's rating of court members. In the armed forces, commanders are required periodically to rate the efficiency or effectiveness of their immediate subordinates. The convening authority is sometimes a rater on the court member's efficiency rating. A soldier's opportunities for promotion and future assignments depend, in large part, upon efficiency ratings. The fact that the convening authority may be in a position to prepare a particular court member's efficiency report "gives the commanding officer ample opportunity to manifest his displeasure at the manner in which those under his control have handled a case."[27] To eliminate this potential source of unlawful command influence, in 1968 Congress added the following language to article 37 of the Code:

> In the preparation of an … 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 … may … consider or evaluate the performance of

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1960); United States v. Ferguson, 17 C.M.R. 68 (C.M.A. 1954).

[15] United States v. Levite, 25 M.J. 334 (C.M.A. 1987); United States v. Wright, 37 C.M.R. 374 (C.M.A. 1967); United States v. Kitchens, 31 C.M.R. 175 (C.M.A. 1961); United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956).

[16] *E.g.*, United States v. Cole, 38 C.M.R. 94 (C.M.A. 1967); United States v. Olivas, 26 C.M.R. 686 (A.B.R. 1958).

[17] 39 C.M.R. 61 (C.M.A. 1968).

[18] *Id.* at 64.

[19] United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987); United States v. Brice, 19 M.J. 170 (C.M.A. 1984); United States v. Hurt, 27 C.M.R. 3 (C.M.A. 1958); United States v. Carter, 25 C.M.R. 370 (C.M.A. 1958). *See also* United States v. Harrison, 41 C.M.R. 179 (C.M.A. 1970).

[20] United States v. Karlson, 16 M.J. 469 (C.M.A. 1983); United States v. Howard, 48 C.M.R. 157 (C.M.A. 1974); United States v. Albert, 16 C.M.A. 111, 36 C.M.R. 267 (1966); United States v. Leggio, 30 C.M.R. 8 (C.M.A. 1960); United States v. Olson, 29 C.M.R. 102 (C.M.A. 1960); United States v. Estrada, 23 C.M.R. 99 (C.M.A. 1957); United States v. Glidewell, 19 M.J. 797 (A.C.M.R. 1985); United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973).

[21] United States v. Allen, 43 C.M.R. 157 (C.M.A. 1971). *See also* United States v. Brice, 19 M.J. 170 (C.M.A. 1984); United States v. Estrada, 23 C.M.R. 99 (C.M.A. 1957); *cf.* United States v. Robertson, 17 M.J. 846 (N.M.C.M.R. 1984).

[22] United States v. Kitts, 23 M.J. 105 (C.M.A. 1986).

[23] United States v. Wright, 37 C.M.R. 374 (C.M.A. 1967) (concurring opinion); United States v. Danzine, 30 C.M.R. 350 (C.M.A. 1961) (dissenting opinion). Judge Ferguson consistently expressed the opinion that any command pretrial instructions violate the UCMJ. Article 37(a), as amended in 1968, exempts "general instructional or informational courses in military justice"from the prohibition.

[24] United States v. Hollcraft, 17 M.J. 1111, 1113 (A.C.M.R. 1984).

[25] *Compare* R.C.M. 104*with* MCM, 1969, para. 38 *and*MCM, 1951, para. 38.

[26] AR 27–10, para. 5–10*c.*

[27] Keeffe and Moskin, *Codified Military Injustice*, 35 Cornell L.Q. 151, 158 (1949).

duty of any such member of a court-martial… [28]

When evidence is presented sufficient to render reasonable a conclusion that improper command influence existed, the Government must then prove, by clear and positive evidence, that command influence did not occur.[29] If the Government fails, the military judge must find that improper command influence exists and take whatever measures are necessary and appropriate to ensure, beyond reasonable doubt, that the findings and sentence are not adversely affected. If there is no way to avoid the adverse affect beyond reasonable doubt, the case should be dismissed.[30]

b. The military judge. Article 37 of the UCMJ[31] attempts to insulate court members from unlawful command influence. Similarly, it attempts to shield other participants in the court-martial process from improper influence. The other participants have a duty to the accused to perform their roles in accordance with the Code's explicit provisions. In some cases involving attempts to improperly influence participants other than court members, it is unnecessary to analyze the case solely in terms of unlawful command influence. Instead, appellate courts will focus on whether the improper act denied the accused a right explicitly guaranteed under the UCMJ.

The Manual contains a detailed discussion of the essential role the military judge plays in the court-martial.[32] The military judge's role is as sensitive and as vital as that of the court members. The military judge must be shielded from all the forms of unlawful command influence against which court members are insulated. Moreover, Congress intends that the military judge's independence approximate that of a Federal civilian judge.[33] Congress envisions the general court-martial judge as a full-time, independent judicial officer.[34] For that reason, appellate courts frown upon any attempt to compromise the military judge's independence.[35]

The military judge's independence has statutory, Manual, and regulatory protection. Congress incorporated statutory protections in articles 26 and 37 of the UCMJ.[36] Article 26(c) provides that neither the convening authority nor any member of the staff may prepare or review a general court-martial judge's efficiency report.[37] Article 37(a) provides that the convening authority may not censure, reprimand, or admonish the military judge for the judge's acts during a court-martial.[38]

When the President promulgated the Manual, he extended the protection of article 26(c), UCMJ, to special court-martial judges.[39] On its face, the Manual provision applies only to the convening authority; the provision does not expressly prohibit the preparation or review of an efficiency report by a member of the convening authority's staff.[40] The Secretary of the Army has filled this gap by providing an Army regulation[41] prescribing that members of the United States Army Judiciary determine who rates special court-martial judges assigned to the Judiciary.[42] The convening authority or a member of the staff may prepare an efficiency report for only part-time, special court-martial judges not assigned to the Judiciary but such efficiency reports cannot evaluate judicial performance.[43]

The creation of the United States Army Judiciary gave the military judge additional protection.[44] All full-time special court-martial judges, general court-martial judges, and appellate judges are assigned to the United States Army Judiciary. The Judiciary is largely self-supervised and administratively removed from The Judge Advocate General's direct control. The chief trial judge exercises direct administrative supervision over all judges assigned to the United States Army Judiciary.[45] Raters on efficiency reports of judges assigned to the Judiciary are other members of the Judiciary. Chief circuit military judges determine the rating schemes for military judges within the circuit.[46]

The statutory and administrative protections for the military judge eliminate most of the opportunities for improper influence. Of course, it is still possible for the convening authority to attempt to communicate an improper statement to

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[28] UCMJ art. 37.

[29] *United States v. Rosser*, 6 M.J. 267, 272 (C.M.A. 1979); *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990); *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991).

[30] *United States v. Jameson*, 33 M.J. 669, 672 (N.M.C.M.R. 1991), citing *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) and *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990).

[31] UCMJ art. 37.

[32] *See, e.g.*, R.C.M. 801.

[33] Snyder, *Evolution of the Military "Judge,"* 14 S.C.L.Q. 381 (1962); Miller, *Who Made the Law Officer a"Federal Judge"*?, 4 Mil. L. Rev. 39 (1959).

[34] UCMJ art. 26.

[35] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

[36] UCMJ arts. 26, 37.

[37] UCMJ art. 26.

[38] UCMJ art. 37.

[39] R.C.M.104(b)(2)(B).

[40] *Id.*

[41] AR 27–10.

[42] *Id.* at para. 8–5*e*.

[43] UCMJ art. 37(b).

[44] *See* letter, Adjutant General of the Army to commanders exercising general court-martial jurisdiction, AGAO-CC 210.31 (27 Oct. 1958) JAG, HQDA, TAGO, 29 October 1968, subject: Law Officer Program. Para. 1, General Order 37, HQDA (13 Nov. 1958), created the Field Judiciary, and para. 1, General Order 5, HQDA (7 Mar. 1961) made the Judiciary a Class II activity. Section V, General Order 56, HQDA (26 Sept. 1962), redesignated the activity as the U.S. Army Judiciary.

[45] AR 27–10, para. 8–1*d*.

[46] *Id.* at para. 8–5*e*.

the judge. In *United States v. Hughes*,[47] the convening authority made an obviously improper statement at an officers' call before the accused's trial: "This time it looks like we will get him [the accused]." The defense contended that this remark influenced the military judge. The Army Court of Review found that "[t]here is no evidence that this judge even knew of the remarks, let alone was influenced by them since he was not a member of the command."[48] Where the military judge's special statutory and administrative protections are inapplicable, however, the court will use the same safeguards the court employs to protect court members.[49]

c. The defense counsel. The defense counsel's zeal for the client's defense is as essential an element of a fair trial as the impartiality of the military judge and court members. Appellate courts condemn any attempt to discourage the defense counsel's zeal as readily and emphatically as they do attempts to improperly influence the court members.

The defense counsel does have many of the same special statutory and regulatory protections that the military judge enjoys. Article 37(b), UCMJ, provides that the convening authority and his staff members may not give the defense counsel a lower efficiency rating because of "the zeal with which [he] … represented any accused before a court-martial."[50] Another protection is that detailed military counsel is ordinarily a member of the United States Army Trial Defense Service (USATDS) of the Judge Advocate General's Corps and, hence, removed from the convening authority's chain of command.[51]

d. Witnesses. It is unlawful for the convening authority to intimidate, tamper with, or improperly influence a witness.[52] Exercising unlawful command influence over a witness is reversible error.[53] While the convening authority may not unlawfully influence a witness before trial, the convening authority may have lawful dealings with the witness. In particular, the convening authority may enter into an agreement to grant the witness immunity in exchange for the witness' testimony.[54] The practice of granting of immunity is well established in both military and civilian criminal practice. The grant of immunity is lawful, and the witness is competent so long as the witness promises only to testify truthfully.[55] If the witness believes, even mistakenly, that he or she is required to give only specified testimony, however, the witness is incompetent.[56] The convening authority may be bound by promises that amount to a grant of immunity even though a proper grant of immunity was neither granted nor intended.[57]

e. The trial counsel. The Court of Military Appeals has pointed out that:

> Much less aloofness necessarily marks the relationship of the trial counsel to the convening authority. Unlike the court member and the law officer, the trial counsel is at least in some degree a partisan, and a functionary charged with the duty of insuring that all competent evidence against an accused person is presented—once the convening authority has decided that trial is warranted. Since the responsibility for supervising the orderly and effective administration of justice rests with the convening authority, he is thus—in many cases—confronted with a choice between the specter of command control, on the one hand, and the stricture of inadequate presentation [by the trial counsel], on the other. It is difficult for us to comprehend how he may safely navigate this legal-administrative Scylla and Charybdis unless he is accorded some measure of freedom in advising and instructing prosecution personnel.[58]

Although in some respects the trial counsel is the convening authority's functionary, the counsel is ordinarily an attorney. As a professional, trial counsel should ordinarily be permitted latitude for the exercise of professional judgment. However, supervision by the convening authority and the staff judge advocate can properly limit the trial counsel's freedom in choosing trial strategies and tactics.

In dictum, the Court of Military Appeals has stated that the convening authority may not reduce the trial counsel to "the likeness of an automaton."[59] It may be difficult to understand why the court would object to limitation of the trial counsel's discretion by the convening authority. Perhaps the reason lies in the UCMJ and cases which state that the trial counsel at a general court-martial must be an attorney.[60] The punitive powers of the general court-martial are so

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[47] 43 C.M.R. 750 (A.C.M.R. 1971).

[48] *Id.* at 752.

[49] In United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976), the court stated that "official inquiries outside the adversary process which question or seek justification for a judge's decision" are barred unless made by an independent judicial commission. *Id.* at 43.

[50] UCMJ art. 37.

[51] AR 27–10, chap. 6.

[52] UCMJ art. 37.

[53] United States v. Levite, 25 M.J. 334 (C.M.A. 1987); United States v. Saunders, 19 M.J. 763 (A.C.M.R. 1984); United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (en banc); United States v. Tucker, 17 M.J. 519 (A.F.C.M.R. 1983); United States v. Rodriguez, 16 M.J. 740 (A.F.C.M.R. 1983); United States v. Charles, 15 M.J. 509 (A.F.C.M.R. 1982); United States v. Estes, 28 C.M.R. 501 (A.B.R. 1959); *but see* United States v. Thomas, 22 M.J. 383 (C.M.A. 1986) (the court cited several ways that the Government might meet its burden of showing the accused was not denied favorable evidence). *See also* United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984).

[54] R.C.M. 704.

[55] United States v. Thibeault, 43 C.M.R. 704 (A.C.M.R. 1971).

[56] United States v. Conway, 42 C.M.R. 291 (C.M.. 1970).

[57] Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982).

[58] United States v. Haimson, 17 C.M.R. 208, 217–18 (C.M.A. 1954).

[59] *Id.* at 218.

[60] UCMJ art. 27; United States v. Wright, 2 M.J. 9 (C.M.A. 1976).

great that the court is convinced that both counsel ought to be attorneys, bound by the Rules of Professional Conduct for Lawyers[61] to refrain from unconscionable tactics. By requiring that the trial counsel be an attorney, the court undoubtedly believed that it was helping to ensure the integrity of the judicial process. When the convening authority deprives the trial counsel of all discretion, the convening authority in effect undermines the purpose of requiring that trial counsel be an attorney; if the convening authority dictates all decisions to the trial counsel, the nonattorney convening authority becomes the trial counsel in fact.

It is more likely that the staff judge advocate might attempt to limit the trial counsel's freedom. As the staff judge advocate is an attorney, it cannot readily be argued that this limitation of the trial counsel's discretion would violate the rule requiring that counsel be attorneys. Moreover, the staff judge advocate has two administrative duties which necessitate that the trial counsel's discretion be limited to some degree. First, there is the duty of ensuring that the convening authority's cases are prosecuted fairly but vigorously. The second duty is supervising personnel assigned to that office, including trial counsel. In one case, the Court of Military Appeals permitted the acting staff judge advocate to issue an extremely detailed set of"suggestions" to the trial counsel.[62] Nevertheless, in the same opinion, the court suggested that the staff judge advocate may not "relegate him [the trial counsel] to the role of parrot for the staff judge advocate."[63] In another case, in which the trial counsel obeyed the staff judge advocate's order to move for continuance during which the staff judge advocate intimidated a witness, the court concluded that the staff judge advocate's action was illegal[64] and held that the staff judge advocate was disqualified from conducting the post-trial review.

To date no military appellate court has reversed a conviction solely on the ground that the convening authority or staff judge advocate interfered with the trial counsel's discretion. Except where the convening authority undermines the purpose of the rule requiring counsel to be attorneys, it is difficult to conceive of a case in which the accused would be entitled to a reversal solely because of interference with the trial counsel's discretion. If the interference results in a less effective presentation of the Government's case, the accused can hardly object. On the other hand, if the interference results in a more effective presentation of the Government's case, the accused cannot seriously argue that he or she has a right to be ineptly prosecuted. An appellate court probably would not reverse a conviction on the ground of interference with the trial counsel's discretion unless some other ground for objection causes or results from the interference, for example, where the staff judge advocate requires the trial counsel to move for continuance for an unlawful purpose, or where a tactic the convening authority requires the trial counsel to use is unconscionable.

f. The convening authority. Under the UCMJ, there are three levels of convening authority: general, special, and summary.[65] The summary and special court-martial convening authorities are usually immediately subordinate to the general court-martial convening authority, and the general court-martial convening authority also ordinarily has superior convening authorities. Article 37(a) of the Code provides that a convening authority's superiors may not improperly interfere with the convening authority's performance of judicial acts.[66] It would be in violation of article 37 for a superior convening authority to dictate the disposition of a case or a recommendation of a subordinate commander or convening authority.[67]

Article 37 of the UCMJ does not prohibit general instructions or informational courses on military justice, if such courses are designed "solely for the purpose of instructing members of the command in the substantive and procedural aspects of courts-martial."[68] However, by regulation, only the military judge may orient and instruct court members on their immediate responsibilities in court-martial proceedings.[69] The commander has the right to issue policy statements to improve discipline and order and to prevent crimes provided these statements do not interfere with the discretion of court members or of inferior commanders.[70] The commander may remark on the seriousness of specific crimes provided such remarks are unbiased and do not direct or suggest certain actions by subordinate commanders.[71] The key in all cases is that each soldier charged with a crime is entitled to have guilt or innocence, and, if convicted, a sentence determined by members of the court-martial based solely upon the evidence presented during trial—free from all

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[61] DA Pam 27–26, Rules of Professional Conduct for Lawyers (31 Dec. 1987).

[62] United States v. Mallicote, 32 C.M.R. 374 (C.M.A. 1962) (without disqualifying him from further action in the case).

[63] *Id.* at 378.

[64] United States v. Kennedy, 24 C.M.R. 61 (C.M.. 1957).

[65] UCMJ arts. 22–24.

[66] UCMJ art. 37.

[67] *Id.*; R.C.M. 104(a)2).

[68] UCMJ art. 37.

[69] AR 27–10, para. 5–10*c.*

[70] United States v. Betts, 30 C.M.R. 214 (C.M.A. 1961). Because the convening authority did not feel himself bound by the Department of the Navy instruction as to the disposition of cases involving homosexuals, there was held to be no unlawful command influence. In the advice the SJA had advised the convening authority that he was not bound by the Secretary of the Navy's instructions as to the elimination of homosexuals. United States v. Estrada, 23 C.M.R. 99, 102 (C.M.A. 1957): "We do not condemn general service policies and pronouncements. It is a commander's prerogative to determine such policies and to promulgate them as he sees fit. However, it is clearly not within a commander's prerogative to inject his policies into judicial proceedings." *See also* United States v. Brice, 19 M.J. 170 (C.M.A. 1985) and United States v. Harrison, 41 C.M.R. 179 (C.M.A. 1970). The court held that a policy directive dealing with gunshot incidents in Vietnam was within the proper exercise of the convening authority's responsibility when read as a whole. *See also* United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (en banc). United States v. Schomaker, 17 M.J. 1122 (N.M.C.M.R. 1984); United States v. Robertson, 17 M.J. 8 46 (N.M.C.M.R. 1984).

[71] United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983); United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973).

external influence. Soldiers are also entitled to have a review by a neutral and impartial convening authority.[72]

g. Consequences of unlawful directives or statements. If a statement exceeds proper instructions or general policy statements, it may:

(1) Unlawfully influence court members.

(2) Usurp the function of subordinate commanders. Each level of command must have the opportunity use its independent discretion in recommending appropriate disposition of offenses.[73] Despite the recommendation or attempted disposition by a subordinate convening authority, a superior authority may direct that charges be forwarded to the superior authority for further consideration, to include referral.[74] Also, a commander may not be ordered to prefer charges if he or she does not believe the truth thereof.[75]

(3) Make the commander issuing the statement an accuser.[76]

(4) Deprive the convicted individual of an impartial individualized review.[77] The statement of a convening authority may indicate bias or prejudice, thereby disqualifying him or her from taking action on the case.

(5) Deprive the accused of character witnesses both on the merits and on extenuation and mitigation.[78]

Although the Manual furnishes some guidelines in this area, there are certain controls that cannot be exercised by the commander. These are:

(1) The commander may not issue orders or regulations that directly or indirectly suggest that certain categories of minor offenses should be disposed of under article 15.[79]

(2) The commander may not direct predetermined kinds or amounts of punishment.[80]

(3) The commander may not direct a specific type of court-martial as to a particular offender,[81] or as to a specific class of offenders.[82]

(4) The commander under certain circumstances may not withdraw a case that has already been referred to trial by an inferior court.[83]

(5) The commander may not criticize the sentences adjudged in previous cases.[84]

(6) The commander may not have a fixed policy against ameliorating any type of punishment irrespective of the facts and circumstances.[85]

(7) The commander may not have a predisposition to approve a sentence.[86]

Although there are specific actions that the commander cannot take, substantial control lawfully may be used in exercising court-martial jurisdiction.[87]

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[72] United States v. Glidewell, 19 M.J. 797 (A.C.M.R. 1985); United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973).

[73] United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956); United States v. Hinton, 2 M.J. 564 (A.C.M.R. 1976); United States v. Sims, 22 C.M.R. 591 (A.B.R. 1956).

[74] R.C.M. 601(f); United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983).

[75] R.C.M. 307(a) discussion.

[76] UCMJ art. 1(9); United States v. Corcoran, 17 M.J. 137 (C.M.A. 1984); United States v. Crossley, 10 M.J. 376 (C.M.A. 1980).

[77] United States v. Howard, 48 C.M.R. 939 (C.M.. 1974).

[78] United States v. Levite, 25 M.J. 334 (C.M.A. 1987); United States v. Saunders, 19 M.J. 763 (A.C.M.R. 1984); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (en banc); United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984) (en banc).

[79] AR 27–10, para. 3–4*b*(1).

[80] *Id.* at para. 3–4*b*(2).

[81] United States v. Charleston, 26 C.M.R. 630 (A.B.R. 1958). A company commander who had recommended an Article 15 withdrew his recommendation and recommended trial by general court-martial after the battalion executive officer told him the case could not be handled by anything less than a general court-martial.

[82] United States v. Sims, 22 C.M.R. 591 (A.B.R. 1956) (the commanding general indicated his desire that all accused with two prior AWOL convictions be tried by GCM); United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956) (the CG directed trial by general court-martial of all regular Army soldiers with two prior admissible convictions); United States v. Daley, 47 C.M.R. 365 (A.C.M.R. 1973) (the convening authority initiated a policy of trying all cases involving absence without leave from overseas replacement units by general court-martial; the court stated that "while a superior commander is not completely deprived of his right to control his subordinates and their disciplinary problems, inferior commanders must be allowed to make individualized recommendations." *Id.* at 367).

[83] Withdrawal after trial has begun or withdrawal for an improper reason may preclude a later trial for the same offenses on double jeopardy grounds. R.C.M. 604; United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983).

[84] UCMJ art. 37; United States v. Littrice, 13 C.M.R. 43 (C.M.A. 1953) (at a pretrial conference an acting squadron commander told the court members that they should not usurp the prerogatives of the convening authority and from his own experience he found that the general courts-martial were thoroughly reviewed by the superior convening authority; the court indicated that this may have tended to coerce or confuse the court as to what their own responsibilities were as to findings or sentencing; in the same case, the court found it was an unlawful command influence where at the pretrial conference the members were told that if they performed their duties as court members in an outstanding manner this would be reflected in their OER's; of particular importance in the case was the criticism by the commander of the inadequacy of sentences imposed by prior courts-martial); United States v. Hunter, 13 C.M.R. 53 (C.M.A. 1953) (it was unlawful command influence for the convening authority at a pretrial conference to discuss the prior derelictions of the accused with at least three court members and to inform them that a previous court-martial had imposed too light a sentence).

[85] United States v. Leggio, 30 C.M.R. 8 (C.M.A. 1960).

[86] United States v. Howard, 48 C.M.R. 139 (C.M.A. 1974); United States v. Wise, 20 C.M.R. 188 (C.M.A. 1955); United States v. Laurie, 20 C.M.R. 194 (C.M.A. 1955); United States v. Glidewell, 19 M.J. 797 (A.C.M.R. 1985); United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1974). *See also* United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987).

[87] *See* table 2–1.

(1) The commander can withhold article 15 authority as to specific offenders or offenses.[88]

(2) The commander may withhold court-martial jurisdiction of certain commanders by local regulations which state who will be the summary and special court-martial convening authority.[89]

The convening authority may also take the following actions:

(1) Prefer charges personally.[90]

(2) Order the reinstatement of charges for which an inferior commander had improperly given an article 15.[91]

h. Appellate agencies. While the convening authority exercises some appellate authority in the post-trial action, the appellate courts created in the UCMJ are the United States Courts of Military Review and the United States Court of Military Appeals.[92] With the advice and consent of Congress, the President appoints the members of the Court of Military Appeals.[93] The Judge Advocates General appoint the members of the Courts of Military Review.[94]

The appointing authorities may influence the outcome of cases generally by appointing or removing judges on the basis of the judges' policy views. Just as the President selects Supreme Court appointees partly on the basis of their policy views, neither the President nor The Judge Advocate General would be guilty of unlawful command influence if he selected an appointee on the basis, in part, of the appointee's policy views. In *United States v. Robertson*,[95] it appeared that an appointee had been added to the then Navy Board of Review "because of his known views on a key issue" in that case.[96] The accused alleged that as the appointee's views affected the case's outcome, The Judge Advocate General of the Navy was guilty of unlawful command influence. The Court of Military Appeals rejected the accused's contention; the court remarked that the record was "completely devoid of anything that suggests or smacks of command influence."[97] In principle, if The Judge Advocate General can appoint on the basis of the appointee's policy views, he should also be able to remove a judge from the court on the same ground. The President may not remove Court of Military Appeals judges in this fashion because, during their 15-year terms, "Judges of the United States Court of Military Appeals may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or for mental or physical disability, *but for no other cause*."[98]

An attempt by the President or The Judge Advocate General to influence one of their appointees during the judge's term would be an entirely different matter. An attempt to limit the judge's discretion or direct the judge's conduct would undoubtedly constitute unlawful influence.

2–3. Raising the issue of unlawful command influence

If the defense counsel believes that unlawful command influence will probably affect the trial's outcome, the issue may be raised in several ways. In a particular case, counsel might use one or more methods of raising the issue.

The defense counsel or the accused could file charges against the convening authority under article 98 of the Code.[99] Article 98 provides that any person who knowingly and intentionally violates a procedural rule prescribed by the UCMJ "shall be punished as a court-martial may direct."[100] An attempt to exercise unlawful command influence is a court-martial offense. The UCMJ draftsmen evidently believed that article 98 would be the primary mechanism for enforcing article 37.[101] Their belief proved to be erroneous; charges citing a violation of article 98 are rare.

Second, the defense counsel can make a motion for appropriate relief at the trial's article 39(a) session.[102] For example, in a case of unlawful command influence affecting court members, the defense counsel should conduct voir dire as a predicate for the motion. During the voir dire, counsel should attempt to elicit answers, showing that the court members know of the unlawful command influence and that it has affected their attitude toward the accused. The defense counsel should ensure that the record reflects the factual basis for the claim of unlawful command influence.[103]

Third, the defense counsel can raise the issue on appeal. In the past, when the issue arose for the first time on

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[88] AR 27–10, paras. 3–4*c*, 3–7*c*.

[89] R.C.M. 306(a). "A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally."

[90] R.C.M. 601(c). The referral to special or general court-martial and review of such case must be transferred to another convening authority or the commander can direct that a subordinate make a preliminary inquiry and prefer appropriate charges if warranted. R.C.M. 307(a) discussion.

[91] MCM, 1984, Part V, para. 1*e*; United States v. Wharton, 33 C.M.R. 729 (A.F.B.R. 1963) (The accused's squadron commander gave the accused an Article 15 for involuntary manslaughter. The superior commander ordered the Article 15 set aside. Intervening commanders and the Article 32 investigating officer recommended trial by special court-martial. The superior commander directed trial by general court-martial).

[92] UCMJ arts. 66, 67. The Military Justice Act of 1983 no permits appeal to the United States Supreme Court.

[93] UCMJ art. 67.

[94] UCMJ art. 66.

[95] 38 C.M.R. 402 (C.M.A. 1968).

[96] *Id.* 404.

[97] *Id.*

[98] UCMJ art. 67(a)(2) (emphasis added).

[99] UCMJ art. 98.

[100] *Id.*

[101] *See* H.R. Rep. No. 491 at 7–8.

[102] *See infra* chap. 23. The motion could be for change of venue, new court members, new pretrial proceedings, etc.

[103] United States v. Alexander, 19 M.J. 614 (A.C.M.R. 1984). The defense must be given an opportunity to present evidence on the issue.

appeal, the appellate courts directed both parties to submit affidavits.[104] However, the Court of Military Appeals concluded that this method was"unsatisfactory."[105] Accordingly, in*United States v. Dubay*,[106] the Court of Military Appeals established the following procedure:

> In each case, the record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command. That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the law officer will order an out-of-court hearing, in which he will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon. If he determines the proceedings by which the accused was originally tried were infected with command control, he will set aside the findings or sentence, or both, as the case may require, and proceed with the necessary rehearing. If he determines that command control did not in fact exist, he will return the record to the convening authority, who will review the findings and take action thereon… The convening authority will forward the record, together with his action thereon, to The Judge Advocate General for review by a board of review [Court of Military Review].[107]

2–4. Corrective action

If unlawful command influence is discovered before trial, the best remedy is a full, complete, and effective retraction of the acts or statements by the convening authority or offending party.[108] If unlawful command influence is found at trial, the remedy depends upon the pervasiveness of the improper influence. If the improper influence has spread generally throughout the command, the judge may grant a change of venue or a continuance until the influence subsides, or style a remedy to fit the particular circumstances. If the influence has not spread extensively, the judge can permit the defense counsel to remove by challenge any court members affected by the unlawful command influence.[109] If unlawful command influence is found during the appeal to have impacted a case, the appellate court may correct the findings or sentence or return the case to the service's Judge Advocate General for a rehearing.[110]

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[104] United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).
[105] *Id.* 413.
[106] 37 C.M.R. 411 C.M.A. 1967).
[107] *Id.*
[108] *See* United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974); United States v. Kitchens, 31 C.M.R. 175 (C.M.A. 1961); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (en banc). These cases also show that retractions are not always effective and may in some cases aggravate the issue.
[109] United States v. Roser, 21 M.J. 883 (A.C.M.R. 1986); United States v. Sherman, 21 M.J. 787 (A.C.M.R. 1986); United States v. Giarrantano, 20 M.J. 533 (A.C.M.R. 1983); United States v. Stokes, 19 M.J. 781 (A.C.M.R. 1984); United States v. Southers, 18 M.J. 795 (A.C.M.R. 1984).
[110] United States v. Levite, 25 M.J. 334 (C.M.A. 1987).

Chapter 3
The Military Judge

3–1. General

The military judge is a central participant in the court-martial. From the outset of the trial to its conclusion, the military judge plays a decisive role. When the accused moves for relief from the court, the military judge rules on the motion. When the trial and defense counsel offer evidence, the military judge determines the evidence's admissibility. The judge instructs the court members before they deliberate on findings and sentence. In short, the military judge is the individual most responsible for the fair and orderly conduct of court-martial proceedings in accordance with law and ensuring justice in the military judicial system.[1]

3–2. The evolution of the military judge's role and powers

Military judges did not always possess the powers they now have. These powers gradually accumulated since 1920. Prior to that time, under the Articles of War, the judge possessed few powers; in fact, there was no designated "judge." In 1920 Congress enacted a series of statutes which slowly increased the military judge's powers.

a. The Army Reorganization Act of 1920. [2] The Army Reorganization Act of 1920 amended the Articles of War of 1916. As amended, article 8 required that a general court-martial convening authority detail a law member to the court.[3] If a judge advocate was available, article 8 required that the convening authority detail the judge advocate as the law member. If a judge advocate was "not available for that purpose," the convening authority was to detail a specially qualified officer of another branch as law member. The courts granted the convening authority great latitude in determining whether a judge advocate was available.[4]

The law member was a voting member of the courts.[5] The law member's vote was equal to that of other members, and the law member participated fully in all closed, deliberative sessions.[6] The law member's legal powers were generally only advisory. He or she ruled initially on all interlocutory questions except challenges, but other court members could object to and overrule the determination by vote.[7] The law member ruled finally on the admissibility of evidence,[8] but the statute defined the term "admissibility" very narrowly.[9]

b. The Elston Act of 1948. The Elston Act[10] further amended the Articles of War. The Act required that the law member be an attorney, certified as qualified by The Judge Advocate General.[11] In the law member's absence, a general court-martial could neither hear evidence nor vote on findings or sentence.[12]

The law member still participated in the court's closed sessions.[13] With three exceptions, however, the law member's rulings on interlocutory questions became final.[14] The three exceptions were challenges, motions for a finding of not guilty, and questions concerning the accused's sanity.[15]

c. The Uniform Code of Military Justice of 1950. The UCMJ redesignated the law member as the law officer.[16] The law officer was removed as a voting member of the court.[17] The law officer could no longer participate in the court's closed sessions, except to assist the court members to place their findings in proper form.[18] The UCMJ gave the law officer the additional duty of instructing the court members on the elements of the offense.[19]

The Department of the Army took additional steps to improve the law officer's status. First, the Department of the Army established the Law Officer Program in 1958.[20] Under the program, law officers were required to be qualified

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[1] R.C.M. 801. *See* United States v. Graves, 50 C.M.R. 393, 396 (C.M.A. 1975): "The trial judge is more than a mere referee, and as such, he is required to assure that the accused receives a fair trial."

[2] Act of June 4, 1920, chap. 227, 41 Stat. 759, 787–812 (1920). The statute is also known as the National Defense Act of 1920.

[3] 41 Stat. at 788.

[4] Hiatt v. Brown, 339 U.S. 103 (1950) (the court sustained the convening authority's determination that a judge advocate was unavailable for detail as law officer even though the convening authority appointed a judge advocate as assistant prosecutor).

[5] 41 Stat. at 793, note 2; MCM, 1928, paras. 38*a*, 40; MCM, 1921, para. 89*a*.

[6] *Id.*

[7] MCM, 1928, paras. 40, 51.

[8] MCM, 1928, paras. 40, 51; MCM, 1921, para. 89*a*.

[9] 41 Stat. at 793, note 2; MCM, 1928, para. 51*d*; MCM, 1921, para. 89*a*(4).

[10] Title II, Selective Service Act of 1948, Pub. L. No. 80–759, 62 Stat. 604, 627–44 (1948).

[11] 62 Stat. at 629, note 10; MCM, 1949, para. 4*e*.

[12] 62 Stat. at 629, note 10.

[13] MCM, 1949, para. 38*a*.

[14] 62 Stat. note 10, at 631–32; MCM, 1949, paras. 51*a*, 51*d*, 58*f*.

[15] MCM, 1949, paras. 51*a*, 51*d*, 58*f*.

[16] UCMJ art. 26.

[17] *Id*

[18] *Id.*

[19] *Id.* at arts. 26, 39, 51.

[20] Letter, Adjutant General of the Army to commanders exercising general court-martial jurisdiction, AGAO–CC 210.31 (29 Oct. 1958); JAG, HQDA, TAGO, 27 Oct. 1958, subject: Law Officer Program. Para. 1, General Order 37, HQDA, dated 13 Nov. 1958, created the Field Judiciary. Para. 1, General Order 5, HQDA, dated 7 Mar. 1961. Section V, General Order 56, HQDA dated 26 Sept. 1962, redesignated the activity as the U.S. Army Judiciary, a Class II activity of The Judge Advocate General.

judge advocates, normally on a 3-year tour of duty. The law officers became members of the Field Judiciary under The Judge Advocate General's direct control. In turn, the Judiciary assigned its members to duty stations within judicial circuits.[21] Although the law officer might be assigned to a convening authority's station, the law officer was not a member of the convening authority's command; and neither the convening authority nor the staff judge advocate supervised the law officer's performance of judicial duties.

Second, The Judge Advocate General redesignated the Field Judiciary as the United States Army Judiciary and reorganized the Judiciary as a separate Class II activity.[22] The reorganization removed the law officers from the direct control of even The Judge Advocate General. The Judiciary was largely self-supervised.[23]

d. The Military Justice Act of 1968. The Military Justice Act of 1968[24] amended the UCMJ, redesignating the law officer as a military judge.[25] The Act prohibited the judge from participating in the court members' closed sessions.[26] The Act granted the judge additional powers while in open session; any judicial rulings on questions of law, including interlocutory questions and motions for a finding of not guilty, became final.[27]

As a result of the Secretary of the Army's implementation of the Act, the Army now has full-time military judges. Their status is governed by statute.[28] Their efficiency ratings are prepared and reviewed within the Judiciary to help insulate the judges from command control.

The Act greatly increased the military judge's powers by permitting general or special court-martial trial of noncapital cases by judge alone.[29] If the accused requests trial by judge alone and the judge grants the request, the court members are excused, and the military judge assumes all the court members' powers to make findings and adjudge sentence. Chapter 28 discusses the procedure for trial by judge alone.

e. The military judge's present status. The UCMJ manifests Congress' intention to make the military judge as nearly like a Federal civilian judge "as it was possible under the circumstances."[30] The Military Justice Act of 1983 and the 1984 Manual further reduce the differences between military judges and their civilian counterparts. The Manual contains a list of the military judge's principal powers: presiding over the court-martial's open sessions; taking action to ensure that the court's proceedings are conducted in a dignified manner; ruling on interlocutory questions; recessing and adjourning the court; instructing the court members; calling article 39(a) sessions; holding the arraignment; receiving pleas; setting the time for assembly and the uniform; assisting the court in open session to put findings in proper form; and both making the findings and adjudging the sentence where the trial is by judge alone.[31]

The Court of Military Appeals has also sought to effectuate Congress' intention. The court has announced its goal "to assimilate the status of the [military judge], wherever possible, to that of a civilian judge of the Federal system."[32]

The President and the Secretary of the Army have empowered military judges to issue search authorizations.[33] Army Regulation 27–10 provides that military judges and military magistrates may issue search, seizure or apprehension authorizations if the affidavits or testimony presented establish probable cause.[34]

The Court of Military Appeals has encouraged trial judges to issue orders to effectuate their findings.[35] While these cases indicate that the military judge must be involved in the pretrial confinement process,[36] the Court of Military Appeals has indicated that the military should follow the civilian approach[37] in having a neutral and detached magistrate decide if an accused could and should be detained.[38] By regulation, the Army has adopted such a system to review pretrial confinement.[39] A series of recent decisions has expanded the post-trial powers of the military judge to include conducting post-trial sessions to consider the legal sufficiency of evidence[40] and newly discovered evidence.[41]

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[21] "Standard Operating Procedure," memorandum of Field Judiciary Division, Office of The Judge Advocate General (1 Jan 1959); *see also* Meagher & Mummey, *Judges in Uniform: An Independent Judiciary for the Army*, 44 J. Am. Jud. Soc'y 46 (1960); Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178 (1960).

[22] "The U.S. Army Judiciary," JAGO Mem. No. 10–4 (27 Nov. 1962).

[23] *Id.*

[24] Pub. L. No. 90–632, 82 Stat. 1335 (1968). *See* Ervin, *The Military Justice Act of 1968*, 45 Mil. L. Rev. 77 (1969).

[25] UCMJ art. 26.

[26] *Id.*

[27] UCMJ art. 51.

[28] UCMJ art. 26. *See also* United States v. Moorehead, 44 C.M.R. 4 (C.M.A. 1971) (the military judge of a Coast Guard general court-martial did not have "primary duty" as required by article 26(c), where the Coast Guard arrangement was one of random or one-time use of a military judge in general courts-martial).

[29] UCMJ art. 16.

[30] *Hearings before the House Armed Services Committee on H.R. 2498*, 81st Cong., 1st Sess., 607 (1949); United States v. Renton, 25 C.M.R. 201 (C.M.A. 1958).

[31] R.C.M. 801.

[32] United States v. Biesak, 14 C.M.R. 132, 140 (C.M.A. 1954).

[33] Mil. R. Evid. 315(d)(2); AR 2–10, chap. 9.

[34] AR 27–10, chap. 9.

[35] *See, e.g.*, Phillippy v. McLucas, 50 C.M.R. 915 (1975); Milanes-Canamero v. Richardson, 50 C.M.R. 916 (1975); Porter v. Richardson, 50 C.M.R. 910 (1975).

[36] *See* Bouler v. Wood, 50 C.M.R. 854 (C.M.A. 1975).

[37] Gerstein v. Pugh, 40 U.S. 103 (1975).

[38] Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976).

[39] AR 27–10, chap. 9. *See also R.C.M. 305.*

[40] United States v. Griffith, 27 M.J. 42 (C.M.A. 1988).

[41] United States v. Scaff, 29 M.J. 60 (C.M.A. 1989).

A Federal civilian judge ordinarily may exercise appropriate judicial authority at any time, but a military judge may not exercise such judicial authority until detailed to a court-martial.[42] Military judges also lack the authority to suspend sentences.[43] Finally, the military judge lacks one of the Federal civilian judge's most important guarantees of independence, tenure.[44] The Judge Advocate General may summarily revoke the certification of a military judge.[45] While the Military Justice Act of 1968 granted military judges many functions and powers more similar to those of Federal district judges,[46] there are still important differences between military judges and Federal civilian judges.

3–3. The military judge's qualifications

The UCMJ requires that the military judge possess certain military and legal qualifications. The only military status requirement is that the judge be a commissioned officer on active duty.[47] The judge need not be in the same armed force as the accused.[48] The statutory requirements are that the military judge be (1) a member of the bar of a Federal court or the highest court of a State, and (2) certified as qualified to perform judicial duties by the Judge Advocate General.[49] A clear distinction must be made between statutory disqualifications and mere ineligibility.[50] If, in violation of article 26(d), the military judge previously acted as accuser, prosecution witness, investigating officer, or counsel in a case, the military judge is ineligible to participate in the trial.[51] The judge's ineligibility does not deprive the court of jurisdiction, but may necessitate a rehearing. An ineligible judge should excuse himself or herself from the trial;[52] but the accused may expressly waive the military judge's ineligibility.[53]

What is the effect of a failure to detail a qualified military judge to a court-martial? Every general court-martial must have a qualified military judge or there is jurisdictional error.[54] If a qualified military judge is not detailed to a special court-martial, the special court-martial may not adjudge a bad conduct discharge.[55]

3–4. Professional standards for the military judge

The Code of Judicial Conduct and the Rules of Professional Conduct for Lawyers are directly applicable to military judges.[56] In addition, all of the ABA Standards for Criminal Justice, to include the Special Functions of the Trial Judge, apply to military judges unless clearly inconsistent with the UCMJ, MCM, or department regulations.[57]

Most of the ethical and professional problems the military judge encounters fall into three broad areas: regulating the conduct of the trial; relationships with parties; and the maintenance of judicial independence.

a. Regulating the conduct of the trial. The Manual generally empowers the military judge to preside over and control the proceedings.[58] In exercising the power to regulate the trial's conduct, the military judge frequently encounters four problems. First, the military judge must not exercise the power to question witnesses so as to create the appearance of bias against the accused.[59] Even when sitting with a court and without authority to make findings or adjudge a sentence, a judge could improperly display bias which might unfairly prejudice the court members against the accused:

> It is a matter of common knowledge that jurors hang tenaciously upon remarks made by the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the effect of a witness' testimony or the merits of the case, they almost invariably follow them.[60]

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[42] R.C.M. 503(b), 803.
[43] United States v. Occhi, 2 M.J. 60 (C.M.A. 1976).
[44] *See, e.g.*, *In re* Taylor, 31 C.M.R. 13 (C.M.A. 1961) (Judge Advocate General may decertify a military judge as an administrative matter); *see also* The Military Justice Act of 1983 Advisory Commission Report, Dec. 1984; Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J. 327 (1984).
[45] *In re* Taylor, 31 C.M.R. 13 (C.M.A. 1961).
[46] S. Rep. No. 1601, 90th Cong., 2d Sess. 3 (1969).
[47] UCMJ art. 26(b).
[48] R.C.M. 503(b)(3).
[49] UCMJ art. 26(b).
[50] R.C.M. 502(c); R.C.M. 503 analysis.
[51] United States v. Cardwell, 46 C.M.R. 1301 (A.C.M.R. 1973) (a trail judge should recuse himself if he acted on matters before him as magistrate and becomes prosecution witness); United States v. Watson, 47 C.M.R. 990 (A.C.M.R. 1973) (opinion formed in related case my disqualify judge); United States v. Law, 28 C.M.R. 139 (C.M.A. 1959).
[52] United States v. Renton, 25 C.M.R. 201 (C.M.A. 1958).
[53] United States v. Griffin, 8 M.J. 66 (C.M.A. 1979); United States v. Airhart, 48 C.M.R. 685 (C.M.A. 1974) (military judge had authenticated prosecution evidence); United States v. Law, 28 C.M.R. 139 (C.M.A. 1959).
[54] UCMJ art. 26.
[55] UCMJ art. 19; AR 27–10, para. 8–6*b*(3)(c) (a military judge not assigned to the U.S. Army Trial Judiciary may not preside over a BCD Special Court-Martial).
[56] AR 27–10, para 5–8; DA Pam 27–26.
[57] AR 27–10, para. 5–8.
[58] R.C.M. 801.
[59] *See* United States v. Morgan, 22 M.J. 959 (C.G.C.M.R. 1986); United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984); United States v. Shackleford, 2 M.J. 17 (C.M.A. 1976); United States v. Clower, 48 C.M.R. 307 (C.M.A. 1974).
[60] State v. Philpot, 97 Iowa 365, 369, 66 N.W. 730, 732 (1896).

The judge must strive to maintain an impartial and objective stance.[61]

When an appellate court analyzes the propriety of the military judge's examination of a witness, the court will consider the following factors, inter alia: (1) the number of questions; (2) the questions' phrasing; (3) the evident purpose of the questions; and (4) the witness' identity.[62] The fact that the judge's question was more likely to have been asked by the prosecution than by the defense is insufficient to show that the judge displayed bias.[63] As long as the judge does not display favoritism,[64] the judge may ask the witness to develop the facts for the court members' better understanding.[65] The judge should be especially careful in questioning the accused.[66] The military judge may not abandon his or her impartial role and become more prosecutor than judge.[67]

Second, the military judge must prevent the court members from asking biased or otherwise improper questions. When counsel and the military judge have completed questioning a witness, the court members have an opportunity to ask questions.[68] All questions by court members must be in writing.[69] The military judge may prevent the court members from asking repetitious questions or questions calling for inadmissible responses.[70] The military judge should also prevent the court members from asking questions which reflect bias against the accused.[71] Like the military judge, the court members may not overtly side with the prosecution.[72] A court member may not indicate an opinion of the accused's guilt or innocence until the member has received all the relevant material, evidentiary and instructional.[73] As a precaution, the military judge shall require that the court member submit the question in writing to the judge for approval.[74]

Third, the military judge should resist assisting counsel in the presentation of their cases.[75] The court-martial is an adversary proceeding, and opposing counsel should ordinarily be permitted to execute their own trial strategies.[76] The commentary to Standard 6-1.1(a) states that "the judge should avoid trying the case for the lawyers."[77] The ABA Standards authorize the judge to intervene in the conduct of a case.[78] The judge may give isolated, occasional assistance to counsel who are uncertain of the correct procedures.[79] When the military judge frequently intervenes to assist counsel, however, there may be an appearance of partiality.[80] As a general rule, the military judge should intervene only as necessary.

Fourth, just as the military judge controls court members' conduct, the military judge must regulate counsel's conduct during the course of the trial. The military appellate courts have held that the military judge must prevent counsel from engaging in bitter, personal exchanges before the court members.[81] Standard 6-3.2 expressly requires that the judge prohibit colloquy between counsel in the jury's presence.[82] If any counsel engages in unprofessional conduct

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[61] United States v. Hardy, 30 M.J. 757 (A.C.M.R. 1990).

[62] *See* United States v. Posey, 44 C.M.R. 242 (C.M.A. 1972) (military judge, sitting alone, subjected the accused to extensive questioning on insignificant details during the presentencing proceedings); United States v. Flagg, 29 C.M.R. 452 (C.M.A. 1960) (court members asked accused numerous and detailed questions).

[63] United States v. Lindsay, 30 C.M.R. 235 (C.M.A. 1961) (the military judge can ask questions to clear up uncertainties and develop facts for better understanding by the court).

[64] United States v. Carper, 45 C.M.R. 809 (N.C.M.R. 1972) (improper for military judge to praise prosecution witness for his testimony; however nonprejudicial when military judge sitting alone); United States v. Coleman, 42 C.M.R. 769 (A.C.M.R. 1970).

[65] United States v. Snipes, 19 M.J. 913 (A.C.M.R. 1985); United States v. Coleman, 42 C.M.R. 769 (A.C.M.R. 1970) (inappropriate questioning of witness by military judge on matters outside direct examination and improperly soliciting opinion as to appropriate sentence).

[66] United States v. Posey, 44 C.M.R. 242 (C.M.A. 1972); United States v. Bouie, 18 M.J. 529 (A.F.C.M.R. 1984) (military judge asked accused 370 questions; test is not the number of questions asked but whether accused was prejudiced).

[67] United States v. Shackelford, 2 M.J. 17 (C.M.A. 1976); United States v. Morgan, 22 M.J. 959 (C.G.C.M.R. 1986) (military judge overstepped bounds of impartiality in cross-examining accused to obtain admission of knife where trial counsel had been unsuccessful in obtaining admission).

[68] Mil. R. Evid. 614(b).

[69] *Id.*

[70] United States v. Jackson, 14 C.M.R. 64 (C.M.. 1954).

[71] United States v. Smith, 20 C.M.R. 237 (C.M.A. 1955) (accused testified on the merits that he was not at the scene of the offense; accused was twice recalled to the stand by the president of the court who told him the court did not believe his testimony; the conduct of the president and the tacit approval of the court members indicated that the court-martial members deserted their proper role and joined the ranks of partisan advocates).

[72] United States v. Lamella, 7 M.J. 277 (C.M.A. 1979).

[73] Benchbook, para. 2–24.

[74] Mil. R. Evid. 614(b) (shall be in writing); United States v. Marshall, 30 C.M.R. 117 (C.M.A. 1961) (members of court conducted oral partisan examination of accused); *but see* United States v. Miller, 14 M.J. 924 (A.F.C.M.R. 1982) (oral questions by court members is within the military judge's discretion). The *Miller* holding is not a recommended practice.

[75] United States v. Taylor, 47 C.M.R. 445 (A.C.M.R. 1973) (military judge abandoned impartial role and assumed role of advocate in order to aid an inexperienced prosecutor). *See also* United States v. Felton, 31 M.J. 526 (A.C.M.R. 1990); *contra*, United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990) (judge assisting trial counsel in laying foundation for evidence did not become a partisan advocate).

[76] United States v. Jordan, 45 C.M.R. 719 (A.C.M.R. 1972) (impartiality was lost when the military judge called and impartially questioned a witness, not desired by either counsel); United States v. Howard, 33 M.J. 596 (A.C.M.R. 1991) (impartiality was lost when the military judge, relying on his own expertise, permitted the trial counsel to re-open the prosecution case after closing arguments on sentencing).

[77] Commentary, ABA Standards Relating To The Special Functions Of The Trial Judge, § 6–1.1(a) (1980).

[78] Commentary, ABA Standards Relating To The Special Functions Of The Trial Judge, § 6–1.1 (1980).

[79] United States v. Payne, 12 C.M.A. 455, 31 C.M.R. 41 (1961).

[80] United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984).

[81] United States v. Lewis, 16 C.M.A. 145, 36 C.M.R. 301 (1966); United States v. Cannon, 26 C.M.R. 593 (A.B.R. 1958).

[82] ABA Standards Relating To The Special Functions Of The Trial Judge, § 6–3.2 (1980).

in the court, the military judge should correct the counsel. Standard 6-3.5 provides that the judge should correct the abuse and, if necessary, discipline the attorney.[83]

b. The military judge's relations with the parties. The commentary on Canon 2 of the Code of Judicial Conduct states that "a judge must avoid all impropriety and appearance of impropriety." Legal institutions are public institutions which will not function effectively unless the public has complete confidence in judges' personal and professional integrity. The military judge must be extraordinarily conscientious in complying with Canon 2.[84] The military community is a much tighter and more closely knit community than the civilian community. The nature of this community makes the military courts' emphasis upon the avoidance of impropriety an absolute imperative.

A judge can easily create the appearance of impropriety by engaging in ex parte communications with one of the parties. Canon 3 of the Code of Judicial Conduct provides that the judge generally should"neither initiate nor consider ex parte … communications concerning a pending or impending proceeding."[85] Standard 6-2.1's condemnation of ex parte communications is equally firm. "The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice."[86] The Canon and Standard are designed to safeguard the accused's rights to confrontation and a trial on the record. If the military judge accepts ex parte communications from the trial counsel, the accused cannot be certain that guilt will be determined solely on the basis of the evidence in the record or that the accused has had an opportunity to confront all the witnesses. A violation of the prohibition on ex parte communications can result in a denial of the accused's constitutional rights. It is well-settled that the judge may not discuss the case's merits with the trial counsel in the defense counsel's absence.[87] The Court of Military Appeals treats meetings between the military judge and the staff judge advocate or his or her representative in a similar fashion.[88] The military judge may, in certain cases, review the pretrial file which the staff judge advocate's office prepares.[89] The Court of Military Appeals has suggested, however, that if the judge is sitting without court members, any right to examine the pretrial file is more limited than when sitting with court members.[90] As a practical matter, the military judge's reading of the pretrial investigation or the file of the staff judge advocate raises needless issues in most cases. Though not ex parte, such communication may raise an appearance of impropriety. The practice is best avoided.

The judge's social relations can also create an appearance of impropriety. Social or business relations or friendships must not create the suspicion that they constitute an element influencing judicial conduct.[91] Canon 2 of the Code and Standard 6- 1.5 expressly prohibit the judge only from permitting his social relations to influence his or her judicial conduct;[92] but the commentary on Standard 6-1.5 makes it clear that when read in the light of Canon 2, Standard 6-1.5 requires that the judge avoid creating any "appearance that suggests a special relationship."[93] The Canon and Standard pose peculiar problems for the military judge. Over the course of a military career, the military judge will become closely acquainted with many of the staff judge advocates, trial counsel, and defense counsel with whom the military judge will have official dealings. Many military installations have very limited housing facilities, and the military judge might discover that a close neighbor is the staff judge advocate with whom the judge must work. It is true that the military judge need not live "in … seclusion,"[94] but the military judge should be circumspect in social relations with representatives of the convening authority.

c. The military judge's independence. Canon 1 of the Code of Judicial Conduct enjoins the judge to preserve "the independence of the judiciary… "[95] Canon 3 adds that the judge"should be unswayed by partisan interests, public

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[83] *Id.* at § 6–3.5.

[84] *See, e.g.,* United States v. Goodman, 3 M.J. 1 (C.M.A. 1977) (the military judge provided pretrial advice to the criminal investigator); United States v. Reeves, 12 M.J. 763 (A.C.M.R. 1981) (the military judge who conducted the pretrial confinement hearing of this accused was not automatically an investigating officer); United States v. Tomcheck, 4 M.J. 66 (C.M.A. 1977) (ethical violation for military judge to testify as an adverse character witness against an accused); United States v. Conley, 4 M.J. 327 (C.M.A. 1978) (military judge became a witness for the prosecution when he used his expertise as a handwriting examiner to compare questioned documents with accused's handwriting); United States v. Berman, 28 M.J. 615 (A.F.C.M.R. 1989) (military judge's sexual relationship with trial counsel disqualified judge as to all cases in which trial counsel appeared).

[85] ABA Code Of Judicial Conduct Canon 3 (1972).

[86] ABA Standards Relating To The Special Functions Of The Trial Judge No. 6–2.1 (1980).

[87] United States v. Gardner, 46 C.M.R. 1025 (A.C.M.R. 1972) (military judge received *ex parte* from the trial counsel a list of legal authorities and military judge spoke with the trial counsel about the expected testimony of a witness); United States v. Copening, 34 M.J. 28 (C.M.A. 1992) (military judge discussed *ex parte* alternative theories of admissibility for suppressed evidence which became relevant in a motion for reconsideration).

[88] In United States v. Priest, 42 C.M.R. 48 (C.M.A. 1970), and United States v. Powell, 42 C.M.R. 237 (C.M.A. 1970), the Court of Military Appeals held that the military judge's unrecorded conferences with the staff judge advocate or his representative constituted error.

[89] United States v. Mitchell, 36 C.M.R. 14 (C.M.A. 1965) (reference to pretrial files will frequently assist trial judges in uncovering all legal issues in a particular case).

[90] United States v. Carroll, 43 C.M.R. 152 (C.M.A. 1971) (reading by military judge of pretrial advice and article 32 proceedings without knowledge and consent of accused was error, but such error did not necessarily constitute reversible error. The issue was whether, because of the error, the accused received a more severe sentence than might otherwise have been imposed). *See also* United States v. Paulin, 6 M.J. 38 (C.M.A. 1978).

[91] ABA Code Of Judicial Conduct Cannon 2 and 5 (1972); ABA Standards Relating To The Special Functions Of The Trial Judge No. 6–1.5 (1980); *see* United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988) and *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989).

[92] ABA Code Of Judicial Conduct Canon 2 and 5 (1972); ABA Standards Relating To The Special Functions Of The Trial Judge No. 6–1.5 (1980).

[93] Commentary, ABA Standards Relating To The Special Functions Of The Trial Judge, No. 6–1.5 (1980).

[94] ABA Canons Of Judicial Ethics No. 33 (1937).

[95] ABA Code Of Judicial Conduct Canon 1 (1972).

clamor, or fear of criticism."[96] The military judge's observance of these canons is especially important in light of the charges of unlawful command influence which are occasionally leveled against the court-martial system. The Congress, the President, The Judge Advocate General, and the Court of Military Appeals have all sought to insulate the military judge from such influence. To a large extent, their efforts have been successful. The charge is an insistent one, however, and the military judge can counter the charge only by scrupulously observing Canons 1 and 3. The military judge must never give the public reason to believe that his or her independence has been compromised.

d. Conclusion. It is the military judge's responsibility to ensure that the trial is conducted in a fair and orderly manner.[97] The purpose of the Code of Judicial Conduct and the Standards is to ensure that the judge fulfills that responsibility. The Code's canons and the Standards are ethical and professional rules that guarantee the proceeding's fundamental fairness. Whenever the military judge violates these rules, there is a strong likelihood that the military judge has committed error, which the appellate courts will test for prejudice.[98]

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[96] *Id.*at Canon 3.

[97] R.C.M. 801(a) discussion. The military judge also must be careful not to exceed "the permissible scope of public discussion of an on-going trial." United States v. Garwood, 20 M.J. 148, 151 (C.M.A. 1985).

[98] *See* United States v. Wiggens, 25 M.J. 587 (A.C.M.R. 1987); United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988).

Chapter 4
The Court Members

4–1. General

A court-martial adjudicates the accused's guilt or innocence. The convening authority selects the court members who will make the adjudication, the military judge guides and instructs them, and counsel attempt to persuade them. Unless the military judge has granted the accused's request for trial by judge alone, the court members have the ultimate responsibility of fulfilling the trial's purpose.

4–2. Court members' qualifications

a. Court members in general. There are three principal sources which establish court members' qualifications and disqualifications: the UCMJ, the Manual for Courts-Martial, and service regulations.

(1) *Qualifications.* Article 25 of the UCMJ establishes the statutory qualifications for court members.[1] First, the court member must be on active duty with the armed forces.[2] The court member need not be a member of the same command[3] or the same armed force[4] as the accused. If the court member is not a member of the convening authority's command, the member's own commander must consent to such service on the court.[5] If the court member and the accused are not members of the same armed force, the member is still qualified; but"[w]hen a court-martial composed of members of different armed forces is selected, at least a majority of the members should be of the same armed force as the accused unless exigent circumstances make it impractical to do so without manifest injury to the service."[6] Because civilians lack a military status, they ordinarily are not qualified to serve as court members. Even where the accused is a civilian, the UCMJ does not authorize civilians to serve as court members.[7] The only exception to the general rule is that members of two agencies, the National Oceanic and Atmospheric Administration and the Public Health Service, are qualified to serve as court members while they are assigned to and serving with an armed force.[8] Under such circumstances, these two agencies qualify as uniformed services.

Second, the court member must be in a qualified personnel category. There are three categories: commissioned officers, warrant officers, and enlisted soldiers.[9] Commissioned officers qualify as court members for the trial of an accused in any category.[10] Warrant officers qualify as court members for the trial of other warrant officers and enlisted soldiers.[11] A warrant officer is not qualified to serve as a court member in the trial of a commissioned officer.[12] An enlisted soldier is not qualified to serve as a court member in the trial of a commissioned or warrant officer.[13] An enlisted soldier may serve as a court member in the trial of another enlisted soldier if the accused specifically requests enlisted soldiers orally on the record, or in writing; the personal request is a jurisdictional requirement.[14] The enlisted court member must not be a member of the accused's unit.[15] The exclusion of members of the accused's own unit raises three questions.

The first question is: How is a unit defined? Article 25(c)(2) of the UCMJ states that a unit is "any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them."[16] Irrespective of size, the body constitutes a single unit if the body meets the statutory definition of the term.[17] In a case in which the company's assigned strength was almost 1,000 men, a Board of Review stated that:

> [A]s the size of Army units is no longer regulated by statute, we do not attribute to the Congress an intention to

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[1] UCMJ art. 25.

[2] *Id.*; R.C.M. 502(a)(1); R.C.M. 103 discussion states that:

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

[3] R.C.M. 503(a)(3).

[4] *Id.*

[5] *Id.* Such concurrence "may be oral and need not be shown by the record of trial." *Id.* discussion.

[6] *Id.* discussion.

[7] UCMJ art. 25.

[8] R.C.M. 502(a) discussion.

[9] *Id.*

[10] R.C.M. 502(a)(1)(A).

[11] R.C.M. 502(a)(1)(B).

[12] *Id.*

[13] R.C.M. 502(a)(1)(C).

[14] *Id.See*, *e.g.* United States v. Brookins, 33 M.J. 793 (A.C.M.R. 1991).

[15] UCMJ art. 25.

[16] *Id.*

[17] *Id.*, United States v. Wilson, 21 M.J. 193 (C.M.A. 1986); United States v. Scott, 25 C.M.R. 636 (A.B.R. 1958).

> apply the terms "unit"or "company" to military bodies of any particular strength or composition. … [C]ompanies as now organized may vary widely in their authorized strengths, and their actual strength can fluctuate from less than that considered normal for a squad or platoon to more than battalion size.[18]

Thus, all the enlisted soldiers of the accused's company were considered members of the unit and disqualified from serving as members of the accused's court-martial.

The second question is: For purposes of article 25, who is considered a member of the unit? Is the membership restricted to persons formally assigned to the unit, or does membership include persons attached to or on temporary duty with the unit? Before the UCMJ's enactment, the Articles of War referred to enlisted soldiers "assigned" to the accused's unit.[19] Construing this language, one Board of Review held that only persons "formally" assigned to the same unit as the accused were within the proscription.[20] The UCMJ, however, uses broader language; it refers to "a member of the same unit."[21] Congress' use of broader language in the UCMJ suggests that Congress intended to extend the disqualification to enlisted soldiers attached to the accused's unit.[22] Although ineligible, participation by such an enlisted court member is a nonjurisdictional defect that can be waived by failure to object.[23]

The third question is: What is the critical time for determining whether the accused and the enlisted court member were members of the same unit? Is the critical time (1) the date of the offense's commission, (2) the date of trial, or (3) both dates? One Board of Review stated that "[q]uite clearly, the Article (25) provides at least that membership in the same unit at the time of trial is not permitted."[24] A purposive construction of the statute would be that both times are critical. If a person is in the same unit as the accused at the time of the offense or the trial, that person is likely to be exposed to prejudicial pretrial information. The statute should be construed liberally to effectuate its purpose; and so construed, the statute bars enlisted soldiers who were members of the accused's unit at the time of the offense or at the time of trial.

While there are requirements as to active duty and personnel category, there are no absolute requirements as to the member's rank. An accused should not be tried by a court with any members below the accused in grade or rank.[25] If a member who is junior in rank to the accused does sit, the error is not jurisdictional.[26]

(2) *Disqualifications.* Article 25(d)(2) provides that accusers, prosecution witnesses, investigating officers, and counsel in the same case are ineligible as court members.[27] A problem occasionally arises when a court member has certified or authenticated a prosecution exhibit. For example, where a court member has signed the morning report extract in an AWOL case[28] or the ship's diary in an AWOL/missing movement case,[29] he or she has been deemed a prosecution witness and, hence, disqualified. The court member also becomes a prosecution witness if the trial counsel introduces a record of previous convictions signed by the court member.[30] In a similar fact situation, where the court member had signed the accused's service record, the court disqualified the court member on the theory that, in the process of preparing the service record, the court member had become an investigating officer.[31] In one case, where the court member authenticated the accused's service record but the accused had plead guilty, the Navy Board of Review refused to find error.[32] Reaching a contrary result, however, an Air Force Board of Review argued that "we are dealing with the question of the competency of a member of a court, which question is independent of and completely disassociated from the accused's plea. Obviously, the qualifications of a member of a court are not contingent upon nor affected by the accused's plea."[33]

(3) *Unavailability by regulation.* By regulation, the services may restrict the availability of certain members.[34] For example, Army regulations provide that Chaplains, Medical Corps officers, Medical Specialist Corps officers, Dental

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[18] *Scott*, 25 C.M.R. at 640;*see also* United States v. Timmons, 49 C.M.R. 94 (N.C.M.R. 1974).
[19] United States v. Quimbo, No. 335865, 2 B.R.J.C. (1949).
[20] *Id.*
[21] UCMJ art. 25(c) (1).
[22] The twin purposes of the disqualification are to ensure the selection of members without any previous bias against the accused, and to prevent ill feelings from developing among the members of the same unit. Enlisted soldiers attached to a unit are as exposed to prejudicial information, circulating within the unit, as assigned members. Ill will between an assigned and attached member of a unit can be just as disruptive as ill will between two assigned members of the unit. It would serve the legislative purposes to construe the disqualification extending to at least members attached to the accused's unit.
[23] United States v. Wilson, 21 M.J. 193 (C.M.A. 1986); *accord* United States v. Kimball, 13 M.J. 659 (N.M.C.M.R. 1982); United States v. Tagert, 11 M.J. 677 (N.M.C.M.R. 1981).
[24] United States v. Cook, 16 C.M.R. 404, 406 (N.B.R. 1954).
[25] UCMJ art. 25; R.C.M. 503(a)(1) discussion; R.C.M. 912(f)(l)(k) (unless unavoidable).
[26] United States v. McGee, 15 M.J. 1004 (N.M.C.M.R. 1983) (error waived by a failure to object). *See also*United States v. Schneider, A.C.M. 9003419 (A.C.M.R. 31 Jan 1992).
[27] UCMJ art. 25.
[28] United States v. Beeks, 9 C.M.R. 743 (A.F.B.R. 1953).
[29] United States v. Wells, 4 C.M.R. 501 (C.G.B.R. 1952).
[30] United States v. Smith, 16 C.M.R. 453 (C.G.B.R. 1954); United States v. Hurst, 11 C.M.R. 649 (C.G.B.R. 1953).
[31] United States v. McDermott, 14 C.M.R. 473 (N.B.R. 1953).
[32] United States v. Forehand, 8 C.M.R. 564 (N.B.R. 1953).
[33] United States v. Morris, 9 C.M.R. 786, 788 (A.F.B.R. 1953).
[34] AR 27–10, chap. 7 contains a reference of such restrictions.

Corps officers, Veterinary Corps officers, Army Nurse Corps officers and Inspectors General are normally not available for detail as court members.[35]

(4) *Specific types of court members.* There has been some confusion concerning specific types of court members. Lawyers are qualified to serve as court members. As chapter 3 pointed out, the Articles of War contemplated that one of the court members could be a lawyer. However, the advent of the military judge makes it unnecessary to include a lawyer among the court members. Moreover, there is a danger that, if one court member is a lawyer, he or she will usurp the other members' functions, or they will be unduly swayed by the lawyer's views. Consequently, the Court of Military Appeals discourages the practice of detailing legal officers as court members.[36]

Similarly, military police personnel are not per se disqualified from court membership.[37] Courts have discouraged the unnecessary selection of military police, however. "At the risk of being redundant—we say again—individuals assigned to military police duties should not be appointed as members of courts- martial. Those who are the principal law enforcement officers at an installation must not be."[38] Of course military police are subject to challenge to the same extent as any other member for proper reasons.

b. The president of the court. The senior detailed member of the court is its president.[39] If someone other than the senior member serves as president but the error does not appear to have had any effect upon the trial's outcome, the error is harmless.[40]

c. Selection of members. Subject to the foregoing qualifications and disqualifications, the convening authority is directed to "detail

… such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[41] Within these criteria, the convening authority has broad discretion in selecting court membership.[42] Rank, however, may not be used as a device for the systematic exclusion of qualified court members.[43] The convening authority may intentionally include members of a particular gender, provided inclusion is for a proper purpose.[44] The convening authority may rely on the recommendations of the staff and subordinate commanders who nominate prospective court members.[45] The convening authority may even appoint a court selected by a convening authority of another command or members from another command or armed force if made available by their commander.[46] Persons working in the prosecutorial arm of the convening authority's staff should not participate in the selection of members because of the appearance of impropriety that is raised.[47]

4–3. Court members' duties

a. Court members in general. The court members have essentially the same duties as civilian jurors. The members must be present throughout the entire trial except for out of court hearings on motions and other matters. The members hear or see the evidence presented by the prosecution and defense and, after receiving instructions on the applicable law, retire to deliberate and vote on the accused's guilt or innocence. Unlike most civilian jurors, the members, in the event a finding of guilty is returned, also hear evidence in extenuation, mitigation, and aggravation, and, after receiving instructions on sentencing matters, retire to deliberate and vote on an appropriate sentence. During the deliberations on findings and sentence, each member has an equal vote; no member may use rank or position to influence another member's vote.[48]

In discharging their duties, the members may consider only the evidence presented in open court and included in the

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[35] *Id.*

[36] United States v. Sears, 6 C.M.A. 661, 20 C.M.R. 377 (1956); *see also* United States v. Worrell, 3 M.J. 817 (A.F.C.M.R. 1977).

[37] United States v. Hedges, 11 C.M.A. 642, 29 C.M.R. 458 (1960).

[38] United States v. Swagger, 16 M.J. 759, 760 (A.C.M.R. 1983).

[39] R.C.M. 502(b)(1).

[40] United States v. Pulliam, 3 C.M.A. 95, 11 C.M.R. 95 (1953); United States v. Emery, 1 C.M.R. 643 (A.F.B.R. 1951).

[41] UCMJ art. 25(d)(2).

[42] *See generally* Schwender, *One Potato, Two Potato … : A Method to Select Court Members*, The Army Lawyer, May 1984, at 12.

[43] United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (improper exclusion of junior personnel based on tendency to give lighter sentences); United States v. Redman, 33 M.J. 679 (A.C.M.R. 1991); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975) (fixed policy of excluding all lieutenants and warrant officers was improper); United States v. Greene, 20 C.M.A. 232, 43 C.M.R. 72 (1970) (selection criteria that resulted in no member of the rank of major or below resulted in an appearance of impropriety); United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3 (1964); United States v. Autrey, 20 M.J. 912 (A.C.M.R. 1985); *but see* United States v. Yager, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades below E–3 permissible where there was a demonstrable relationship between exclusion and the selection criteria of the Code); *also* United States v. Carman, 19 M.J. 932 (A.C.M.R. 1985); United States v. Delp, 11 M.J. 836 (A.C.M.R. 1981). Deliberate inclusion of a court member is permissible, however. United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3 (1964) (deliberate inclusion of minority member); United States v. Smith, 18 M.J. 704 (A.C.M.R. 1984) (deliberate inclusion of female member); United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (although selection of only senior NCOs created an appearance of evil, the convening authority did not categorically exclude lower grades from consideration).

[44] United States v. Smith, 27 M.J. 242 (C.M.A. 1988).

[45] United States v. Marsh, 21 M.J. 445 (C.M.A. 1986); United States v. Kemp, 46 C.M.R. 152 (C.M.A. 1973).

[46] R.C.M. 503(a)(3); United States v. May, 50 C.M.R. 416 (N.C.M.R. 1975); United States v. Alvarez, 5 M.J. 762 (A.C.M.R. 1978). *But see* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) (improper staff assistance tainted the selection process).

[47] United States v. Marsh, 21 M.J. 445 (C.M.A. 1986); United States v. Cherry, 14 M.J. 251 (C.M.A. 1982).

[48] United States v. Accordino, 20 M.J. 1102 (C.M.A. 1985).

record. For this reason, there are restrictions on court members' communications with other court members and other participants in the trial. Members may not discuss the case with other court members until the case is submitted to them for findings. Members may not communicate with witnesses during the trial. Private communications between a court member and witness deprive the accused of the guarantees of confrontation and cross-examination. If a court member communicates with a witness concerning the case, there is a rebuttable presumption of prejudice. The Government can rebut the presumption only by a "clear and positive showing that the improper communication … did not and could not operate in any way to influence the decision."[49]

The problem of improper communication also arises when the president of the court confers with the staff judge advocate during the trial. Such conferences are clearly unauthorized. The accused is entitled to a fair and impartial trial by a court uninfluenced from outside sources. The decision of court members should be predicated only upon evidence and instructions obtained in the courtroom.[50] Like other improper communications, a conference between the president and the staff judge advocate raises a presumption of prejudice.[51] The Government can rebut the presumption by showing that the conference concerned purely administrative matters.[52] The presumption stands, however, if the evidence shows that the conferees discussed such substantial matters as a confession's admissibility or the evidence's sufficiency.[53]

The appellate courts have been justifiably strict in scrutinizing private communications. The accused has rights to confrontation and appellate review on the record. These rights would be meaningless if the courts were to permit court members to engage in off- the-record conversations with other participants in the trial.

b. The president of the court. The president's role is similar to that of a foreman of a civilian jury. The president presides over closed sessions when the members deliberate and speaks for the members in announcing findings or sentence or requesting instructions from the military judge.[54]

A military judge must be detailed to every general court-martial.[55] If, at a special court-martial, the convening authority does not detail a military judge, the president's duties are more extensive. In addition to the duties already mentioned, the president assumes most of the duties of the military judge.[56]

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[49] United States v. Adamiak, 15 C.M.R. 412, 418 (C.M.A. 1954) (court members and witness discussed witness' testimony during recess of court); United States v. Almeida, 19 M.J. 874 (A.F.C.M.R. 1985) (Government successfully rebutted presumption of prejudice); United States v. Gaston, 45 C.M.R. 837 (A.C.M.R. 1972) (communication regarding the accused from an outside third party to two court members during a recess prior to findings).

[50] United States v. Franklin, 9 C.M.R. 741 (A.F.B.R. 1953) (off-the-record conference between trial counsel and president of the court).

[51] United States v. Aguilera, 40 C.M.R. 168 (C.M.A. 1969).

[52] United States v. Nicholson, 27 C.M.R. 260 (C.M.A. 1959) (Government showed that court members were only asking for comparison of pay grades between different services); United States v. Cox, 23 C.M.R. 535 (A.B.R. 1956) (SJA and president of court conferred during adjournment concerning procedural aspects of investigation requested by court. No prejudice found where case showed compelling evidence of the accused's guilt.); United States v. Willingham, 20 C.M.R. 575 (A.F.B.R. 1955) (president of court and staff legal officer conferred during recess. Error held not prejudicial as only procedural matters were discussed.).

[53] United States v. Guest, 11 C.M.R. 147 (C.M.A. 1953) (prejudicial for SJA to furnish legal authorities to president of court).

[54] R.C.M. 502(b).

[55] UCMJ art. 26(a).

[56] R.C.M. 502(b)(2)(C); *see also supra* chap. 3; AR 27–10, para. 8–4.

Chapter 5
The Defense Counsel

5–1. General

The Supreme Court has consistently emphasized that the effective assistance of counsel is an essential element of a fair trial. In Powell v. Alabama,[1] Mr. Justice Sutherland wrote that:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law… Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible … He [the accused] requires the guiding hand of counsel at every step in the proceeding against him.[2]

In a long line of cases, including Gideon v. Wainwright[3] and Argersinger v. Hamlin,[4] the Supreme Court has expanded and protected the right to counsel. Although the assistance of counsel is as important in a court-martial trial as it is in a civilian criminal trial, the Supreme Court held in Middendorf v. Henry[5] that an accused at a summary court-martial does not have a right to counsel.[6] This chapter discusses the means by which the accused obtains counsel and the standards by which the courts measure the adequacy of counsel's representation of the accused.

5–2. The Trial Defense Service

In the eyes of many, there has always been an inherent conflict of interest in having a defense counsel, paid by the United States and rated by the staff judge advocate, represent an accused in a court-martial styled "United States v. Accused." At least in part to alleviate this perception,[7] the defense function went through a metamorphosis between 1975 and 1980.[8] Starting with a directive from The Judge Advocate General that defense counsel should be rated by the senior defense counsel in the command,[9] and moving through test programs in various commands,[10] the structure of the defense function became more and more an independent entity.

On 7 November 1980 the U.S. Army Trial Defense Service (USATDS) was permanently established.[11] USATDS is an activity of the U.S. Army Legal Services Agency (USALSA), a field operating agency of The Judge Advocate General.[12] Approximately 200 judge advocates are assigned to USATDS, serving in field offices around the world.[13] Each USATDS counsel is rated by a senior defense counsel (SDC), and SDC's are rated by one of nine regional defense counsel (RDC).[14]

USATDS obtains funding through the commander, USALSA,[15] develops its own programs and plans the training for defense counsel,[16] and handles the detail of defense counsel to individual accused.[17] The defense function is now being carried out by judge advocates who are independent and free to zealously represent their clients.

5–3. The initial detail of counsel

The chief, USATDS, or his delegate must detail counsel to represent the accused in a general or special court-martial.[18] The detailed counsel is provided to the accused without cost.

Legally qualified counsel must be detailed to represent the accused in a general court- martial.[19] The trial and defense counsel in a general court-martial must be: (1) a judge advocate or law specialist who is a graduate of an accredited law school or a member of the bar of a Federal court or of the highest court of a state; and (2) certified as competent by The Judge Advocate General.[20] Army regulations also provide that appointees to the Judge Advocate

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1 287 U.S. 45 (1932).
2 *Id.* at 69.
3 372 U.S. 335 (1963).
4 407 U.S. 25 (1972).
5 425 U.S. 25 (1976).
6 *Id.*
7 *Fact Sheet: US Army Trial Defense Service*, The Army Lawyer, Jan. 1981, at 27.
8 *See generally*, Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 Mil. L. Rev. 4 (1983) [hereinafter cited as Howell].
9 *Field Defense Services*, The Army Lawyer, Oct. 1976, at 1, 6.
10 *See* Howell,*supra* note 8, at 35–50.
11 *Id.* at 45.
12 AR 27–10, para. 6–3.
13 The majority of these judge advocates serve as trial defense counsel "whose primary duties are to represent soldiers in courts-martial, administrative boards, and other proceedings and act as consulting counsel as required by law or regulations." *Id.* at para. 6–3*h*.
14 USATDS Standard Operating Procedure.
15 AR 27–10, para. 6–5a.
16 *Id.* at para. 6–6.
17 *Id.* at para. 6–9.
18 *Id.* at para. 6–9 (may be delegated to senior defense counsel).
19 UCMJ art. 27.
20 *Id.*

General's Corps be graduates of an accredited law school and members of the bar of a Federal court or of the highest court of a state.[21]

In a special court-martial, legally qualified defense counsel are also detailed for the accused.[22] The accused must be afforded the opportunity to be represented at trial by legally qualified counsel.[23]

The UCMJ states that legally qualified counsel must be provided in a special court-martial unless "physical conditions or military exigencies" make legally qualified counsel unavailable.[24] If legally qualified counsel is not provided, the convening authority must prepare a detailed written statement explaining why legally qualified counsel was unavailable.[25] The statement is appended to the record of trial to permit appellate review of the denial of the request for legally qualified counsel.[26] This requirement is clearly incongruous as the convening authority no longer details defense counsel in the Army. A change to the UCMJ that would require the chief, USATDS, or his or her delegate to make such an explanation, if ever needed, would provide consistency in this area. A bad conduct discharge may not be adjudged by a special court-martial unless "counsel qualified under Article 27(b) (legally qualified counsel) was detailed to represent the accused."[27] Note, however, that R.C.M. 502 goes beyond the UCMJ and requires detailed counsel in a special court-martial to be certified under article 27(b).

While the accused has a right to legally qualified counsel, he or she does not have a right to counsel of any particular rank or experience.[28] It is good practice to detail defense counsel roughly equal to the trial counsel in ability and experience. If the trial counsel is markedly superior in ability or experience, there is a risk that the accused may raise the issue of inadequate representation.[29]

In addition to detailing defense counsel, the USATDS may detail associate counsel.[30] If the USATDS details an associate defense counsel, the chief and associate counsel constitute a defense team.[31] All members of the defense team should be present at the trial.[32] If the associate defense counsel is absent, the record should reflect the accused's consent to the absence.[33] Where the record does not contain the accused's express consent, however, there is no prejudicial error if it can be fairly inferred from the record that the accused in fact consented to the associate counsel's absence.[34] If the chief defense counsel is absent, the record should reflect the accused's consent to counsel's absence.[35] Again, even if the record does not contain an express consent, the court may infer the accused's consent from the record.[36] In addition to associate counsel, who must be certified, assistant defense counsel may be detailed to general or special courts-martial.[37] Such an assistant counsel need only be a commissioned officer.[38]

5–4. The replacement of detailed counsel

The authority that details defense counsel can easily replace a detailed counsel before an attorney-client relationship has formed.[39] The detailing authority may excuse or change such counsel without showing cause.[40]

Once an attorney-client relationship has formed, however, the severing of such a relationship through the replacement of detailed counsel can be very difficult. The detailing authority can replace such counsel only under very limited circumstances.[41] Clearly, detailed counsel may be excused or replaced at the express request of the accused.[42] Detailed defense counsel will also normally be excused when the accused has obtained individual military counsel.[43] The Manual also recognizes that the attorney-client relationship may have to yield to other good cause shown on the

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[21] AR 135–100, para. 3–13 (1 Feb. 1984); AR 601–102, para. 4*h*, 4*i*(1 Oct. 1981).
[22] UCMJ art. 27(c); R.C.M. 501(b).
[23] R.C.M. 502(d). Almost all accused avail themselves of this right. A very small percentage of military accused at special or general court-martial opt for self-representation. Such pro se defense is permitted only after a suitable inquiry by the military judge. R.C.M. 506(d). It is error to summarily deny the accused's request to proceed pro se. United States v. Tanner, 16 M.J. 930 (N.M.C.M.R. 1983).
[24] UCMJ art. 27(c)(1).
[25] *Id.*
[26] *Id.*
[27] AR 27–10, para. 5–24*a.*
[28] R.C.M. 502(d)(1).
[29] *See,e.g.*, United States v. Cronic, 466 U.S. 648 (1984); United States v. Tellier, 32 C.M.R. 323 (C.M.A. 1962).
[30] R.C.M. 502(d)(1).
[31] United States v. Nichelson, 39 C.M.R. 69 (C.M.A. 1968).
[32] *Id.*
[33] United States v. Howard, 39 C.M.R. 433 (A.B.R. 1968).
[34] *Id.*
[35] 39 C.M.R. 69 (C.M.A. 1968).
[36] *Id.*
[37] R.C.M. 502(d)(2).
[38] *Id.* Assistant counsel should not be permitted to act in the absence of qualified counsel.
[39] R.C.M. 505(d)(2)(A).
[40] *Id.*
[41] R.C.M. 505(d)(2)(B). United States v. Gnibus, 21 M.J. 1 (C.M.A. 1985).
[42] R.C.M. 506(c).
[43] R.C.M. 506(b)(3). The detailing authority may allow detailed counsel to remain on the case as associate counsel if requested by the accused. The military judge cannot misadvise the accused. In United States v. Johnson, 21 M.J. 211 (C.M.A. 1981), the military judge improperly advised the accused that if he obtained individual military counsel, he would"automatically" lose the service of his detailed counsel.

record.[44] "Good cause" will include physical disability, military exigency, and extraordinary circumstances,[45] but will not include those"temporary inconveniences which are incident to normal conditions of military life."[46] Whenever new counsel is detailed without the consent of the accused, the courts will closely scrutinize the action.[47]

5–5. Individual military counsel

In addition to the right of self representation and the right to detailed defense counsel, the accused also enjoys the option of requesting a military counsel of the accused's own selection if such counsel is reasonably available.[48] However, there is an important exception: in a general or special court-martial the accused may not select a layman military member as individual counsel. In United States v. Kraskouskas,[49] the Court of Military Appeals announced the rule that, in a general court-martial, the defense, whether detailed or individual, must be an attorney. In any case, the military judge or president of a special court-martial without a military judge may permit a layman to sit at the counsel table and consult with the accused; but the accused may not select a layman for active representation as individual counsel in a general or special court-martial.[50]

At one time the courts interpreted "reasonably available" very broadly, and counsel were occasionally transported around the world to represent military accused. Amendments to the UCMJ in 1981 allowed the services to determine reasonable availability.[51] The term reasonably available was then defined in a change to the 1969 Manual[52] and by regulation[53] in a much more restrictive way. The present restrictions in the 1984 Manual[54] and regulations[55] are similarly very restrictive and result in most individually requested counsel being USATDS counsel from the same or a nearby location.

The procedure for requesting individual military counsel is very straightforward. The request, with all necessary details, is sent through the trial counsel to the convening authority.[56] If the requested counsel is one of those determined to be not reasonably available under the Manual or regulation, then the convening authority shall deny the request and notify the accused.[57] The convening authority will not deny the request if the accused asserts either an

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[44] R.C.M. 505(d)(2)(B).

[45] *E.g.*, United States v. Hanson, 24 M.J. 377 (C.M.A. 1987) (military judge acted within the bounds of his authority in reducing detailed defense counsel to the status of assistant defense counsel and detailing additional counsel to represent accused based on belief he had not adequately investigated the case); United States v. Jones, 4 M.J. 545 (A.C.M.R. 1978) (defense counsel's release from active duty). *Cf.* United States v. Baca, 27 M.J. 110 (C.M.A. 1988) (military judge improperly severed attorney-client relationship when chief defense counsel testified on behalf of accused on a competency motion litigated by the associate defense counsel).

[46] R.C.M. 505(f).*See*, *e.g.*, United States v. Catt, 1 M.J. 41 (C.M.A. 1975) (prior participation in a minor way in the Government's preparation of the case by detailed defense counsel did not automatically require that counsel be replaced); United States v. Timberlake, 46 C.M.R. 117 (C.M.A. 1973) (deep-seated differences between counsel and accused plus permanent change of station of defense counsel).

[47] United States v. Gnibus, 21 M.J. 1 (C.M.A. 1985); United States v. Miller, 2 M.J. 767 (A.C.M.R. 1976).

[48] R.C.M. 506(a).

[49] 26 C.M.R. 387 (C.M.A. 1958).

[50] R.C.M. 506(e).

[51] UCMJ art. 38(b) amended 20 Nov. 1981. Military Justice Amendments of 1981, Pub. L. No. 97–81, § 4(b)(7), 95 Stat. 1088.

[52] MCM, 1969 (rev. ed.), para 48(b).

[53] AR 27–10.

[54] R.C.M.506(b)(1). The following persons are not reasonably available:
(A) A general or flag officer;
(B) A trial or appellate military judge;
(C) A trial counsel;
(D) An appellate defense or government counsel;
(E) A principal legal advisor to a command, organization, or agency and, when such command, organization, or agency has general court-martial jurisdiction, the principal assistant of such an advisor;
(F) An instructor or student at a service school or academy;
(G) A student at a college or university;
(H) A member of the staff of the Judge Advocate General of the Army, Navy, or Air Force, the chief counsel of the Coast Guard, or the director, Judge Advocate Division, Headquarters, Marine Corps.

[55] AR 27–10, para. 6–10*b*. The following persons are also deemed not reasonably available to serve as individual military counsel:
a. USATDS counsel assigned to and with duty station at the office of the chief, USATDS.
b. Senior Regional Defense Counsel, Europe.
c. USATDS counsel assigned outside the USATDS region in which the trial or article 32, UCMJ, investigation will be held, unless the requested counsel is stationed within 100 miles of the situs of the trial or investigation.
d. USATDS counsel whose duty stations are in Panama, Hawaii or Alaska, for article 32, UCMJ, investigations or trials held outside Panama, Hawaii, or Alaska, respectively.
AR 27–10, para. 5–7, also contains further restrictions stating that the chief of Military Justice/Criminal Law Section, or persons serving in an equivalent position are also deemed not reasonably available. AR 27–10, para. 5–7*d*, lists relevant factors to determine the reasonable availability of counsel.

[56] AR 27–10, para. 5–7*f*(2). Requests will, as a minimum, contain the following information:
a. Name, grade, and station of the requested counsel.
b. Name, grade, and station of the accused and his or her detailed defense counsel.
c. UCMJ article(s) violated and a summary of the offense(s).
d. Date charges preferred and status of case; e.g., referred for investigation under article 32, UCMJ, referred for trial by GCM, bad-conduct discharge (BCD) SPCM, or regular SPCM.*e.*
e. Date and nature of pretrial restraint, if any.
f. Anticipated date and length of trial or hearing.
g. Existence of an attorney-client relationship between the requested counsel and the accused, in this or any prior case.
h. Special circumstances or other factors relevant to determine availability.

[57] R.C.M. 506(b)(2); AR 27–10, para. 5–7*f*(1).

existing attorney-client relationship or that the requested counsel will become reasonably available by the date of the trial.[58] A request that has not been denied by the convening authority will be forwarded to the commander or supervisor of the requested person.[59] That authority will then make a determination of reasonable availability[60] based upon factors prescribed in the regulation.[61] If the determination is adverse, the accused may appeal to the next higher level of command.[62] The standard for review is whether the commander has abused his or her discretion.[63] If the appeal is also denied the accused must raise the request again at trial in order to preserve the issue for appeal.[64] Obviously, in order to review the decision at trial it is necessary that the authorities who denied the request for individual military counsel set forth in detail the reasons for the denial of the request.[65] The remedy at trial, even if it is determined that there was an abuse of discretion, is not dismissal.[66] The Manual requires the military judge to make a record of the facts and grant any continuances that might be necessary, but the military judge may not dismiss the charges on this issue.[67]

5–6. Individual civilian counsel

The article 32 investigating officer, the detailed defense counsel, and the military judge must advise the accused of the right to individual civilian counsel as well as the right to individual military counsel.[68] While the Government furnishes military counsel at no expense to the accused, the accused must obtain civilian counsel at no expense to the Government.[69]

If the accused indicates a desire to obtain civilian counsel, one must be given a fair opportunity to do so. The Court of Military Appeals has stated that "it ought to be an extremely unusual case when a man is forced to forego civilian counsel and go to trial with assigned military counsel rejected by him."[70] The military judge can ensure that the accused has a fair opportunity to retain civilian counsel by granting a reasonable continuance. In the final analysis, however, the granting or denial of a motion for continuance lies within the military judge's sound discretion.[71] If the accused has been granted an ample opportunity to retain civilian counsel, including one or two continuances, the judge's denial of an additional continuance is not error.[72]

Just as there are limitations upon the types of military members the accused may select as counsel, there are limitations upon the type of civilian counsel the accused may retain. Individual counsel must be legally qualified.[73] The Court of Military Appeals has stated that in a general court-martial, counsel must be a lawyer of a "recognized bar."[74] Courts have, for example, permitted a British solicitor,[75] an attorney admitted to practice in the Republic of the Philippines,[76] and a member of the bar of the Federal Republic of Germany[77] to practice before courts-martial. The

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[58] *Id.*

[59] *Id.*

[60] R.C.M. 506(b)(2); AR 27–10, para. 5–7*f*(1); United States v. Hacrow, 9 M.J. 669 (N.C.M.R. 1980).

[61] AR 27–10, para. 5–7*d*.

In determining the availability of counsel not governed by the provisions of paragraph 5–7*c*., above, the responsible authority under R.C.M. 506(b)(1) may consider all relevant factors, including, but not limited to, the following:

a. The requested counsel's duty position, responsibilities, and workload.

b. Any ethical considerations that might prohibit or limit the participation of the requested counsel.

c. Time and distance factors; i.e., travel to and from the situs, anticipated date, and length of trial or hearing.

d. The effect of the requested counsel's absence on the proper representation of the requested counsel's other clients.

e. The number of counsel assigned as trial or assistant trial counsel to the article 32, UCMJ, investigation or trial.

f. The nature and complexity of the charges and legal issues involved in the case.

g. The experience level, duties, and caseload of the detailed military defense counsel.

h. Overall impact of the requested counsel's absence on the ability of the requested counsel's office to perform its required mission; *e.g.*, personnel strength, scheduled departures or leaves, and unit training and mission requirements.

[62] R.C.M. 506(b)(2). No appeal, however, may be made which requires action at the departmental or higher level.

[63] United States v. Quinones, 50 C.M.R. 476 (C.M.A. 1975).

[64] R.C.M. 905(b)(6); United States v. Cutting, 34 C.M.R. 127 (C.M.A. 1964).

[65] United States v. Gatewood, 35 C.M.R. 405 (C.M.A.

[66] United States v. Redding, 11 M.J. 100 (C.M.A. 1981); R.C.M. 906(b)(2).

[67] R.C.M. 906(b)(2).

[68] *See* UCMJ art. 32; R.C.M. 502(d)(6) discussion; United States v. Johnson, 21 M.J. 211 (C.M.A. 1986); United States v. Donohew, 39 C.M.R. 149 (C.M.A. 1969). *See also* United States v. Jorge, 50 C.M.R. 845 (C.M.A. 1975) (the military judge erred in failing to advise the accused of his right to request civilian counsel even though the accused was represented by individual military counsel at trial).

[69] R.C.M. 506(a).

[70] United States v. Kinard, 45 C.M.R. 74, 77 (C.M.A. 1972).

[71] *Id.*

[72] United States v. Thomas, 22 M.J. 57 (C.M.A. 1986) (the exercise of the right to civilian counsel is not absolute but must be balanced against society's interest in expeditious administration of justice); United States v. Thomas, 33 M.J. 694 (A.C.M.R. 1991) (abuse of discretion to deny continuance to retain civilian counsel); United States v. Hampton, 50 C.M.R. 531 (N.C.M.R. 1975) (court held that the military judge did not abuse his discretion by denying a third continuance when the civilian counsel was unable to appear because of being involved in a trial in another jurisdiction and the accused was defended by two military counsel, individual and appointed).

[73] R.C.M. 502(d).

[74] United States v. Kraskouskas, 26 C.M.R. 387, 389 (C.M.A. 1958); R.C.M. 502(d) extends to special courts-martial.

[75] United States v. Harris, 26 C.M.R. 273 (C.M.A. 1958).

[76] United States v. George, 35 C.M.R. 801 (A.F.B.R. 1965).

[77] United States v. Easter, 40 C.M.R. 731 (A.C.M.R. 1969).

determination of whether a foreign attorney is qualified to practice before a court-martial will be made by the military judge.[78] The military judge should primarily look at the counsel's training and familiarity with general principles of criminal law that apply in a court-martial.[79]

5–7. Withdrawal by detailed counsel

If the accused obtains individual counsel, the accused may excuse or retain detailed military counsel. Unless the accused expresses a contrary intention, retained detailed counsel becomes the associate to the individual civilian counsel; the individual civilian counsel is the chief counsel in charge of the case. The accused may stipulate that detailed counsel will be the chief counsel. In the typical case, though, the detailed counsel is the associate.

If the accused desires the detailed counsel to serve as associate, the detailed counsel should comply with the accused's desire. If the detailed counsel remains as associate counsel, he or she is obliged to cooperate with individual counsel. The two counsel might disagree over tactics. If they cannot resolve their disagreement, they should inform the accused of the dispute and permit the accused to resolve the disagreement. If the detailed counsel cannot in good conscience accept the accused's decision or if the dispute has strained the relations with individual counsel to the point that they cannot work together as a defense team, the detailed counsel should ask the military judge to permit withdrawal from the case. Rule 1.16(b)(3) of the Rules of Professional Conduct for Lawyers allows permissive withdrawal in these circumstances.[80]

5–8. The disqualification of counsel

The counsel who participate in courts-martial are subject to the normal ethical prohibitions against representation of conflicting interests and disclosure of a client's confidences.[81] Based upon these ethical mandates, the Congress in the UCMJ, the President in the Manual, and the Court of Military Appeals in its decisions, have developed a number of rules of disqualification: a person who has acted as investigating officer, military judge, or court member in a case may not subsequently act as trial counsel or assistant trial counsel and, unless expressly requested by the accused, may not act as defense counsel or assistant defense counsel in the same case;[82] a person may not act for both the prosecution and the defense in the same case;[83] a person who acted for the accused at a pretrial investigation or other proceeding involving the same general matter may not subsequently act for the prosecution;[84] a person who has previously acted for the prosection in the same case is ineligible to serve as a member of the defense;[85] and an accuser may not serve as defense counsel unless the accused expressly requests that person.[86]

The essence of each rule is that if a person has acted in certain capacities earlier in the proceeding, that person may not perform certain counsel functions later in the same or a closely related proceeding. In each fact situation, the switch in capacities involves too great a likelihood of a conflict of interest or a disclosure of confidential communications.

The Court of Military Appeals follows a three part test to determine if counsel are disqualified: was there former representation, was there a substantial relationship between subject matters, and was there a subsequent proceeding.[87] If the test is met, the government has the burden to show no communication occurred between the attorney who previously represented the accused and the prosecution. If so, counsel is disqualified.[88] Potentially, the conflict could disqualify the entire office.

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[78] R.C.M. 502(d)(3)(B); Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980).

[79] R.C.M. 502(d)(3)(B). The discussion also points out other important factors to consider such as:
a. the availability of the counsel at times at which sessions of the court-martial have been scheduled;
b. whether the accused wants the counsel to appear with military defense counsel;
c. the familiarity of the counsel with spoken English;
d. practical alternatives for discipline of the counsel in the event of misconduct;
e. whether foreign witnesses are expected to testify with whom the counsel may more readily communicate than might military counsel; and
f. whether ethnic or other similarity between the accused and the counsel may facilitate communication and confidence between the accused and civilian defense counsel.

[80] DA Pam 27–26;*see also infra* chap. 30.

[81] DA Pam 27–26 at Rules 1.6, 1.7.

[82] UCMJ art 27; United States v. Trakowski, 10 M.J. 792 (A.F.C.M.R. 1981). *But see* United States v. Sparks, 29 M.J. 52 (C.M.A. 1989).

[83] UCMJ art. 27.

[84] R.C.M. 502(d)(4).

[85] *Id. But see*United States v. Catt, 50 C.M.R. 326 (C.M.A. 1975). In *Catt* the court drew a distinction between someone who had acted in the same case "for the prosecution" and someone who had participated in the same case albeit technically for the Government, in a neutral, impartial, or advisory capacity. The court stated that in the former situation, any member of the defense would have to be "excused forthwith" as statutorily ineligible. Further, once an attorney has established an attorney-client relationship for either the prosecution or the defense, one is bound by a professional duty to avoid divulgence of the client's confidences and secrets. This prohibition does not automatically apply, however, in those situations where no confidence or secrets have been obtained. Finally, the court stated that where an accused expressly requests such a person as counsel, there is no legal or ethical bar preventing that person from acting in a defense capacity *See also* United States v Sparks, 29 M.J. 52 (C.M.A. 1989).

[86] R.C.M. 502(d)(4); United States v. Lee, 2 C.M.R. 118 (C.M.A. 1952).

[87] United States v. Rushatz, 31 M.J. 450 (C.M.A. 1990). *See also* United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987).

[88] *Id.*

5–9. The right to counsel of choice

Although the accused is entitled to the assistance of counsel at a court-martial, the sixth amendment does not always guarantee the accused the right to choose one's own counsel. In United States v. Gipson,[89] the Army Court of Military Review considered the issue of whether the military judge erred by failing to grant the individual civilian defense counsel a continuance to prepare and participate at trial. After a number of delays requested by the first civilian defense counsel over a 4-month period, the military judge denied the motion of the new civilian defense counsel for a 30-day delay. The military judge ascertained that the detailed counsel was prepared to defend the case; the new civilian defense counsel withdrew from the case; and the trial proceeded with detailed military counsel representing the accused.

The Army Court of Military Review found that the"right to counsel of choice is not absolute and must be balanced against society's interest in the efficient and expeditious administration of justice."[90] Here, another continuance was necessary to permit the accused to be represented by counsel of choice. The history of delays in the case reflected the military judge's attempt to allow the accused to be represented by his or her counsel of choice. The court held, therefore, that there was no abrogation of the accused's right to be represented by civilian counsel and no abuse of discretion by the military judge in denying the motion for continuance.[91]

The Supreme Court clarified this issue further in United States v. Wheat.[92] In Wheat the Supreme Court reviewed a claim that the accused had been prejudiced when the trial court would not permit him to waive conflicts of interest by his attorney who also represented two other co-defendants in a drug conspiracy case. Chief Justice Rehnquist wrote that:

> Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers [Citations omitted].[93]

The Supreme Court declined to find that waivers by all affected defendants would cure the problems created by using the same attorney in the multiple representation situation.[94] Instead, the trial court must recognize a presumption in favor of an accused's counsel of choice, but the presumption may be overcome by a showing of actual or serious potential for conflict.[95]

In considering whether the accused is entitled to counsel of choice, the ethical standards of the Rules of Professional Conduct[96] also apply. A defense counsel should particularly note the requirements of Rule 1.7, "Conflict of Interest: General Rule," and Rule 1.9, "Conflict of Interest: Former Client," in advising an accused about his or her ability to represent the accused free of actual or potential conflicts of interest since this may affect the accused's choice of counsel.[97]

5–10. The representation of more than one accused

The accused is entitled to a defense counsel who will provide loyal representation. If the defense counsel undertakes to represent two or more accused, the counsel might discover that he or she cannot defend all of the clients with undivided loyalty.[98] The clients' interests may conflict, and, in the process of attempting to resolve the conflict, the defense counsel might deny one or both clients of the loyalty to which they are entitled. This problem can arise whether the defense counsel represents the clients at separate trials or at the same trial.[99]

a. Separate trials. Consider the following fact situation: at the first trial, the counsel defended A. In the second trial, the same counsel is defending B. A appears as a prosecution witness against B. A's and B's cases are closely related. When the trial counsel completes the direct examination of A, the military judge permits defense counsel to cross-examine A. Because the defense counsel and A once had an attorney- client relationship, the defense counsel has a duty to A not to disclose confidential communications.[100] In this hypothetical situation, there is a serious danger that

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[89] 25 M.J. 781 A.C.M.R. 1988).
[90] *Id.* at 783. *But see* United States v. Wilson, 28 M.J. 1054 (N.M.C.M.R. 1989).
[91] *Id.*
[92] 108 S. Ct. 1692 (1988).
[93] *Id.* at 1697.
[94] *Id.*
[95] *Id.* at 1700.
[96] DA Pam 27–26.
[97] DA Pam 27–26 at Rules 1.7, 1.9.*See also* Comments to Rules 1.7 and 1.9.
[98] DA Pam 27–26 at Rule 1.7.
[99] *See generally*, AR 27–10, app. C, Attorney-Client Guidelines, para. C–2*a*(steps to ensure that conflicts of interest do not arise because of multiple clients).
[100] *See* DA Pam 27–26 at Rule 1.9.

the defense counsel's past relationship with A will inhibit cross-examination of A. Counsel might fear that certain questions that might otherwise have asked would touch upon the subject matter of privileged communications with A. The end result might be that the defense counsel will deny B the individual loyalty--and vigorous defense--to which B is fully entitled. Where there is a fair risk that the second client has received less effective representation, the court will reverse a conviction in the second trial; counsel's loyalty is so essential to a fair trial that even the appearance of evil must be avoided.[101]

The governing rules are well stated in the cases of United States v. Lovett[102] and United States v. Thornton.[103] In Lovett, the Court of Military Appeals strongly emphasized that the client must have one's counsel's undivided loyalty; if not, the client's right to counsel does not have "any meaning."[104] "So strong is the prohibition that, despite the unquestioned purity of counsel's motives, any doubt concerning equivocal conduct on his part 'must be regarded as having been antagonistic to the best interests of his client.' "[105]

In Thornton, the court added that:

> Counsel thus found himself placed in the legally precarious position of having to "walk the tightrope" between safeguarding the interests of the accused on the one hand and retaining the prior confidences of [X] on the other. Such a rope is too narrow. The possibility of falling is too real… The basic underlying principle which condemns the representation … of conflicting interests seeks to achieve as its purpose no more than this--to keep counsel off the tightrope… [T]he test is not whether counsel could have done more by way of further cross-examination or impeachment of his former client, but whether he did less as a result of his former participation.[106]

In the Thornton case, the court suggested that it might not have reversed if the counsel had fully informed the second client of the possible conflict.[107] The Court of Military Appeals has also emphasized that a defense counsel, even though detailed to represent more than one accused, has an ethical duty to take steps necessary to withdraw from a situation that involves a conflict of representation.[108] Thus, detailed counsel should be especially careful to avoid any conflict of interest. Because of the problems caused by multiple representation and the inability to set down any general guidelines, the Court of Military Appeals finally drew a bright line rule in United States v. Breese.[109]

> [a]ccordingly, from the date of this decision [27 April 1981], we shall assume--albeit subject to rebuttal--that the activity of defense counsel exhibits a conflict of interest in any case of multiple representation wherein the military judge has not conducted a suitable inquiry into possible conflict.[110]

Of course, to conduct the inquiry the military judge must be on notice of a potential conflict or the conflict must be apparent.[111] Where the accused retains civilian counsel with a conflict of interest and knowingly waives the right to conflict-free counsel, the Government should not be held accountable.[112] In any event the military judge should address the accused personally;[113] advise the accused of the dangers of representation by counsel with a conflict of interest; elicit from the accused a narrative response that he or she has been advised of the attorney's possible conflict of interest; and ensure the accused has discussed this possible conflict with the attorney or another attorney and voluntarily waives the sixth amendment protections. An accused may waive the right to conflict-free counsel, but such waiver must be knowing and voluntary.[114]

b. Same trial. The dangers are even greater where no apparent conflict of interest exists and counsel decides to represent both accused at the same trial. An unforeseen conflict could arise during trial which might cause the defense counsel to overtly side with one client against the other. If the defense counsel turns against one of the clients, the

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[101] United States v. Davis, 3 M.J. 430 (C.M.A. 1977); United States v. Thornton, 23 C.M.R. 281 (C.M.A. 1957).
[102] 23 C.M.R. 168 (C.M.A. 1957).
[103] 23 C.M.R. 281 (C.M.A. 1957).
[104] 23 C.M.R. 168, 171 (C.M.A. 1957).
[105] *Id.* (emphasis added) (citing United States v. McCluskey, 20 C.M.R. 261, 266 (C.M.A. 1955)).
[106] 23 C.M.R. 281, 283-85 (C.M.A. 1957).
[107] United States v. Thornton, 23 C.M.R. 281, 285 (C.M.A. 1957). *See also* R.C.M. 502(d)(6) discussion (B); ABA Standards, The Defense Function, Standard 3.5 (1979).
[108] United States v. Blakey, 1 M.J. 247 (C.M.A. 1976). The court found no conflict of interest in this case but reiterated its admonition of appointing separate counsel for each accused in United States v. Evans, 1 M.J. 206 (C.M.A. 1975); R.C.M. 502(d)(6) discussion (B) (defense counsel should bring the matter to the attention of the military judge so the accused's understanding and choice can be made part of the record); DA Pam 27–26 at Rule 1.16.
[109] 11 M.J. 17 (C.M.A. 1981).
[110] *Id.* at 23. The court suggested that Federal Rule of Criminal Procedure 44(c) be used as a guideline in conducting this inquiry. *See also* United States v. Testman, 7 M.J. 525 (A.C.M.R. 1979), where the court suggested that perhaps there was *no* situation where there will not be a conflict of interest. United States v. Hurtt, 22 M.J. 134 (C.M.A. 1986) and United States v. DeVitt, 20 M.J. 240 (C.M.A. 1985) reaffirm the *Breese* rebuttal presumption rule.
[111] United States v. Devitt, 20 M.J. 240 (C.M.A. 1985); United States v. Jeancoq, 10 M.J. 713 (A.C.M.R. 1981).
[112] *See* United States v. Piggee, 2 M.J. 462 (A.C.M.R. 1975).
[113] R.C.M. 901(d)(4)(D).
[114] United States v. Devitt, 24 M.J. 307 (C.M.A. 1987); United States v. Hurtt, 22 M.J. 134 (C.M.A. 1986); United States v. Davis, 3 M.J. 430 (C.M.A. 1977); AR 27–10, para. C–2. The military judge also may err by improperly severing the attorney-client relationship where the accused has waived the right to conflict-free counsel. United States v. Herod, 21 M.J. 762 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 447 (C.M.A. 1987).

court members might also turn against the client. The surest way to avoid a conflict of interest is to have each accused separately represented.[115]

If that is not possible, counsel can move for a severance of the trials.[116] Counsel may demonstrate that the clients have antagonistic interests, or that the clients have factually inconsistent defenses.[117] There are cases where the clients' interest may not be antagonistic. In one such case, counsel defended two accused at the same trial without sacrificing the interest of one to the other.[118] With respect to one client the counsel conceded that the client had stabbed the victim; but the counsel could hardly have done otherwise in the face of overwhelming evidence that the client had performed the act. With respect to the other client the counsel argued that he could be guilty of nothing more than simple assault and battery. Both accused received identical, fairly lenient sentences. The court refused to hold that the counsel had denied the first client effective representation.[119]

Cases in which it will be possible for counsel to loyally defend two clients are rare. In United States v. Faylor,[120] the defense counsel represented co-accused Faylor and Fisher at the same trial. They entered pleas of guilty to the charge of misappropriation of a car. During the presentencing proceeding, counsel made an unsworn statement on behalf of both accused. In the statement, counsel made the following points: Fisher was very young and, prior to the offense, had never been in trouble with the authorities; Fisher may have been more intoxicated than Faylor; Faylor was the motivating force in the offense; and Fisher deserved only a brief period of confinement without a punitive discharge. The court members sentenced Fisher to a brief period of confinement, and sentenced Faylor to dishonorable discharge, total forfeitures, and confinement at hard labor for 2 years. On appeal, the Court of Military Appeals ordered a rehearing on Faylor's sentence. The court commented:

> A better example of conflict of interest could not be more clearly and amply demonstrated… The sideling tactics of counsel with an apparent objective of totally sacrificing the accused Faylor in an attempt to impress the court with the need for mitigation for his other client left the accused Faylor inadequately and ineffectively represented. It is additionally evident from a glance at the severity of the sentence meted to the accused Faylor, as contrasted with that accorded… Fisher that the court was as equally impressed as defense counsel with the accused's "motivating force" of criminality referred to by counsel in his plea. This accused was deprived of the undivided loyalty of his counsel.[121]

5–11. The representation of one accused

Whether the counsel is a military attorney or a civilian lawyer, the accused is entitled to the effective assistance of counsel.[122] To safeguard this right, the court must determine whether counsel has defended the client with reasonable competence. Over the years, the Court of Military Appeals has taken several different views of the test of adequacy of representation.

a. The first view. The Court of Military Appeals' first view was that the accused had not been denied the right to the effective assistance of counsel unless the defense was grossly and glaringly inadequate. The court presumed that counsel performed their tasks competently and was reluctant to second-guess counsel. The court asserted that it would hold counsel adequate unless counsel's defense was "so erroneous as to constitute a ridiculous and empty gesture or [was] so tainted with negligence or wrongful motives… as to manifest a complete absence of judicial character."[123] The court applied this view even to capital cases.[124] The court applied this view even where counsel interviewed the client for only 10 minutes prior to trial.[125]

In civilian criminal practice, the defendant's appellate counsel is ordinarily the same counsel who represented the defendant at the trial level. The civilian appellate counsel is understandably reluctant to criticize one's own performance at trial. In military practice, however, the trial defense counsel does not represent the accused on appeal; there are

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[115] United States v. Blakey, 1 M.J. 247 (C.M.A. 1976); United States v. Evans, 1 M.J. 206 (C.M.A. 1975).
[116] R.C.M. 906(b)(9).
[117] *Id.* discussion.
[118] United States v. Young, 27 C.M.R. 171 (C.M.A. 1958).
[119] In light of the advent of USATDS and strict standards of representation, such a holding should be unlikely today.
[120] 9 C.M.A. 547, 26 C.M.R. 327 (1958).
[121] *Id.* at 548, 26 C.M.R. at 328; United States v. Devitt, 20 M.J. 240 (C.M.A. 1985) ("When an actual conflict of interest develops at any stage of a trial, prejudice will be conclusively presumed as to all further proceedings." *Id.* at 244).*See also* United States v. Davis, 20 M.J. 1015 (A.C.M.R. 1985) (prejudice only if actual conflict adversely affects the lawyer's performance); United States v. Newark, 24 M.J. 238 (C.M.A. 1987).
[122] United States v. Jefferson, 13 M.J. 1 (C.M.A. 1982); United States v. Walker, 45 C.M.R. 150 (C.M.A. 1972); United States v. Haston, 21 M.J. 559 (A.C.M.R. 1985).
[123] United States v. Hunter, 6 .M.R. 37, 41 (C.M.A. 1952).
[124] *Id.*
[125] United States v. Wilson, 8 C.M.R. 48 (C.M.A. 1953).

separate appellate defense counsel. The military system invites, if not encourages, appellate defense counsel to make the claim of inadequate representation by the trial defense counsel.[126]

b. The second view. In response to appellate defense counsel's insistence, the court adopted a second view in United States v. Parker.[127] The second view was that, at least in capital cases, the test for adequacy should be strict. Parker was a capital case in which the accused was convicted of rape. Following conviction, counsel failed to introduce any evidence in mitigation or extenuation to avoid the death sentence. The court members sentenced the accused to death. The court used a technique it employed in subsequent cases: it seized upon one general critical shortcoming and reinforced its decision by listing other supporting deficiencies. The court felt that the counsel's principal shortcoming was his failure to attempt to avoid the death sentence. To reinforce its decision, the court listed other specific deficiencies: there was some evidence that counsel had interviewed the accused only once prior to trial for 30 minutes; since counsel's cross-examination of Government witnesses strengthened the prosecution's case, the counsel probably had not interviewed the Government witnesses before trial; even though the court was specially appointed and high ranking, counsel did not voir dire or challenge any members; he made only two objections during the taking of testimony; he did not request instructions nor except to the instructions given; he offered no testimony on the merits; he offered no evidence to support his claim that the accused's confession was involuntary; and, lastly, he did not request a continuance to obtain additional time to prepare the defense.

Chief Judge Quinn dissented and pointed out that the defense counsel's decision not to present mitigating or extenuating evidence might have been wise. Chief Judge Quinn noted that if defense counsel had presented such evidence, the trial counsel could have introduced very damaging rebuttal evidence.[128] The Chief Judge opined that the real explanation for the majority's decision was that the majority was disturbed by the death sentence.[129] Subsequent cases provided some support for this opinion; the cases seemed to restrict the application of the second view of adequacy of counsel to capital cases.[130]

c. The third view. The court next applied a strict test in all cases, capital and noncapital, contested and guilty plea.

The court initially applied the third view in a noncapital, guilty plea case.[131] The accused pleaded guilty to an 8-month desertion. A pretrial agreement provided that the convening authority would not approve any sentence in excess of dishonorable discharge, total forfeitures, and 18 months' confinement at hard labor. The accused did not have any admissible prior convictions. Nevertheless, his counsel neither presented evidence in extenuation or mitigation nor argued to lessen the sentence. After an 8-minute deliberation, the court members sentenced the accused to a dishonorable discharge, total forfeitures, and 2 years' confinement at hard labor. Because there was an issue about whether there were admissible matters in extenuation and mitigation which counsel could have presented, the court remanded the case to the Board of Review. In remanding the case, the court clearly indicated that, if there were admissible matters in extenuation and mitigation, counsel's failure to present them would constitute inadequate representation.

The courts applied the third view even where the counsel presented some evidence in extenuation and mitigation but omitted evidence the court considers crucial. For example, the courts have held counsel inadequate where counsel failed to show that the accused had made restitution[132] or that a civilian court had already punished the accused for the same offense.[133] The courts even criticized counsel who refused to permit the accused to testify in extenuation and mitigation in fear that the testimony might be inconsistent with the guilty plea and render the plea improvident.[134] Deliberate or negligent omissions can amount to inadequate counsel.

The courts have extended the third view to cases where the defense counsel failed to raise applicable defenses. In United States v. Horne,[135] the Court of Military Appeals held that the counsel's failure to raise the defense of entrapment constituted inadequate representation.

d. The fourth view. In the 1970's, the Court of Military Appeals required counsel "to exercise the customary skill and knowledge which normally prevails… within the range of competence demanded of attorneys in criminal

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[126] Strickland v. Washington, 466 U.S. 668 (1984). "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense."

[127] 19 C.M.R. 201 (C.M.A. 1955).

[128] *Id.* at 214 (Quinn, C.J., dissenting).

[129] *Id.* at 217 (Quinn, C.J., dissenting).

[130] *See, e.g.*, United States v. McFarlane, 23 C.M.R. 320 (C.M.A. 1957) (counsel "conceded everything, explored nothing, was unprepared on every issue, and made the least of what he had"); United States v. McMahan, 21 C.M.R. 31 (C.M.A. 1956).

[131] United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957).

[132] United States v. Hamilton, 14 C.M.A. 117, 33 C.M.R. 329 (1963).

[133] United States v. Rosenblatt, 32 C.M.R. 28 (C.M.A. 1962).

[134] United States v. Rose, 30 C.M.R. 400 (C.M.A. 1961).

[135] 26 C.M.R. 381 C.M.A. 1958).

cases."[136] Thus, the accused was entitled to reasonably competent counsel whether that attorney is personally selected by the accused or appointed to represent him or her by the convening authority.[137] The "reasonably competent" standard was also applied by Federal courts at this time.[138]

In 1977 the Court of Military Appeals dropped a bombshell in United States v. Rivas.[139] Not only must counsel be reasonably competent, but must also exercise that competence "without omission" throughout the trial.[140] It was at first feared that the court was requiring defense counsel to be perfect. Subsequent cases, however, indicated a more reasonable view of how much perfection was required.[141]

e. The last view? In 1982, the Court of Military Appeals reaffirmed the Rivas standard without mention of the "without omission" language.[142] The two-judge majority cited with approval and used the test for effectiveness from United States v. DeCoster,[143] a decision from the Federal system: "before an accused could prevail on the issue of ineffectiveness of counsel he had to demonstrate: (1) 'serious incompetency' on the part of his attorney; and (2) that such inadequacy affected the trial result."[144]

This standard is clearly less strict than the Rivas standard. The adoption of the DeCoster language above was prophetic, however, because 2 years later the Supreme Court set down a standard for effectiveness.[145] Justice O'Connor, writing for the majority, determined that the ineffectiveness test is: whether counsel's conduct was "outside the wide range of professionally competent assistance;" and "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[146]

This standard takes some pressure off trial defense counsel. They should feel greater freedom in selecting trial tactics to fit the situation as they see it.[147] Their decisions are less likely to be second-guessed by appellate counsel reading a cold record of trial.[148] Nevertheless, counsel should think through all their strategies and should be prepared to demonstrate both the deliberateness and the wisdom of various trial maneuvers. Counsel should maintain a detailed record of the number of client interviews, the duration of interviews, and the substance of what occurred during each interview. If counsel decides to follow a course of limited resistance, he or she should make a memorandum of the decision, setting forth the reasons for the decision. Finally counsel should make a thorough investigation for matters in extenuation and mitigation and be prepared to present as many matters as appropriate.

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[136] United States v. Walker, 45 C.M.R. 150, 152 (C.M.A. 1972). *See also* United States v. Burwell, 50 C.M.R. 192 (A.C.M.R. 1975) (the court held the accused was denied effective assistance of counsel when the defense counsel, during a 36-word argument before findings, conceded the accused's guilt on one charge and failed to argue substantial defense evidence as to another charge); United States v. Galliard, 49 C.M.R. 471 (A.C.M.R. 1974) (adequacy includes competency and application of it); United States v. Kloepfer, 49 C.M.R. 68 (A.C.M.R. 1974) (the negligence of defense counsel with regard to polygraph examination of accused was declared ineffective assistance of counsel); United States v. Schroder, 47 C.M.R. 430 (A.C.M.R. 1973) (counsel must exercise customary skill and knowledge which normally prevails in other records of trial that come before this court).

[137] United States v. Zuis, 49 C.M.R. 150 (A.C.M.R. 1974).

[138] *Id.* at 155.*See*, *e.g.*, McMann v. Richardson, 397 U.S. 759 (1970).

[139] 3 M.J. 282 (C.M.A. 1977).

[140] *Id.* at 289.

[141] *E.g.*, United States v. Watson, 15 M.J. 784 (A.C.M.R. 1983); United States v. Cooper, 5 M.J. 850 (A.C.M.R. 1978); United States v. Sublett, 5 M.J. 570 (A.C.M.R. 1978).

[142] United States v. Jefferson, 13 M.J. 1, 5 (C.M.A. 1982).

[143] 624 F.2d 196 (D.C. Cir. 1979).

[144] *Id.* at 5 (citing general guidelines from United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1979)).

[145] Strickland v. Washington, 466 U.S. 668 (1984). This standard was further applied to guilty plea challenges in Hill v Lockhart, 474 U.S. 52 (1985). The Court of Military Appeals recognized *Strickland* in United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986).

[146] *Strickland*, 466 U.S. at 690, 694;*see also* United States v. Scott, 24 M.J. 186 (C.M.A. 1987) (civilian counsel's failure to promptly investigate and prepare accused's sole defense of alibi held to be ineffective assistance of counsel); United States v. Davis, 20 M.J. 1015 (A.C.M.R. 1985) (failure of counsel to notify convening authority of military judge's recommendation of suspension of punitive discharge held to be ineffective assistance of counsel); United States v. Babbitt, 26 M.J. 157 (C.M.A. 1988) (civilian defense counsel's sexual and emotional involvement with his client was not ineffective assistance of counsel).

[147] United States v. Haston, 21 M.J. 559 (.C.M.R. 1985).

[148] Appellate counsel are also required to represent the accused effectively. United States v. Knight, 15 M.J. 202 (C.M.A. 1983).

Chapter 6
Other Participants

6–1. Members of the public

Courts-martial are open to members of the public.[1] Winthrop states that this tradition dates back to the earliest military practices.[2] The accused has a right to a public trial under the sixth amendment and the press and general public have a first amendment right to access to criminal trials.[3] The court has discretion to close the courtroom, however.[4] The Manual for Courts-Martial states that "Except as otherwise provided in this rule, courts-martial shall be open to the public."[5]

a. Exclusion for security reasons. If a case involves classified matters, the right to a public trial may be required to yield. Military courts have consistently held that members of the public may be excluded from those portions of courts-martial which concern sensitive, national security matters.[6] The procedures for such trials should, however, ensure that the trial will be both secret and fair.[7] The convening authority, of course, has the option to dismiss the charges in the event that disclosure of the information, even to a limited extent, would be detrimental to the national interest.[8]

The trial should only be closed to the public for the limited time when classified matters are required to be disclosed.[9] The Government should grant defense counsel any necessary security clearance.[10] The Court of Military Appeals has declared that:

> We… hold… that… the accused's right to a civilian attorney of his own choice cannot be limited by a service-imposed obligation to obtain clearance for access to service classified matter… [T]he burden of choice rests upon the Government. It can permit the accused to be defended by his own lawyer, or it can defer further proceedings against him, or it can, for proper cause, disbar the lawyer presented by the accused from practice before courts-martial.[11]

While the Government must grant the personnel participating in the secret sessions access to relevant classified information, the military judge will caution those personnel that they are not to divulge the information to unauthorized persons.[12] The record of trial will be prepared in accordance with the Rules for Courts-Martial dealing with records of trial requiring security protection.[13]

b. Exclusion for other good reasons. In United States v. Brown,[14] the Court of Military Appeals interpreted the 1951 Manual provision authorizing exclusion for "other good reasons." The court held that the public may not be excluded solely because testimony concerns obscene matter, in that case indecent telephone calls. The court, however, provided guidance as to what constituted "good reason." The court stated that the following situations warrant exclusion of all or part of the public: to prevent overcrowding, the court may limit the number of spectators; the court may exclude disorderly persons; the court may exclude all spectators if the witness is a child who cannot testify before an audience; and the court may exclude youthful spectators if the testimony will concern scandalous or indecent matter.[15] The public may also be excluded during a hearing to determine the admissibility of a nonconsensual sexual offense victim's past sexual behavior.[16] But recent cases establish a stringent test and in each case an evidentiary hearing must be held. The

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[1] R.C.M. 806(a) (open to both military and civilian personnel).

[2] Winthrop, Military Law And Precedents 161-62 (2d ed. 1920).

[3] Waller v. Georgia, 467 U.S. 39 (1984); Press Enterprise v. Superior Court of California, Riverside County, 464 U.S. 51 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (198); United States v. Hershey, 2 M.J. 433 (C.M.A. 1985); United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

[4] Mil. R. Evid. 412(c); 505(i), (j); 50(i).

[5] R.C.M. 806(a). "Opening courts-martial to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process."R.C.M. 806(b) discussion.

[6] Grunden, 2 M.J. 116 (C.M.A. 1977); United States v. Harris, 18 C.M.A. 596, 40 C.M.R. 308 (1969); United States v. Gonzalez, 12 M.J. 747 (A.F.C.M.R. 1981); United States v. Kauffman, 33 C.M.R. 748 (A.F.B.R. 1963), *aff'd in part,* 11 C.M.A. 283, 34 C.M.R. 63 (1963); United States v. Neville, 7 C.M.R. 180 (A.B.R. 1952), *petition denied,* 7 C.M.R. 84 (1952).

[7] Grunden, 2 M.J. 116 (C.M.A. 1977); United States v. Dobr, 21 C.M.R. 451 (A.B.R. 1956) (accused must be given access to and be allowed to present any relevant classified information); Mil. R. Evid. 505(g).

[8] Mil. R. Evid. 505(f).

[9] Id.; United States v. Grunden, 2 M.J. 116 (C.M.A.1977).

[10] United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957) (unless the attorney is barred from practice before courts-martial)

[11] Id. at 125, 23 C.M.R. at 349. What if the civilian layer refuses to apply for a security clearance?

[12] Mil. R. Evid. 505(g). See also United States v. Baasel, 22 M.J. 505 (A.F.C.M.R. 1986) where nonattorney was used to screen classified information from the accused to his attorneys.

[13] R.C.M. 1103(h), 1104(b)(1)(D). *See generally*Woodruff, *Practical Aspects of Trying Cases Involving Classified Information,* The Army Lawyer, June 1986, at 7.

[14] 7 C.M.A. 251, 22 C.M.R. 41 (1956).

[15] *Id.*United States v. Grunden, 2 M.J. 116 (C.M.A. 1977), narrowly circumscribed the scope of *Brown. See also* United States v. Michaud, 48 C.M.R. 379 (N.C.M.R. 1973) (right to a public trial is subject to the limitation that spectators having no immediate concern with the trial need not be admitted in such numbers as to overcrowd the courtroom or displace space needed for those who do have special concern with the trial, and similarly, anyone whose conduct interferes in any way with the administration of justice may be removed).

[16] Mil. R. Evid. 412(c)(2); *but see* Globe Newspaper Co. v. Norfolk, 457 U.S. 596 (1982) (cannot be automatic exclusion, must be determined on a case by case basis).

party seeking closure of the court must "advance an overriding interest that is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review."[17]

Where there is no good reason for the direct exclusion of the public, the convening authority and military judge should not attempt to exclude the public by the indirect means of conducting the trial at an unusual time or an isolated place.[18] A convenient time and place should be selected to permit the public to attend.

6–2. Representatives of the media

In Brown, the Court of Military Appeals noted that "the right to a public trial includes the right of representatives of the press to be in attendance."[19] There are limitations on this right, however. In both Estes v. Texas[20] and Sheppard v. Maxwell,[21] the Supreme Court noted that press coverage inside the courtroom can be so massive, disruptive, and distracting that the defendant is denied a fair trial. In Sheppard, the Supreme Court stated that the judge may limit the number of newsmen, exclude them from the bar, and generally regulate their conduct within the courtroom.[22] The right to a public trial is not only a right of the accused, but also in part a right of the public and the news media. The trial may be closed to the public and the news media only if an overriding interest is articulated by the judge that a fair trial for the accused is likely to be jeopardized.[23] Rule 53 of the Federal Rules of Criminal Procedure also places restrictions upon the activity of newsmen within the courtroom.[24] The Manual provision is quite similar to Rule 53; the Manual provision reads "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."[25]

6–3. Witnesses

In the military, the general rule is that witnesses are excluded from the courtroom except when testifying.[26] If a witness is not excluded, counsel is entitled, on request, to an instruction that in weighing the witness' testimony, the court members may consider the fact that the witness was present in court and had an opportunity to listen to the other witnesses. The military judge may further instruct the witness not to discuss his or her testimony with anyone except counsel or the accused.[27] If there is evidence that someone has attempted to influence the witness' testimony, the judge may order the witness' segregation.[28] Exceptions to the general rule permit expert witnesses to remain in the courtroom to hear testimony upon which their hypothetical questions will be based,[29] or a person "designated as representative of the United States by trial counsel or… a person whose presence is shown by a party to be essential to the presentation of the party's case."[30]

The judge (or president of a special court-martial without a military judge) has discretion to limit the number of redirect and recross-examinations of witnesses by counsel and court members. When the counsel complete questioning the witness, the military judge may examine the witness. When the military judge completes the examination, the court members have an opportunity to pose questions.[31] The presiding officer may also permit a counsel who has rested to reopen the case to introduce previously omitted testimony.[32]

6–4. Trial counsel

In a general court-martial, the trial counsel must be an attorney.[33] In a special court-martial the trial counsel may be a layperson. The trial counsel may be disqualified "in any case in which that person is or has been: (A) the accuser; (B)

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[17] United States v. Hershey, 20 M.J. 433 (C.M.A. 1985); *see* Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); *see also* United States v. Travers, 25 M.J. 61 (C.M.A. 1987) (accused may bar the public from the court only if he can demonstrate an overriding interest that could justify closure).

[18] JAGJ 1958/6100, 18 Aug. 1958.

[19] 7 C.M.A. at 258, 22 C.M.R. at 48.

[20] 381 U.S. 532 (1965).

[21] 384 U.S. 333 (1966).

[22] *Id.*at 358. *See* Steward,*Trial by the Press,* 43 Mil. L. Rev. 37 (1969); United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), *aff'd,* 48 C.M.R. 19 (C.M.A. 1973).

[23] *Hershey,* 20 M.J. 433 (C.M.A. 1985); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); *but see* Mil. R. Evid. 505, 506.

[24] Fed. R. Crim. P. 53 (photographing and broadcasting proceedings).

[25] R.C.M. 806(c). The military judge may permit 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.

[26] Mil. R. Evid. 615; R.C.M. 806(b) discussion.

[27] Benchbook, para. 2-26.

[28] *See*United States v. Borner, 3 C.M.A. 306, 12 C.M.R. 62 (1953).

[29] McCormick, Evidence § 14 (3d ed. 1984).

[30] Mil. R. Evid. 615;*see* United States v. Ayala, 22 M.J. 777 (A.C.M.R. 1986) (no violation of rule excluding witnesses where criminal investigative agent designated Government representative at trial and testified); *see also* United States v. Croom, 24 M.J. 373 (C.M.A. 1977) (Government psychiatrist found essential to presentation of Government's case).

[31] Mil. R. Evid. 614.

[32] R.C.M. 917(c) discussion; Busch, Law And Tactics In Jury Trials § 269 (1949).

[33] UCMJ art. 27; United States v. Daigneault, 18 M.J. 503 (A.F.C.M.R. 1984) (defects in appointment of trial counsel or qualifications are procedural matters to be tested for prejudice).

an investigating officer; (C) a military judge; or (D) a member."[34] Also, counsel who have acted for a party are disqualified from serving for an opposing party in the same case.[35]

The trial counsel's general duty is to prosecute the case in the name of the United States.[36] The trial counsel's specific duties include: reporting procedural irregularities to the convening authority; correcting minor errors in the charges; notifying all court-martial participants of the date, hour, and place of meeting of the court; arranging for the presence of witnesses at the trial; obtaining a suitable room for the trial; supplying court members with stationery and a copy of the charges and specifications; proving each offense by competent evidence; making argument on the findings; introducing evidence in aggravation of the offense; making argument on the sentence; and supervising the preparation of the record of trial.[37]

6–5. Reporter

Neither the Code nor the Manual impose any minimum legal qualifications for court reporters. A reporter is disqualified, however, who "is or has been in the same case: (A) the accuser; (B) a witness; (C) an investigating officer; (D) counsel for any party; or (E) a member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial."[38] Article 28 of the UCMJ authorizes the service secretaries to promulgate regulations governing the detail of court reporters.[39] The detail of reporters may be accomplished by the convening authority personally or through a staff officer. Such detail may be oral and stated on the record but need not be reflected in the court papers.[40] The Secretary of the Army has promulgated a regulation that court reporters may be detailed to only general courts-martial and special courts-martial authorized to adjudge a bad conduct discharge.[41]

The reporter's duties are to record the proceedings during trial and to prepare the formal record of the trial.[42] There is a presumption of regularity accompanying a proper authentication of the record of trial that the recorder has recorded the proceedings properly.[43]

6–6. Interpreter

If some of the testimony will be given in a language other than English, the convening authority or another staff officer may appoint an interpreter for the court.[44] If the accused does not understand English, the military judge or president will direct that an interpreter be appointed for the accused.[45]

Like the reporter, the interpreter may be disqualified for various reasons.[46] The interpreter is like other witnesses in that the interpreter must be sworn and counsel may dispute the accuracy of the testimony, in this case the translation. Counsel may cross-examine the interpreter or call other interpreters to show that the translation is inaccurate.[47]

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[34] R.C.M. 502(d)(4).

[35] *Id.*;*but see* United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987); United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987) (all attorneys associated with an individual who is disqualified are not disqualified from participating in a case).

[36] R.C.M. 502(d)(5).

[37] R.C.M. 502(d)(5) discussion; see *infra chap.* 10, concerning detail of counsel.

[38] R.C.M. 502(e)(2); United States v. Yarbrough, 22 M.J. 138 (C.M.A. 1986) (error for reporter to be an accuser but since reporter never transcribed record of trial, reversal not required); United States v. Tucker, 9 C.M.A. 587, 26 C.M.R. 367 (1958); United States v. Moeller, 8 C.M.A. 275, 24 C.M.R. 85 (1957); United States v. McGee, 13 M.J. 699 (N.M.C.M.R. 1982) (no automatic reversal rule where "nominal" accuser serves as court reporter).

[39] UCMJ art. 28.

[40] United States v. Dionne, 6 M.J. 791 (A.C.M.R. 1978) (reporter function is purely a mechanical one).

[41] AR 27–10, para. 5–11a.

[42] R.C.M. 502(e)(3)(B).

[43] United States v. Little, 44 C.M.R. 833 (A.F.C.M.R. 1971) (affidavit of defense counsel to the effect that the recorder failed to record repetitive questions and part of the closing argument).

[44] UCMJ art. 28.

[45] R.C.M. 502(e)(3)(A). The accused may also retain an unofficial interpreter at no expense to the United States. *Id.* discussion.

[46] R.C.M. 502(e)(2); United States v. Martinez, 11 C.M.A. 224, 29 C.M.R. 40 (1960).

[47] Mil. R. Evid. 604.

Part Two
Jurisdiction

Chapter 7
Sources of Jurisdiction

7–1. General

Since the American Revolution, soldiers serving in the Armed Forces of the United States have been governed by laws designed to promote and maintain discipline and security within the military. In cases where a soldier in the Armed Forces has failed to comply with the law, the military has been empowered to exercise jurisdiction.[1] The sources authorizing the exercise of military jurisdiction in such cases may be divided under two headings:

a. Constitutional provisions.

b. International law.[2]

7–2. Constitutional provisions

The pertinent provisions of the United States Constitution serving as a source of military jurisdiction are found in the powers granted to the Congress, in the authority vested in the President, and in guarantees prescribed in the fifth amendment.[3]

a. Powers granted to Congress. Article I, section 8, grants in pertinent part, the following powers to Congress:

(1) "[to] provide for the common Defense… "(clause 1);

(2) "to constitute Tribunals inferior to the Supreme Court" (clause 9);

(3) "to define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations" (clause 10);

(4) "to declare War … and make Rules concerning Captures on Land and Water" (clause 11);

(5) "to raise and support Armies" (clause 12);

(6) "to provide and maintain a Navy" (clause 13);

(7) "to make Rules for the Government and Regulation of the land and naval Forces" (clause 14);

(8) "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" (clause 15);

(9) "to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States" (clause 16); and

(10) "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (clause 18).[4]

b. Powers granted to the President. Article II, section 2, designates the President as Commander in Chief of the Army and Navy and of the Militia when called into the actual service of the United States.[5] The President is thus vested with the power to wage wars declared by Congress and to implement the laws passed by Congress regarding the conduct of the war. The President is also charged with the responsibility of governing and regulating the Armed Forces, and of defining and punishing offenses relating to the Armed Forces and the conduct of war.[6] In addition, the Congress may grant specific authority to the President to assure additional responsibilities with regard to particular phases of military jurisdiction.[7]

c. The fifth amendment.

(1) *General.* The fifth amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crimes, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces; or in the Militia, when in actual service in time of war or public danger."[8] This clause recognizes the

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[1] Jurisdiction has been defined many ways. A generally accepted definition of jurisdiction is "the authority, capacity, power, or right to act." Black's Law Dictionary 991 (4th rev. 1979). For the purpose of this text, jurisdiction of a military agency is the authority, capacity, power or right of that agency to act judicially in a particular case. *See also* R.C.M. 201(a)(1) discussion.

[2] MCM, 1984, Preamble at 1.

[3] Courts-martial are not a part of the judiciary of the United States nor are they included among the"inferior courts" which Congress may establish under article III, section 1 of the United States Constitution.

[4] U.S. Const. art. I, § 8.

[5] *See* Swaim v. United States, 165 U.S. 553 (1897).

[6] *Ex parte Quirin,* 317 U.S. 1, 26 (142).

[7] UCMJ arts. 36, 56. (Article 36 of the Uniform Code of Military Justice authorizes the President to prescribe the rules of procedure, including modes of proof, to be used in military tribunals and Article 56 authorizes the establishment of maximum punishments.).

[8] U.S. Const. amend. V.

authority for trial of cases in the "land and naval forces" without a grand jury proceeding.[9]

(2) *Meaning of "land or naval forces."*

(a) Air Force. It is clear that the term"land or naval forces" includes all of the Armed Forces. Although not included in a strict and literal sense, the Air Force does come within the purpose and intent of the exception; consequently, cases arising in the Air Force are not subject to the requirement of grand jury proceedings.[10]

(b) Military commissions. Ex parte Quirin[11] involved a trial by military commission of saboteurs who landed on American shores during World War II. The Supreme Court held that military commissions were not subject to the fifth and sixth amendments. The Court's conclusion was based, not on the exception for "cases arising in the land or naval forces," but rather on the fact that trials by military commissions of enemy belligerents for violations of the law of war traditionally have been without jury. Because the purpose of the fifth amendment was to ensure jury trials only in those cases which traditionally had been tried by jury, the Court concluded that the amendment did not confer the right to trial by jury on enemy belligerents tried by military commissions for violations of the laws of war.[12]

7–3. International law

The sources of military jurisdiction in international law are the law of war, the visiting forces doctrine, and express agreements concerning jurisdiction.

a. Law of war. The law of war is merely a part of the broader field of international law and is a source of military jurisdiction.[13]

b. Visiting forces doctrine.

(1) *Manual provision.* The discussion under R.C.M. 201 of MCM, 1984, provides in pertinent part:

> Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to surrender its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty. See e.g., NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846. As a matter of policy, efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the code to the extent possible under applicable agreements.[14]

(2) *Source.* The visiting forces doctrine as set forth in the Manual for Courts-Martial was first expressed by Chief Justice John Marshall in 1812 in The Schooner Exchange v. M'Faddon and others.[15] In The Schooner Exchange an armed French vessel had entered the port of Philadelphia to seek refuge from a storm. While the ship was there, a libel suit was instituted against it, claiming that the ship had been owned formerly by the petitioners and that it had been seized wrongfully and forcibly by the French Government. In dismissing the case, Chief Justice Marshall stated that:

> [T]he Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.[16]

In support of his conclusion, Marshall reasoned that a public armed ship:

> constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.[17]

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[9] *See contra* W. Winthrop, Military Law and Precedents 48 (2d ed. 1920) [hereinafter Winthrop (2d ed. 1920)]. This clause was once thought to be a grant of authority to try persons not otherwise subject to military jurisdiction. The United States Supreme Court rejected this assertion in United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 n.22 (1955).
[10] United States v. Naar, 2 C.M.R. 739 (A.F.B.R. 1951).
[11] 317 U.S. 1 (1942).
[12] *Id.* at 40.
[13] *See Ex parte Quirin,* 317 U.S. 1 (1942).
[14] R.C.M. 201(d)3) discussion.
[15] 11 U.S. (7 Cranch) 116 (1812).
[16] *Id.* at 147.
[17] *Id.* at 144.

Thus, The Schooner Exchange resolved the issue of whether a friendly foreign warship was immune from attachment by one claiming to be its owner.[18] From this decision the visiting forces doctrine as described in R.C.M. 201(d)(3) discussion of the Manual for Courts-Martial is derived.

c. Express agreements concerning jurisdiction. The influence of the visiting forces doctrine has lessened as express agreements concerning jurisdiction have been entered into between the United States and countries in which United States troops are stationed. It is implicit that sending and receiving nations may regulate by express agreement jurisdiction over criminal offenses committed by visiting troops.[19] The United States has entered into many such agreements in recent years. The first of these was the status of forces agreement between the members of the North Atlantic Treaty Organization concerning the status of their forces, popularly known as the "NATO SOFA."[20] The criminal jurisdiction provisions of this agreement have served as a model for many of the other agreements.

7–4. Exercise of military jurisdiction

a. General. Part I, paragraph 2 of the Manual classifies the exercise of military jurisdiction into four categories.

(1) Jurisdiction exercised by a belligerent occupying enemy territory (military government);

(2) Jurisdiction exercised by a government temporarily governing the civil population within its territory or a portion thereof through its military forces as necessity may require (martial law);

(3) Jurisdiction exercised by a government in the execution of that branch of the municipal law which regulates its military establishment (military law); and

(4) Jurisdiction exercised by a government with respect to offenses against the law of war.[21]

b. Military government. Military government is the exercise of supreme authority by an armed force over the lands, property, and inhabitants of occupied territory. Military occupation confers upon the invading force the means of exercising some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity for maintaining law and order among the inhabitants and the occupying force. In such situations the military force must exercise certain judicial powers.

In Mechanics' and Traders' Bank v. Union Bank,[22] the United States Army's power to exercise judicial powers over territory captured during the Civil War was challenged by the Mechanics' and Traders' Bank which had to pay a substantial judgment to the Union Bank as the result of a judgment rendered against it by a military government occupation court.

On appeal to the United States Supreme Court, the following issue was argued:

> [W]hether the commanding general of the Army which captured New Orleans and held it in May 1862, had authority after the capture of the city to establish a court and appoint a judge with power to try and adjudicate civil causes.[23]

In denying the challenge of Mechanics' and Traders' Bank, the Court upheld the constitutionality of the provost court set up by the commanding general to hear civil cases in the State of Louisiana. In reaching the decision the Court reasoned that:

> [T]he power to establish, by military authority, courts for the administration of civil as well as criminal justice in portions of the insurgent states occupied by the National forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors.[24]

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[18] Schwartz,*International Law and the NATO Status of Forces Agreement,* 53 Colum. L. Rev. 1091 (1953), concludes that there is no such clear-cut rule of immunity in international law. This conclusion is based on a memorandum prepared by the Attorney General of the United States, contained in 99 Con. Rec. 8762–70 (14 July 1953). The Attorney General's view is that the NATO Status of Forces Agreement relinquishes no inherent rights of the United States forces abroad, but rather affords them more immunity in the NATO countries than they would have had without the agreement. *Id.* at 1111.

[19] Wilson v. Girard, 354 U.S. 524, 529 (1957). Such an agreement does not confer on United States military courts any jurisdiction over persons or offenses not otherwise within their general jurisdiction. *See* United States v. Kinsella, 137 F. Supp. 806 (S.D. W.Va. 1956), *rev'd sub nom.* Kinsella v. Krueger, 354 U.S. 1 (1957), in which the district court suggested that the administrative agreement with Japan conferred jurisdiction on the court-martial over a United States civilian dependent accompanying the armed forces overseas in peacetime. The Supreme Court held that because such jurisdiction was forbidden by the Constitution it could not be acquired by treaty.

[20] Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, TIAS 2846, 4 U.S.T. & O.I.A. 1792 ((signed at London, June 19, 1951), advice and consent of Senate obtained July 15, 1953, ratified by the President July 24, 1953, effective Aug. 23, 1953) [hereinafter referred to as "NATO SOFA," or the"Agreement."] *See also* DA Pam 27–161–1,"International Law," Vol. I at 210–25 (1964). The Agreement's provisions on criminal jurisdiction, and various problems with respect thereto, are discussed in J. Snee & A. Pye, Status of Forces Agreements and Criminal Jurisdiction (1957). *See also* The Judge Advocate General's School, U.S. Army, III Documents on International Law for Military Lawyers, Status of Forces (1969).

[21] MCM, 1984, Part I, para. 2(a); see *Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 141–42 (1866). The first three categories were enumerated by Chief Justice Chase in this decision.

[22] 89 U.S. (22 Wall.) 276 (1875).

[23] *Id.* at 294.

[24] *Id.* at 296.

Thus, the Supreme Court in Mechanics' and Traders' Bank upheld the right of the military to establish courts in insurgent territory with the power to exercise jurisdiction over civil and criminal cases.

The exercise of criminal jurisdiction by a military government court was challenged in Madsen v. Kinsella.[25] In Madsen, a military government occupation court, established by the United States High Commissioner for Germany, enforcing German law, was held to have jurisdiction to try the dependent wife of an Army officer for the murder of her husband. The exercise of judicial power by the occupant was said to arise from the occupant's right to protect the forces and from the occupant's duty, under international law, to maintain law and order in occupied territory.[26]

In Bennett v. Davis,[27] another case involving the exercise of criminal jurisdiction, the petitioner in a habeas corpus proceeding challenged "the jurisdiction of the court-martial on the ground that Austria was a sovereign nation and therefore had exclusive jurisdiction over the offense charged."[28]

> [At the time], Austria was occupied by military forces of the Allied and Associated Powers, as a part of conquered German territory, and remained so until the Austrian State Treaty became effective on July 27, 1955.[29]

On review of the petition for habeas corpus, the Tenth Circuit Court of Appeals held that:

> [I]n the absence of an executive agreement providing otherwise,… crimes committed in occupied foreign countries by members of United States Armed Forces are subject to military law and within exclusive jurisdiction of constituted military tribunals.[30]

The accused in Bennett was held to be subject to the laws of the United States, the occupying force, and his conviction was affirmed.

c. Martial law. In the United States martial law[31] is the exercise of governmental power, including judicial power, by military authority in an area where the domestic civilian government, including the courts, cannot function because of foreign invasion or civil insurrection. It is temporary in duration and ends when the control of the civil government is restored.[32] A prominent distinction between military government and martial rule is that military government generally is exercised in the territory of, or territory formerly occupied by, a hostile belligerent and is subject to restraints imposed by the international law of belligerent occupation. Martial rule is invoked only in domestic territory when the local government and inhabitants are not treated or recognized as belligerents. Martial rule over United States territory is governed solely by the domestic law of the United States. Only in those instances when civilian courts are not open and functioning may military tribunals be utilized.

This principle was firmly established in Ex parte Milligan,[33] in which a military commission convened by the commanding general of the military district of Indiana had tried Milligan, a long-time resident of Indiana and a citizen of the United States. Milligan was convicted of conspiracy against the United States and sentenced to death. In a habeas corpus proceeding the Supreme Court, noting that "[n]o graver question was ever considered by this court,"[34] set aside the conviction and held that military tribunals trying United States citizens in unoccupied domestic territory were without jurisdiction when civilian courts were open and functioning. The court stated:

> It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power.[35]

Because Indiana courts were operational and available to try Milligan at the time he was tried by military commission, the Supreme Court ruled that martial law was no longer in effect and that the military commission which tried the

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[25] 343 U.S. 341 (1952). *See also*United States *ex rel.* Jacobs v. Froehlke, 334 F. Supp. 1107 (D.D.C. 1971).
[26] 343 U.S. at 358 n.13.
[27] 267 F.2d 15 (10th Cir. 1959).
[28] *Id.* at 17.
[29] *Id.* at 17–18 (footnotes omitted).
[30] *Id.* at 18.
[31] Also referred to as "martial rule."
[32] *Ex parte Milligan,* 71 U.S. (4 Wall.) at 142 (1866) ("Martial law depends for its jurisdiction upon public necessity. Necessity gives rise to its imposition; necessity justifies its exercise; and necessity limits its duration. The extent of the military force used and the legal propriety of the measures taken, consequently, will depend upon the actual threat to order and public safety which exist at the time.").
[33] 71 U.S. (4 Wall.) 2 (1866).
[34] *Id.* at 118.
[35] *Id.* at 127.

accused lacked jurisdiction to try him.

d. Military law. Military law is the jurisdiction exercised by the military establishment over its own members, and those directly connected with it under certain conditions, to promote good order and discipline. Military law is simply that body of federal statutes enacted by Congress, as implemented by regulations of the President and the armed services, and interpreted by the courts, governing the organization and operation of the armed services in peace and war. This system obviously requires that the military forces exercise judicial powers.

e. Law of war. Military judicial powers may, under certain circumstances, be exercised under the law of war. In Ex parte Milligan,[36] the Supreme Court, in addition to holding that the military commission was without jurisdiction on the basis of martial law, held that the tribunal could derive no jurisdiction from the law of war because Milligan was a citizen of a state in which the regular courts were open and their processes unobstructed.[37]

In Ex parte Quirin,[38] the petitioners had been trained at a German sabotage school subsequent to the declaration of war between the United States and Germany. In June 1942 they landed in this country by submarine during the hours of darkness. Although the saboteurs were wearing military uniforms when they landed, all subsequently changed to civilian clothes and buried their uniforms. They later were apprehended by agents of the Federal Bureau of Investigation and were tried by a military commission, appointed by the President, for violations of the law of war and certain Articles of War. All sought a writ of habeas corpus attacking the jurisdiction of the military commission. One of the petitioners claimed to be an American citizen and therefore entitled to the rights afforded by the Constitution.

The Supreme Court held that the military commission had authority to try violators of the law of war. The Court restricted Milligan to its particular facts, noting that Milligan had never become an enemy belligerent. Because the petitioners were enemy belligerents, they were subject to the law of war and could be tried by a military commission for violations thereof.[39] War crimes cases, including violations of international conventions, may be tried by international military tribunals as well as by the military tribunal of a single nation. An international military tribunal is merely the joint exercise, by the states which establish the tribunal, of a right which each of them was entitled to exercise separately in accordance with international law. For example, the Nuremberg Tribunal was established pursuant to an agreement entered into by the United States, the United Kingdom, France and the Union of Soviet Socialist Republics.[40]

7–5. Agencies through which military jurisdiction is exercised

Part I, paragraph 2(b) of the Manual states that military jurisdiction is exercised through military commissions and provost courts, courts-martial, certain commanding officers, and courts of inquiry.[41]

a. Military commissions. The military commission is a tribunal created to try persons, not members of the Armed Forces,[42] for criminal offenses committed during a period of war or martial rule.

> The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.[43]

Military commissions or courts usually are appointed by theater commanders or subordinate commanders with delegated authority. They may be appointed by any field commander or commander competent to appoint a general court-martial.[44] Winthrop called the military commission "the exclusively war- court."[45]

(1) *Authority and composition.* The Uniform Code of Military Justice specifically recognizes the jurisdiction of military commissions with respect to offenders or offenses that by statute or by the law of war may be tried by such commissions,[46] and expressly makes triable by military commissions and general courts-martial the offenses of aiding the enemy[47] and spying.[48] The military commission usually is composed of five officers, and it may impose any lawful penalty, including death. Subject to applicable rules of international law and to regulations prescribed by the President

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[36] *Id.* at 107.
[37] *Id.* at 121–22.
[38] 317 U.S. 1 (1942).
[39] *See also In re Yamashita,* 327 U.S. 1 (1946).
[40] 2 L. Oppenheim, International Law § 257 (7th ed. 1948).
[41] MCM, 1984, Part I, para. 2(b).
[42] Members of the "armed forces" include those captured members of the enemy's forces who are entitled to prisoner of war status under the 1949 Geneva Prisoner of War Convention.
[43] Winthrop (2d ed. 1920), *supra* note 9, at 831.
[44] *See also supra* note 6.
[45] Winthrop (2d ed. 1920), *supra* note 9, at 831.
[46] UCMJ art. 21.
[47] UCMJ art. 104.
[48] UCMJ art. 106.

or other competent authority, military commissions are guided"by the applicable principles of law and rules of procedure and evidence prescribed for courts- martial."[49]

(2) *Historical background.*

(a) Mexican War. Military commissions were used by General Scott in 1847 during the occupation of Mexico. The commissions primarily tried Mexican nationals for serious civilian offenses and offenses against the occupying forces. Scott also convened"councils of war," apparently a reversion to the terminology and procedural limitations of the 19th century legislation for a few trials involving violations of the law of war. Winthrop notes, the"term 'council of war,' as a designation for a court, has not since reappeared in our law or practice."[50]

(b) Civil War. It has been estimated that over 2,000 cases were tried by military commissions during the Civil War and the period of Reconstruction.[51] The military commissions generally followed the principles and procedures applicable to trials by courts-martial. Military commissions were very popular and highly praised for their value and efficiency during the Civil War.[52]

(c) Reconstruction period. The first of the Reconstruction Laws authorized the general officer commanding each of the five districts into which the South was divided to try offenders by either "local civil tribunals" or "military commissions or tribunals."[53] As a general rule, trial was held by state courts and trials "by military commission under the Reconstruction Laws were in all not much over two hundred in number."[54]

(d) World War II. During and following World War II, enemy belligerents were tried by military commissions for violations of the law of war.[55] In Ex parte Quirin,[56] German saboteurs were tried by a military commission appointed by the President. In denying the saboteurs' petitions for writs of habeas corpus, the Supreme Court upheld the military commission's jurisdiction over the offenses and the President's power to lawfully order a military commission to hear the cases.

In the case of In re Yamashita,[57] the accused, a Japanese general, was convicted by military commission of a violation of the law of war. Pursuant to the orders appointing the commission, it considered depositions, affidavits, hearsay, and opinion evidence. The petitioner contended that the introduction of such evidence was a violation of the Articles of War. The Supreme Court held that the Articles of War and the rules of evidence prescribed pursuant thereto were not applicable to the trial of an enemy.[58] The Court pointed out that Article of War 2, enumerating those persons subject to the Articles of War, did not include enemy combatants.[59] The Court specifically stated:

> Congress gave sanction… to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class.
>
> Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried … was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War… were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.[60]

For these reasons, the Court held that General Yamashita was tried properly by military commission.

The petitioner further claimed that the Geneva Convention of 1929 entitled him to be tried by the same rules of evidence as used in trials of members of the Armed Forces of the United States. Article 63 of that Convention provides

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[49] MCM, Part I, para. 2(b)(2).

[50] Winthrop (2d ed. 1920), *supra* note 9, at 833, n.68.

[51] *Id.* at 834.

[52] Dig. Ops. JAG 1968, at 223-24. "So conspicuous had the importance of these commissions, and the necessity for their continuance become, that the highest civil courts of the country had recognized them as part of the military judicial system of the government, and Congress, by repeated legislation, had confirmed their authority, and, indeed, extended their jurisdiction." *Id.* at 224.

[53] Act of Mar. 2, 1867, "An Act to provide for the more efficient government of the rebel States," § 1, 14 Stat. 428. *See* (2d ed. 1920), *supra* note 9, at 848, for the text of the statute.

[54] (2d ed. 1920), *supra* note 9, at 853.

[55] The rules of evidence in the military commissions during this period were much less stringent than those prescribed for trials under the Articles of War. For example, in appointing the military commission to try captured German saboteurs in 1942, President Roosevelt set forth the following criterion for determining the admissibility of evidence: "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man… ." M.O. of July 2, 1942, 3 C.F.R. 1308 (1938–1943 comp.). *See also In re Yamashita,* 327 U.S. 1, 19 (1946).

[56] 317 U.S. 1 (1942).

[57] 327 U.S. 1 (1946).

[58] *Id.* at 19.

[59] *But see* UCMJ art. 2(9).

[60] 327 U.S. at 20.

that "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[61]

The Supreme Court concluded that article 63 applied only to offenses "committed while a prisoner of war, and not for a violation of the law of war committed while a combatant." That is, it applied only to post- capture and not to precapture offenses.[62] Consequently, the laxity of the rules of evidence as applied by the military commission did not violate the Geneva Convention of 1929.

(3) *Limitations imposed by international law.* Part I, paragraph 2(b)(2) of the Manual incorporates the concept that military commissions will be subject"to any applicable rule of international law." Although not the sole source of applicable international law, the Geneva Conventions of 1949, where applicable, are the primary source of provisions of international law outlining procedures before a military commission. Under these Conventions certain stricter procedural requirements are specified for persons who qualify as prisoners of war under article 4 of the 1949 Geneva Prisoner of War Convention. Article 85 of that Convention provides that "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[63]

The proceedings at the Diplomatic Conference clearly reflect that this provision was intended to apply to precapture offenses, as well as subsequent offenders, thereby obviating the holding in the Yamashita case.[64] Among the "benefits" conferred by the Convention is article 102 which provides:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.[65]

While international law publications of the Department of the Army[66] indicate that a prisoner of war may be tried by a military commission if the procedural safeguards applicable in a United States court-martial proceeding are applied, this conclusion is questionable as article 102 provides for trial by the "same courts." In any event, prisoners of war are subject to court-martial jurisdiction under Article 2(a)(9) of the Uniform Code of Military Justice and may be tried by court-martial in all instances.[67]

The 1949 Geneva Civilian Convention, where applicable, imposes certain minimal standards upon military commissions.[68] For example, if an accused protected by the Convention is charged with an offense for which punishment may be death or imprisonment for two years or more, notice concerning the particulars of the case must be given to the Protecting Power, a neutral nation appointed to safeguard the interest of a belligerent under the provisions of the Convention. The accused is entitled to qualified counsel and the right to petition against the finding and the sentence to higher United States authority. Generally, military commissions do not try ordinary criminal offenses against the law of war and enactments of the United States military authorities, and it is regarding these types of offenses that the provisions of the Convention become applicable.

b. Courts-martial. The court-martial is the most commonly used agency for the exercise of military jurisdiction.

c. Commanding officers. Article 15 of the Uniform Code of Military Justice provides, that, for minor offenses, commanding officers may impose certain limited forms of nonjudicial punishment upon soldiers within their command without resort to a trial by court-martial. Generally, the consent of the soldier is required before the commander may proceed under article 15.[69] By using article 15, the commanding officer becomes another agency through which military jurisdiction may be exercised.

d. Courts of inquiry. Article 135 of the Code authorize the appointment of courts of inquiry "to investigate any matter."[70] A court of inquiry is a formal fact-finding tribunal and constitutes another agency through which military jurisdiction may be exercised.

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[61] Art. 63 1929 Geneva Convention.

[62] 327 U.S. at 21.

[63] Art. 85, 1949 Geneva Civilian Convention.

[64] *See III* Commentary On Geneva Convention Relative to the Treatment of Prisoners of War 413–27 (Pictet ed. 1960).

[65] Art. 102, 1949 Geneva Civilian Convention.

[66] FM 27–10, The Law of Land Warfare, para. 178b.

[67] As it is not discussed elsewhere in this text, it should be noted that the 1949 Geneva Prisoner of War Convention explicitly provides for certain procedural safeguards for prisoners of war, *e.g.,* prohibition of double prosecution for the same act (art. 86), prohibition of ex post facto laws (art. 99), prohibition of compulsory self-incrimination (art. 99), right to qualified counsel (arts. 99, 105), right of appeal (art. 106), the right to a speedy trial (art. 103), provision for compulsory attendance of witnesses (art. 105), and that the prisoner of war, not being a United States national, is not bound to it by a duty of allegiance (arts. 87, 100). *See also* other applicable procedural requirements in arts. 82-108 of this Convention.

[68] *See* arts. 52, 64–78, 117–28, 1949 Geneva Civilian Convention.

[69] MCM, Part V, para. 3.

[70] UCMJ art. 135(a).

Chapter 8
Nature of Court-Martial Jurisdiction

8–1. Nature of court-martial jurisdiction

a. Disciplinary character. Court-martial jurisdiction is entirely disciplinary in character.[1] Courts-martial are authorized to consider only criminal cases[2] and can adjudge only criminal sentences. Courts-martial cannot adjudge civil remedies such as the payment of damages or the collection of private debts.[3]

b. Effect of various factors on jurisdiction.

(1) *Place of commission of the offense.*

(a) General. As a general rule, jurisdiction of courts-martial depends on the military status of the accused.[4] So long as the accused is a member of the armed forces at the time of the offense and the time of trial, the accused is subject to courts-martial jurisdiction. The fact that the offense was committed beyond the boundaries of the United States is not determinative of jurisdiction over the person, because Congress has provided in article 5 of the Uniform Code of Military Justice that the Code "applies in all places." Unlike the Federal courts, courts-martial are not required by article III and the sixth amendment to try an accused in the place where the crime was committed.[5]

(b) Exceptions. Crimes and offenses not capital. The "crimes and offenses not capital" clause of article 134 of the Code authorizes the trial by courts-martial of armed forces personnel who commit offenses which are in violation of State or Federal laws, but not in violation of any other article of the Code.[6] When the civilian Federal statute is of limited geographical application, such as those noncapital crimes and offenses limited in their applicability to the special maritime and territorial jurisdiction of the United States or those included in the law of the District of Columbia, the offense must have been committed within the geographical area to which the particular statute applies to be cognizable under this provision of article 134.[7] It is important to note, however, that one accused of an article 134 violation of a Federal statute need not be tried by courts-martial in the geographical area where the statute is applicable.[8]

Law of war. General courts-martial have the power to try all persons made subject to military jurisdiction by the laws of war.[9] General courts-martial also have the power to:

> try any person … for any crime or offense against … [t]he law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or in part by military authority of the occupying power.[10]

In such cases the court-martial generally sits in the country where the offense is committed, and if the person tried is a protected person under the 1949 Geneva Convention, the court-martial must sit in the occupied country.[11]

(2) *Place of the trial.* The jurisdiction of a court-martial does not depend upon where the court sits.[12] This rule was applied in United States v. Durant,[13] a case involving the theft of the Hesse Crown Jewels. In Durant the defense contended that the court lost jurisdiction by leaving Germany and convening temporarily in Washington, D.C. An Army Board of Review held that the court's leaving the command of the convening authority did not deprive it of jurisdiction.[14] It is now generally recognized that "[o]nce jurisdiction attache[s], the scene of the trial [is] not material so long as no prejudice to or change in the rights of the Petitioner result[s]."[15]

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[1] R.C.M. 201(a)(1).

[2] *Id.* at discussion.

[3] Note, however, the authority of summary courts-martial to act as quasi-administrators of the affairs of deceased personnel, 10 U.S.C. §§ 4712, 9712 (1982), and to conduct an inquest, 10 U.S.C. 4711, 9711 (1982).

[4] Solorio v. United States, 483 U.S. 435 (1987); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 241 (1960). *See also* Puhl v. United States, 376 F.2d 194, 196 (10th Cir. 1967); United States v. Schafer, 13 C.M.A. 83, 85–86, 32 C.M.R. 83, 85–86 (1962).

[5] *See* R.C.M. 201(a)(3).*Cf.* United States v. Gravitt, 17 C.M.R. 249, 256 (1954) and United States v. Schreiber, 16 C.M.R. 639, 656 (A.F.B.R. 1954). In these cases defense moved to change venue away from place of commission due to hostility and publicity. The courts argued that venue could be changed away from the place of commission but denied relief on the facts.

[6] UCMJ art. 134.

[7] MCM, Part IV, para. 60(4(c).

[8] R.C.M. 201(a)(3).

[9] UCMJ art. 18; *see also* R.C.M. 201(f)(1)(B).

[10] R.C.M. 201(f)(1)(B)(i)(b).

[11] Geneva Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, art. 66, 6 U.S.T. 3516, 3558, T.I.A.S. No. 3365, 75 U.N.T.S. 287. *But cf. Ex parte Quirin*, 317 U.S. 1 (1942) and Waberski, 31 Op. Att'y Gen. 356 (1918) which inferentially indicate that military commissions trying offenders for violations of the law of war may sit in the United States.

[12] *See supra* note 7.

[13] 73 BR (Army) 49 (1947) (CM 324235).

[14] *Id.* at 69–70.*Accord*, Durant v. Hiatt, 81 F. Supp. 948, 955–56 (N.D. Ga. 1948), *aff'd, sub nom.*Durant v. Gough, 177 F.2d 373 (5th Cir. 1949).

[15] Perlstein v. United States, 57 F. Supp. 123, 127 (M.D. Pa. 1944), *aff'd,* 151 F.2d 167 (3d Cir. 1945),*cert. granted*, 327 U.S. 777 (1946), *cert. dismissed as moot, sub nom.* Perlstein v. Hiatt, 328 U.S. 822 (1946).

(3) *Absence of court members.* The absence of a court member from a general or special court-martial does not deprive the court of jurisdiction to try the case so long as a quorum of the court members is present. Although the Supreme Court in Ballew v. Georgia,[16] held that a State criminal trial by a jury composed of five members deprives the accused of his right to trial by jury, the Army Court of Military Review has held that the requirement of a six-member jury does not apply to courts-martial.[17] This is true whether the absence is authorized[18] or unauthorized.[19] The convening authority may delegate to the staff judge advocate or some other principal assistant[20] the authority to excuse court members before assembly.[21] The delegate may not excuse more than one-third of the detailed court members.[22]

(4) *Presence of enlisted soldiers as court members.* Enlisted soldiers may serve as members of courts-martial if they are not members of the accused's unit,[23] and if the accused has made a request for enlisted soldiers to be included in the membership of the court.[24]

The question of whether the convening authority may delegate the power to determine the specific enlisted soldiers to serve on the court has been addressed by the Court of Military Appeals. It reasoned that "a designated convening authority's power to appoint a court-martial is one accompanying the position of command and may not be delegated… "[25] Because subordinate administrative personnel had added enlisted soldiers to the court panel from a master list, instead of allowing the convening authority to select them personally, the court-martial was without jurisdiction, for "[properly selected] court members are, unless properly waived, an indispensable jurisdictional element of a general court-martial… "[26]

In cases in which the accused has made a request for enlisted court members, at least one-third of the court membership must be comprised of enlisted soldiers.[27] In past years there has been litigation concerning the procedural aspects of submitting requests for enlisted soldiers, the selection process used for choosing enlisted court members and the failure of convening authorities to comply with specific requests of the accused that only certain ranks or races be selected as court members.[28]

The failure of the trial record to indicate that an accused was advised of the right to have enlisted soldiers appointed as members of the court is not error. The counsel appointed to defend an accused enlisted soldier is required to advise the accused of this right;[29] the military judge may presume that counsel has performed these required duties in the absence of any indication to the contrary.[30] Note, however, that when a request for enlisted court members is properly executed prior to a trial which ends with the declaration of a mistrial and the request is never withdrawn and is specifically reaffirmed by the accused's counsel at the second trial, enlisted soldiers may be properly appointed to the second court without the submission of a new request for enlisted soldiers.[31] Military appellate courts have imposed numerous requirements regarding this request. First, the accused must be an enlisted soldier of the armed forces at the

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[16] 435 U.S. 223 (1978).

[17] United States v. Montgomery, 5 M.J. 832 (A.C.M.R. 1978), *pet. denied*, 6 M.J. 89 (C.M.A. 1978).

[18] UCMJ art. 29(a) (absence due to physical disability or as a result of challenge, or by order of the convening authority or military judge for good cause shown on the record); *see* R.C.M. 505(c); United States v. Grow, 3 C.M.A. 77, 11 C.M.R. 77 (1953). Note that transfer of a court member of the command of the convening authority after a case has been referred for trial to the court does not deprive the court of jurisdiction. United States v. Holstein, 65 BR (Army) 271 (1947) (CM 316193).

[19] United States v. Roundtree, 38 C.M.R. 796, 798 (A.F.B.R. 1967); United States v. Patterson, 30 C.M.R. 478, 479 (A.B.R. 1960) ("[T]he unauthorized absence of a member of the court would not be sufficient grounds for appeal unless it could be demonstrated that such absence materially or substantially prejudiced the rights of the accused."); *see also* United States v. Cross, 50 C.M.R. 501 (A.C.M.R. 1975) (military judge's excusal of court member without approval of convening authority was neither jurisdictional nor prejudicial error). *Contra,* United States v. Colon, 6 M.J. 73 (C.M.A. 1978) (prejudicial error for military judge to proceed to trial without presence of 40% of the detailed members who were not excused by the convening authority). Note, moreover, that the unexplained absence of a court member after reassembly is prejudicial. United States v. Boehm, 38 C.M.R. 328 (C.M.A. 1968); United States v. Greenwell, 31 C.M.R. 146 (C.M.A. 1961). If no reason for the member's absence appears in the record, an appellate court will not assume the absence was for good cause. United States v. Boehm, 38 C.M.R. 328, 334 (C.M.A. 1968). Where a court member is absent after arraignment, the Government has the duty to demonstrate in the record the reasons for such absence and to establish affirmatively that it falls within the provisions of the Code and failure to explain such absence in the record is prejudicial error requiring a rehearing. United States v. Greenwell, 31 C.M.R. 146 (C.M.A. 1961). *Cf.* United States v. Stephenson, 2 C.M.R. 571 (N.B.R. 1951) (failure to swear court members and personnel of the prosecution and the defense divests the court-martial of jurisdiction).

[20] R.C.M. 505(c)(1)(B)(i); AR 27–10, para. 5–18c (22 Dec. 1989).

[21] R.C.M. 505(c).

[22] R.C.M. 505(c)(1)(B)(ii). The selection of the court members, however, is still the responsibility of the convening authority. See generally United States v. Carmen, 19 M.J. 932, 935 (A.C.M.R. 1985).

[23] *But see* United States v. Wilson, 21 M.J. 193 (C.M.A. 1986) (accused waived this personal disqualification).

[24] UCMJ art. 25(c)(1); R.C.M. 503(a)(2);*see* McClaughry v. Deming, 186 U.S. 9, 62 (1902) (wherein Justice Peckham stated that, "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."); United States v. Brookins, 33 M.J. 793 (A.C.M.R. 1991) (jurisdiction was lacking when record of trial failed to reveal oral or written request for enlisted membership when enlisted members were present on the panel).

[25] United States v. Ryan, 5 M.J. 97, 100 (C.M.A. 1978).

[26] *Id.* at 101.

[27] *But see* R.C.M. 503(a)(2) when physical conditions or military exigencies preclude obtaining the requested enlisted court members.

[28] *See, e.g.*, United States v. Credit, 2 M.J. 631 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977) (challenge to court member based upon religion).

[29] R.C.M. 502(d)(6) discussion.

[30] United States v. Lutman, 37 C.M.R. 892, 900 (A.F.B. 1967).

[31] United States v. Williams, 50 C.M.R. 219 (A.C.M.R. 1975).

time of the request; thus, a dishonorably discharged prisoner in confinement is not entitled to enlisted soldiers on a court-martial appointed to try him or her for offenses committed in confinement although he or she had formerly been an enlisted soldier.[32] Furthermore, the accused must personally make this request: oral or written request by defense counsel is insufficient.[33] The requirement was "enacted to make very certain that no person other than an accused could cause the presence of enlisted members on a panel… [T]he language used is … clearly indicative of the mandatory feature of the provision… "[34] the request is not made personally, the convening authority is without statutory authority to designate the enlisted soldiers and the court is without jurisdiction to proceed.[35]

In some cases where the accused has requested that enlisted soldiers be included in the membership, defense counsel have challenged the court-martial's jurisdiction to try the accused on the ground that the appointed court-martial does not consist of one-third enlisted soldiers.

If the court-martial has not proceeded to the presentation of the prosection case, the military judge may permit the prosecution to use its unused peremptory challenge to bring the court-martial membership within the statutory requirements. While defense counsel have objected to a military judge's permitting Government counsel to use a peremptory challenge in this manner, the appellate courts have upheld the practice. In such cases the reviewing courts have stated that the appropriate time for determining the officer-enlisted ratio is when evidence is actually taken in a case,[36] and not when the court is appointed, assembled, or sworn. In this regard a Navy Board of Review has stated that:

> It was the manifest intent of Congress to grant an accused the right, if he so desired, to have the evidence weighed, his guilt determined, and his punishment fixed by a court-martial composed, in designated part, of military personnel of his own [enlisted] status. The provisions of the Code and of the Manual, in our opinion, simply guarantee that an accused will not be "tried" by a court without the required officer-enlisted ratio. The trial of an accused consists only of the joining of issues by arraignment and plea, the hearing and weighing of evidence in determining of those issues, the disposition of interlocutory questions arising during such determination, the resolution of the issues joined in the findings of the court, and of the imposition of a just, legal, and appropriate sentence. The trial of the accused does not include those preliminary proceedings whereby the court is organized, its eventual membership tested and determined by challenge and excuse, and by which it is qualified and sworn.[37]

An Air Force Board of Review[38] and an Army Court of Military Review[39] similarly have held that the proper time for determining the officer-enlisted ratio is at the time of actual trial and not at the time of preliminary proceedings.

In requesting that enlisted soldiers be included in the membership of a court, soldiers sometimes request that the convening authority select only lower ranking enlisted soldiers. Such a request was presented in United States v. Catlow[40] where the accused, an E1, submitted a request worded in part as follows:

> Pursuant to Article 25(c) MCM [sic], the accused, THOMAS CATLOW, hereby requests that he be tried by a Court-Martial Board comprised of his peers, and pursuant to the aforesaid section he demands that said Court-Martial Board be comprised totally of enlisted members of equal rank or a rank not greater than the highest rank at any time held by the accused.[41]

The convening authority treated the accused's request as a request for enlisted soldiers and selected a court-martial consisting of five officers and three enlisted soldiers: a sergeant major, a first sergeant and a specialist four.

On appeal to the Army Court of Military Review, the accused argued that the court-martial lacked jurisdiction because the convening authority failed "to comply with all of the conditions specified in the request… "[42] In denying the accused's allegation, the court found that the convening authority properly treated the accused's request for enlisted soldiers as divisible, "that is, one for enlisted membership within the requirements of article 25(c)(1) and another for a total membership of enlisted persons of the lowest grade."[43] The court further concluded that the convening authority's selection of enlisted soldiers was proper, absent an indication on the part of the accused that the request was to be disregarded if the specified conditions included in the request were not honored.

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[32] United States v. Ragan, 32 C.M.R. 913 (A.F.B. 1962).
[33] United States v. Warren, 50 C.M.R. 357 (A.C.M.R. 1975).
[34] United States v. White, 45 C.M.R. 357, 362 (C.M.A. 1972).
[35] In Asher v. United States, 46 C.M.R. 6 (C.M.A. 1972) the court gave retroactive effect to the *White*holding. *See also* Gallagher v. United States, 46 C.M.R. 191 (C.M.A. 1973).
[36] United States v. Rendon, 27 C.M.R. 844, 847 (N.B.R. 1958).
[37] *Id.* at 847.
[38] United States v. McCaffity, 2 C.M.R. (AF) 25, 29 (1949).
[39] United States v. Smith, 42 C.M.R. 366 (A.C.M.R. 1970).
[40] 47 C.M.R. 617 (A.C.M.R. 1973).
[41] *Id.* at 620.
[42] *Id.*
[43] *Id.*

In United States v. Timmons,[44] the accused, a seaman recruit, submitted a request that enlisted personnel be included as members of the panel in his court-martial, and in addition, that "enlisted members [selected] be of a rank of E-4 or below, and be supplied from my unit, the Fleet Training Center."[45] The convening authority treated the accused's request as one for a court composed of enlisted members and selected an appropriate number of enlisted members from units different than the accused's to sit as members in the accused's court-martial.

At trial, the accused challenged the convening authority's failure to select enlisted members from the Fleet Training Center in a motion requesting dismissal of the "charges against him on the grounds that Article 25(c)(1), Uniform Code of Military Justice, in prohibiting enlisted members from his own unit from sitting on his court-martial, denied him equal protection under the Constitution of the United States."[46] On denial of the motion, the accused requested trial by military judge alone.

On appeal, the accused alleged that he "was denied his fifth amendment right to due process of the law when enlisted men from his own unit were denied participation as members of his court."[47] In addition, the accused argued that:

> Article 25(c)(1), Uniform Code of Military Justice, "discriminates against enlisted men as a class and against him in particular, because it amounts to a deprivation of trial by peers (i.e., other men from his own unit); while at the same time it allows an officer to be tried by a court of peers (i.e., other officers from his own unit)."[48]

A Navy Court of Military Review rejected these arguments and held that the accused's court-martial was properly constituted under the provisions of article 25(c)(1) of the Code. In reaching its decision, the court concluded that the convening authority acted properly in ignoring the accused's request regarding the selection of enlisted members only from his unit. In addition, the court concluded that the accused's fifth amendment right to due process was not violated by the provisions of article 25(c)(1) which required the exclusion of enlisted members of the accused's unit from serving on the membership of his court-martial.

In addressing the accused's allegations of error, the court briefly summarized the legislative history surrounding article 25(c)(1) and its provisions granting an enlisted accused the right to request appointment of enlisted members, other than those of their own unit, to serve as members of a court-martial.[49]

In reviewing the legislative history of article 25(c)(1) the court noted that no references existed to explain why Congress decided to exclude soldiers of an accused's unit from serving as jury members in cases in which enlisted soldiers were requested.[50] The court, however, concluded that, "Congress probably made this distinction for the purpose of avoiding bias or prejudice either for or against an accused which experience had shown was likely to develop in an integrated body of troops where the members worked and lived in close association with each other."[51] In support of its conclusion, the court noted that an Army Board of Review had made a similar finding in 1957.[52]

Enlisted soldiers have challenged the propriety of convening authorities selecting only senior ranking enlisted soldiers to serve as enlisted court members. The issue was presented to the United States Court of Military Appeals in United States v. Crawford.[53]

In Crawford, the accused, a private E2, was tried by general court-martial before a court of officers and enlisted soldiers. On appeal, the accused alleged that the convening authority's selection of the enlisted court members, three sergeants major and one master sergeant was improper.

In deciding "whether the method by which enlisted court members were selected discriminated against the lower

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[44] 49 C.M.R. 94 (N.C.M.R. 1974).

[45] *Id.*

[46] *Id.* at 94–95.

[47] *Id.* at 94.

[48] *Id.* at 95.

[49] *Id.* In part, the court stated:

> Originally, in this country, dating back to the War of Independence and until 1948, participation as members in courts-martial was limited to officers. The use of officer court members, in fact, predates our Constitution. It was not until 1948 that membership on the court was broadened to include, at the request of an accused, some enlisted members of units other than the accused's unit. Elston Act, Public Law 759, 80th Congress, 62 Stat. 604, approved June 24, 1948. This same provision, with minor changes, carried over into Article 25(c)(1), Uniform Code of Military Justice, which was passed in 1950.

[50] *Id. Accord* United States v. Crawford, 35 C.M.R. 3*passim* (C.M.A. 1964).

[51] United States v. Timmons, 49 C.M.R. 94, 95 (N.C.M.R. 1974).

[52] *Id.* (quoting United States v. Scott, 25 C.M.R. 636, 640 (A.B.R. 1957), as follows:

> The eligibility criteria governing the appointment of enlisted members of court-martial seems obviously designed to insure the selection of individuals who are free from bias or prejudice arising from a previous close association with the accused, or from a possible mental identification with the supposed interests of his unit in the disposition of the case).

[53] 35 C.M.R. 3 (C.M.A. 1964).

enlisted ranks in such a way as to threaten the integrity of the courts-martial system and violate the Uniform Code of Military Justice,"[54] the court carefully reviewed the procedures followed by the convening authority in selecting the enlisted soldiers and extensively reviewed the law applicable to the selection of enlisted soldiers to serve on military courts-martial.

In upholding the selection process in Crawford, Chief Judge Quinn noted that "the Uniform Code [of Military Justice] gives [convening authorities great] discretion in selecting [which persons are] best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament."[55] With respect to the procedures followed by the convening authority in selecting the enlisted soldiers who served on the accused's court-martial, Chief Justice Quinn concluded that "[t]here was no desire or intention to exclude any group or class on irrelevant, irrational, or prohibited grounds."[56] He concluded further that "the evidence leaves no room to doubt that the selection process was designed only to find enlisted men qualified for court service."[57] In Chief Judge Quinn's opinion, a convening authority could look to senior noncommissioned officers in an effort to find qualified personnel to serve as enlisted court members.

In Crawford, the accused also alleged that the convening authority's intentional selection of a black senior noncommissioned officer to serve as a court member was improper. The facts in Crawford revealed that because the accused was black and was charged with assaults against white soldiers, a deliberate effort was made on the part of the staff judge advocate and the convening authority to find a black senior noncommissioned officer to serve as a court member in the accused's court-martial.

In holding that "there was no error in the deliberate selection of a Negro to serve on the accused's court-martial,"[58] Chief Judge Quinn reasoned that the conscious decision on the part of the convening authority to include a member of the accused's race on the membership of the jury which tried the accused, was "discrimination in favor of, not against [the] accused."[59] In reaching his decision, Chief Judge Quinn distinguished a Fifth Circuit Court of Appeals decision which had granted a writ of habeas corpus to a black accused from Louisiana, who alleged that he had been indicted improperly by a grand jury panel which had been selected from a list of 20 persons, six of whom were blacks whose names had been added deliberately to the list. It was Chief Judge Quinn's opinion that in reaching the decision in Collins the Fifth Circuit failed properly to differentiate between the practice of inclusion and exclusion of minorities from jury service.[60]

In a concurring opinion, Judge Kilday agreed with Chief Judge Quinn's decision regarding the legality and propriety of the convening authority's selecting senior noncommissioned officers and a black noncommissioned officer to serve on the accused's court-martial. It was Judge Kilday's opinion, however, that an accused must allege some abuse of discretion on the part of the convening authority in selection of court members if a challenge to the selection process is to be regarded as meritorious. In Crawford, Judge Kilday noted that there was no evidence or allegation that the convening authority abused his discretion in selecting senior noncommissioned officers to serve on the accused's court-martial. Accordingly, Judge Kilday concluded that the accused failed to allege an error in raising the issue.[61]

In dissent, Judge Ferguson argued that the United States Supreme Court has "consistently struck down systematic, arbitrary, and discriminatory exclusion of classes from jury service, when it appears that such classes meet the qualifications for service under the statutes involved."[62] As examples, he noted the Supreme Court's reversal of cases involving the systematic exclusion of blacks and wage earners from jury service.[63] He argued the systematic exclusion of lower ranking noncommissioned officers and other ranks from selection as court members serves to undermine the court-martial system thus making the court-martial simply an instrument of the higher ranks, and contended that the preparation and use of selection lists is improper. In his opinion, the use of such lists, which contain only the names of senior ranking noncommissioned officers, in effect rendered the statutory language of article 25(c)(1) permitting"[a]ny enlisted member … to serve on general and special courts-martial" meaningless.[64]

Lastly, Judge Ferguson criticized the deliberate selection of a black court member by the convening authority because the accused was black. In part, he stated that:

> [T]he detailed and arduous quest for a Negro member of the court, selected solely on the basis of his race, establishes beyond cavil that the ugly fact of race was considered, at least in this jurisdiction, to be the standard by

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[54] *Id.* at 5.
[55] *Id.* at 18.
[56] *Id.* at 12.
[57] *Id.*
[58] *Id.* at 13.
[59] *Id.*
[60] *Id.* Chief Judge Quinn's view was ultimately adopted by the Fifth Circuit in Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975,*reh'g denied*, 386 U.S. 1043 (1967).
[61] 35 C.M.R. at 13-21 (Kilday, J., concurring).
[62] *Id.* at 2 (Ferguson, J., dissenting).
[63] *Id.* at 27-28 (Ferguson, J., dissenting) citing Norris v. Alabama, 294 U.S. 587, 599 (1935) and Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946).
[64] *Id.* at 28-29 (Ferguson, J. dissenting).

which military jurors should be selected in the case of Negro defendants. I would not hesitate to strike this practice down and remind commanders everywhere that neither race, nor color, nor creed, enter into the administration of any American judicial system.[65]

In subsequent cases, the Court of Military Appeals upheld the practice of convening authorities considering only senior ranking noncommissioned officers for selection to serve as court-martial members on the grounds that it is reasonable to assume that "the attainment of senior rank gives fair promise of the possession of the qualities specified in the Code as desirable for court members."[66]

But in United States v. Daigle,[67] the court held that "[w]hen rank is used as a device for deliberate and systematic exclusion of qualified persons, it becomes an irrelevant and impermissible basis for selection."[68]

An accused is permitted to submit a request for the appointment of enlisted soldiers to serve on his or her court-martial anytime before the conclusion of the article 39(a) session or the assembly of the court.[69]

The issue of whether an accused is allowed to withdraw the request for the appointment of enlisted soldiers to serve on the court-martial was settled in United States v. Stipe.[70] In Stipe, the accused chose to be tried by a court-martial consisting of officers and enlisted soldiers. In accordance with the provisions of article 25(c)(1), the accused requested that enlisted soldiers be appointed to serve on his court-martial. In response to his request, the convening authority selected nine officers, one sergeant major (E9), one master sergeant (E8) and two sergeants first class (E7) to serve as jury members on the accused's court-martial.

At the article 39(a) session, the accused "contended that the enlisted soldiers of the court had not been selected on the basis of age, education, training, experience, length of service, and judicial experience as required by Article 25(d)(2), UCMJ… "[71] and he therefore asked to withdraw his request for enlisted court members. The military judge refused to allow the accused to withdraw his request. The accused subsequently was tried by a general court-martial before a court composed of officers and enlisted soldiers.

On appeal, the accused argued that the military judge improperly denied his right to withdraw his request for enlisted soldiers. The Court of Military Review ruled that the military judge did not abuse his discretion in refusing to allow the accused to withdraw his request.[72] The United States Court of Military Appeals reversed the Court of Military Review's decision and held that the military judge was in error in denying the accused "the right to revoke his prior election to have enlisted members serve on the court before the end of the Article 39(a) session… "[73] In reaching its decision, the court noted that under the provisions of article 25(c)(1) an accused is free to request enlisted soldiers but should be permitted to withdraw a request for trial by enlisted soldiers anytime prior to the end of the article 39(a) session or before the assembly of the court.[74] In so ruling, the court noted that such an interpretation was reasonable and consistent with congressional intent "to leave the accused a free choice in the manner"[75] until the time of trial.

If the accused has withdrawn the request for enlisted soldiers, the record should reflect the withdrawal and should clearly show that the accused was fully advised of his or her rights and was in no way influenced by the Government in withdrawing this request.[76]

In submitting a request for enlisted court members, an accused cannot require the convening authority to select only enlisted soldiers from a particular unit, rank or race. Nor does the accused have the right to require a convening authority to select a court-martial panel consisting totally of enlisted soldiers.[77]

Thus, while an accused cannot require the convening authority to select a particular kind of enlisted soldier, the accused can require that the enlisted soldiers be fairly and impartially selected. The exact nature of fair and impartial selection has been addressed by numerous courts. Although the deliberate, systematic exclusion of qualified soldiers on the basis of rank alone is contrary to the Code,[78] the Army Court of Military Review held in United States v. Yager,[79]

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[65] *Id.* at 31 (Ferguson, J., dissenting).

[66] United States v. Mitchell, 35 C.M.R. 31, 32 (C.M.A. 1964); *see also* United States v. Ross, 35 C.M.R. 36 (C.M.A. 1964); United States v. Pearson, 35 C.M.R. 35 (C.M.A. 1964); United States v. Glidden, 35 C.M.R. 34 (C.M.A. 1964); United States v. Motley, 35 C.M.R. 33 (C.M.A. 1964); United States v. Glidden, 34 C.M.R. 577 (A.B.R. 1964).

[67] 1 M.J. 139 (C.M.A. 1975).

[68] *Id.* at 141.*See also* United States v. Nixon, 33 M.J. 433, 435 (C.M.A. 1991) ("military grade by itself is not a permissible criterion for selection of court-martial members"); *but see* United States v. Yager, 7 M.J. 171 (C.M.A. 1979) (exclusion of personnel below E3 for failing to satisfy criteria of article 25(d)(2) is permissible).

[69] R.C.M. 903(a)(1).

[70] 48 C.M.R. 267 (C.M.A. 1974).

[71] United States v. Stipe, 47 C.M.R. 743, 744 (A.C.M.R. 1973).

[72] *Id.* at 746.

[73] United States v. Stipe, 48 C.M.R. 26, 269.

[74] *Id.* at 28; *see*R.C.M. 903(d).

[75] *Stipe*, 48 C.M.R. at 269.

[76] *See* United States v. Lutman, 37 C.M.R. 892, 900-01 (A.F.B.R. 1967). The accused never requested enlisted soldiers and the record failed to indicate whether he was ever advised of his rights. The court held it was presumed that he was advised by his counsel, and thus there was no error. The court stated that having the record reflect the accused's knowledge of his rights was a "prudent, albeit anticipatory, trial procedure…." *Id.*

[77] *See generally* Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 Cath. U.L. Rev. 171 (1966).

[78] United States v. Daigle, 1 M.J. 139 (C.M.A. 1975).

[79] 2 M.J. 484 (A.C.M.R. 1975), *aff'd,* 7 M.J. 171 (C.M.A. 1979).

that the exclusion of enlisted soldiers in the grade of private is permissible. This exclusion was reasonably and rationally calculated to obtain jurors who met the statutory requirements of sufficient age, education, training, experience, length of service and judicial temperament. Furthermore, the exclusion of privates sprang from a recognition that privates are not senior to any other soldiers. Under article 25(d)(1) of the UCMJ a soldier of junior rank should not be allowed to try his senior except in unavoidable situations. Similarly in United States v. Perl,[80] a selection process was not improper even though it excluded privates. The Army Court of Military Review also addressed the issue of whether fair selection had been obtained even though the Government's administrative regulations, which were more stringent than the requirements under the Code, had not been followed. It reasoned that no prejudice had occurred, because the regulation was promulgated for the benefit of the Government and was not intended to confer any basic rights on accused soldiers.

(5) *Absent or unauthorized military judges and counsel.* A court-martial that is constituted illegally does not have jurisdiction over the cases it is convened to try.[81] A court may be constituted illegally if either the military judge or counsel are absent or participate without authorization. For example, if a military judge is present but a question arises as to whether he was appointed and by whom, there is jurisdictional error.[82]

Furthermore, if the military judge is improperly appointed, jurisdictional error will result. The Court of Military Appeals found jurisdictional error when the military judge who presided over the trial was not the judge appointed by the orders which convened the court-martial.[83] It also found error in a case in which the convening authority delegated power to a subordinate officer to detail the military judge and counsel.[84] If Congress meant for this duty to be delegated, it would have expressly provided for such delegation.[85] Since Congress had not specifically provided for the delegation of this duty, the improper delegation was a fatal error. When two military judges have been appointed, the Court of Military Appeals has upheld convictions if only one judge presided and the accused was aware prior to trial of the identity of the military judge.[86] Finally, jurisdictional error resulted where the convening authority, without a showing of good cause, replaced the military judge after the assembly of the court-martial.[87]

The Military Justice Act of 1983 amended article 26, UCMJ, so that the convening authority no longer must personally detail a military judge.[88] The detailing of a military judge is now the responsibility of the chief trial judge of the United States Army Trial Judiciary,[89] who has delegated the authority to all military judges certified to preside over general courts-martial and who are assigned to the United States Army Trial Judiciary.[90] Thus, the detailing of the military judge to a court-martial created by a convening authority is a judiciary responsibility.[91] An orally announced detailing is sufficient for jurisdictional purposes but the detailing decision should be reduced to writing and included in the record of trial.[92]

The presence of unauthorized counsel may also lead to jurisdictional error. In United States v. Coleman,[93] detailed defense counsel previously had been assigned on orders as trial counsel. Although the accused accepted the officer detailed as his defense counsel, and although the counsel was not disqualified by participation as a member of the prosecution, the Court of Military Appeals reversed. Not only had the convening authority failed to delete the counsel's previous appointment as trial counsel, but there was also no indication that the convening authority had ever officially appointed him as defense counsel. In United States v. Williams,[94] however, the Court of Military Appeals affirmed the conviction of an accused whose individual counsel erroneously was listed as trial counsel. The court distinguished Williams from Coleman on the grounds that an accused's individually selected counsel need not be listed in the orders

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[80] 2 M.J. 1269 (A.C.M.R. 1976).

[81] *See, e.g.*, United States v. Johnson, 48 C.M.R. 665 (C.M.A. 1974).

[82] In United States v. Singleton, 45 C.M.R. 206 (C.M.A. 1972), the charges had been referred to trial by a special court-martial empowered to adjudge a bad-conduct discharge. The convening authority, however, had not appointed either military judge, trial counsel, or defense counsel on the court-martial convening orders, although members were appointed. At trial, the military judge and both counsel stated that they had been verbally appointed by the convening authority subsequent to the issuance of the convening orders. The Court of Military Appeals reversed, however, as the record was void of any indication as to "the contents of the oral appointment, when it was made or by whom."*Id.* at 208. That the trial had been by military judge alone, instead of before the detailed court members, may have affected the result.

[83] United States v. Johnson, 48 C.M.R. 665 (C.M.A. 1974). *Accord*, United States v. Debord, 46 C.M.R. 808 (A.C.M.R. 1972).

[84] United States v. Newcomb, 5 M.J. 4 (C.M.A. 1978). This holding that a court-martial is improperly constituted when military judge and counsel are assigned by improper authority was held to apply prospectively only to those cases convened after May 1, 1978. United States v. Mixon, 5 M.J. 236 (C.M.A. 1978).

[85] *See, e.g.*, United States v. Butts, 7 C.M.A. 472, 474, 22 C.M.R. 262, 264 (1957).

[86] United States v. Sayers, 43 C.M.R. 302 (C.M.A. 1971). The court, however, made plain its disapproval of this procedure: "The practice should be discontinued." *Id.* at 304. *Accord*United States v. Crider, 45 C.M.R. 815 (N.C.M.R. 1972). In*Crider*, there were seven trial counsel and two law officers assigned by the appointing order. Relying on the failure of the Court of Military Appeals to find jurisdictional error in *Sayers*, the Navy Court of Military Review affirmed after finding that the accused suffered no prejudice from the unauthorized appointment. 45 C.M.R. at 821.

[87] United States v. Smith, 3 M.J. 490 (C.M.A. 1975) (dictum); *see* R.C.M. 505(e).

[88] UCMJ art. 26(a); R.C.M. 503(b).

[89] AR 27–10, para. 8–6(*a*).

[90] Trial Judiciary Memorandum 84–5 (Revised), subject: Detailing of Military Judges IAW R.C.M. 503(b) and AR 27–10, para. 8–6*a* (Revises TJ Memo 84–5, dated 23 May 1984), 22 Dec. 1989.

[91] AR 27–10, para. 8–6(*b*).

[92] AR 27–10, para. 5–3(*b*).

[93] 42 C.M.R. 126 (C.M.A. 1970).

[94] 45 C.M.R. 233 (C.M.A. 1972).

convening the court-martial, and that counsel's erroneous listing as trial counsel did not prejudice the substantial rights of the accused.[95]

The Court of Military Appeals has even gone so far as to state that although the improper detail of trial counsel is error, "[it] is of no import vis-a-vis the constitution of the court-martial as an entity … for counsel are not an integral part of the court."[96]

In summary, jurisdictional error will result if detailed defense counsel has not been appointed officially as defense counsel. The erroneous listing of either appointed or individual defense counsel as trial counsel, however, without more would not seem to lead to jurisdictional error, although it could be tested for prejudicial error. Additionally, when individual counsel has been appointed previously as trial counsel but prior to trial is removed by order of the convening authority (and not otherwise disqualified), no jurisdictional error results.[97]

In cases such as these, the important distinction between jurisdictional and other error may not always be apparent.[98] In some cases, clerical errors raising jurisdictional problems have been found not to have prejudiced the substantial rights of the accused and thus permit affirmance. The Court of Military Appeals, however, has not only criticized the failure to have properly prepared convening orders[99] but has held courts-martial to be without jurisdiction absent a signed modification of the convening order executed by proper authority.[100]

The Military Justice Act of 1983 amended article 27, UCMJ, so that the convening authority no longer must personally detail the trial counsel and the defense counsel.[101] The detailing of counsel is now a matter of secretarial regulation.[102] The staff judge advocate or an authorized delegate may detail the trial counsel to a court-martial.[103] The detailing of the trial defense counsel is a responsibility of the Chief, United States Army Trial Defense Service.[104] The authority to detail trial defense counsel to a court-martial may be delegated to senior defense counsel.[105] For both trial counsel and trial defense counsel, an orally announced detailing is sufficient for jurisdictional purposes but the detailing decision should be reduced to writing and included in the record of trial.[106]

(6) *Request for trial by military judge alone.* The accused in a court-martial may choose to be tried by judge alone,[107] waiving his right to trial by a court composed of members just as a civilian may waive the right to a jury trial in a Federal district court.[108] article 16 of the Code provides that an accused may be tried by military judge alone if "before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves [the request]."[109]

Before the Military Justice Act of 1983 authorized an oral request for trial by a military judge alone, article 16 of the Code was strictly construed by the Court of Military Appeals, and a complete and correct written request for trial by judge alone was held to be a jurisdictional condition to such trial.[110] But in United States v. Stearman,[111] where there was a failure to include the name of the military judge as part of the request, it was held that such was not jurisdictional error.[112] It would appear that as long as the accused has conferred with the defense counsel and, before the court is assembled, submitted a request for trial by military judge sitting alone, with such request approved by the military judge, the requirement that the accused must know the judge's identity may be satisfied by a demonstration of such knowledge in the record of trial.[113] The omission of the judge's name in the written request is not fatal to

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[95] *Id.* at 235.

[96] United States v. Ryan, 5 M.J. 97, 101 n.5 (C.M.A. 1978); *see also* Wright v. United States, 2 M.J. 9 (C.M.A. 1976).

[97] United States v. Phillips, 46 C.M.R. 4 (C.M.A. 1972).

[98] *See, e.g.*, United States v. Blair, 45 C.M.R. 413 (A.C.M.R. 1972), *petition denied*, 45 C.M.R. 928 (1972), where the article 32 investigating officer was appointed, although he did not serve, as one of seven trial counsel. The court affirmed the conviction, finding no prejudicial error or violation of article 27(a), UCMJ. The court, however, did not discuss the possibility of jurisdictional error. For other examples of nonjurisdictional analysis, *see* United States v. Catt, 23 C.M.A. 422, 50 C.M.R. 326 (1975) (disqualification by military judge of individual defense counsel who summarized article 32, UCMJ, evidence for staff judge advocate prejudiced accused's substantial rights when no attorney-client relationship between the Government and the attorney had been established) and United States v. Carey, 49 C.M.R. 605 (C.M.A. 1975) (record of trial contained no indication that trial counsel was duly appointed, but conviction affirmed on later affidavit by convening authority that trial counsel had been appointed verbally).

[99] United States v. Glover, 15 M.J. 419 (C.M.A. 1983); United States v. Carey, 49 C.M.R. 605 (C.M.A. 1975).

[100] United States v. Perkinson, 16 M.J. 400 (C.M.A. 1983); United States v. Ware, 5 M.J. 24 (C.M.A. 1978).

[101] UCMJ art. 27(a); R.C.M. 503(c).

[102] UCMJ art. 27(a); R.C.M. 503(c).

[103] AR 27–10, para. 5–3(a).

[104] AR 27–10, para. 6–9.

[105] *Id.*

[106] AR 27–10, paras. 5–3(b), 6–9.

[107] UCMJ art. 16(1)(B), 16(2)(C); *see also* R.C.M. 903.

[108] Fed. R. Crim. P. 23(a). This similarity between the Federal and military practice is not surprising in light of the fact that one of the stated purposes of the Military Justice Act of 1968 was to streamline court-martial procedures in line with procedures in U.S. district courts. S. Rep. No. 1601, 90th Cong., 2d Sess., *reprinted* in 1968 U.S. Code Cong. & Admin. News 4501, 4503.

[109] UCMJ art. 16(1)(B); *see also* R.C.M. 903.

[110] United States v. Dean, 43 C.M.R. 52 (C.M.A. 1970).

[111] 7 M.J. 13 (C.M.A. 1979).

[112] *Id.* at 14. This holding specifically overruled United States v. Montanez-Carrion, 47 C.M.R. 355 (C.M.A. 1973); United States v. Grote, 45 C.M.R. 293 (C.M.A. 1972); and United States v. Brown, 45 C.M.R. 290 (C.M.A. 1972).

[113] *See*United States v. Kelly, 2 M.J. 1029, 1030 (A.C.M.R. 1976) (absence of military judge's name from the written request for trial before a military judge alone was not a jurisdictional error).

jurisdiction if the essential elements of article 16 of the Code are otherwise met and the court-martial is properly composed.

(7) *Absence of accused.* A court-martial does not lose its jurisdiction over an accused who is voluntarily absent, without authority, from the trial after arraignment.[114] The absence of the accused, however, must be truly voluntary.[115] In such case, the court may proceed with the trial to findings and sentence notwithstanding the absence of the accused.[116]

(8) *Accused a member of another command.* It is not essential that the accused be a member of the command of the convening authority in order for a court appointed by such authority to exercise personal jurisdiction. Thus, an accused who is a member of the United States Army may be tried by a court appointed by any competent Army authority.[117]

(9) *Place of rehearing.* The Court of Military Appeals may direct The Judge Advocate General to return a record of trial to the convening authority for rehearing.[118] In such an instance, referral of the case to other than the original convening authority or his or her successor may be improper but not a jurisdictional error.[119]

8–2. Finality of courts-martial judgments

a. The Codal Provisions. The Uniform Code of Military Justice provides that the "proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed"[121] under the Code shall be final and conclusive, and that "[o]rders 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… "[122] except:

(1) where the accused has petitioned for a new trial;[123]

(2) where action is pending with the Secretary to"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" or to "substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial;"[124]

(3) where the accused has petitioned to the constitutional authority of the President to exercise clemency;[125] or

(4) where action is pending with The Judge Advocate General on 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."[126]

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[114] United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); United States v. Oliphant, 50 C.M.R. 29 (N.C.M.R. 1974). The arraignment proceeding includes the reading of the charges and specifications by the trial counsel and an inquiry by the military judge regarding the nature of the accused's plea. *See also*R.C.M. 804(b)(1). Note that failure to arraign the accused is not jurisdictional error. United States v. Reyes, 48 C.M.R. 832 (A.C.M.R. 1974) (en banc) (citing United States v. Taft, 44 C.M.R. 122 (C.M.A. 1971) (failure to take accused's plea not jurisdictional error)).

[115] R.C.M. 804(b)(1) discussion; United States v. Peebles, 3 M.J. 177 (C.M.A. 1977); *see* United States v. Cook, 43 C.M.R. 344 (C.M.A. 1971) (when the military judge was aware of questions as to the accused's mental responsibility, he erred in ruling that the accused's absence was voluntary when the only information available was that the accused was absent and could not be located, rather than making a more thorough inquiry into the reasons for the accused's absence); United States v. Holly, 48 C.M.R. 990 (A.F.C.M.R. 1974) (neither the court nor the defense counsel may waive the accused's right to be present; he must do this personally; although the accused voluntarily left trial for a brief period, the military judge erred by permitting trial to continue beyond the period when accused became mentally ill and was hospitalized). In the absence of any indication to the contrary, it will be presumed that the absence of the accused is voluntary. United States v. Hutcheson, 48 C.M.R. 843, 844 (N.C.M.R. 1974), *citing* United States v. Norsian, 47 C.M.R. 209 (N.C.M.R. 1973). Absent extraordinary circumstances, for purposes of trial in absentia, an accused is deemed to have been advised of the trial date once it has been communicated to the defense counsel. United States v. Yarn, 32 M.J. 736 (A.C.M.R. 1991).

[116] United States v. Staten, 45 C.M.R. 267 (C.M.A. 1972); United States v. Cook, 43 C.M.R. 344 (C.M.A. 1971); United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); United States v. Hall, 44 C.M.R. 656 (A.C.M.R. 1971) (no error when accused voluntarily absents himself during continuance in his trial and trial resumes in his absence); *see also* United States v. Oliphant, 50 C.M.R. 29 (N.C.M.R. 1974); United States v. Day, 48 C.M.R. 627 (N.C.M.R. 1974); United States v. Allison, 47 C.M.R. 968 (A.C.M.R. 1973). Although an accused may normally waive the right to be present at court proceedings, a rehearing on the sentence may not proceed unless the accused is present at the outset of the rehearing. United States v. Staten, 45 C.M.R. 267 (C.M.A. 1972).

[117] United States v. Wyatt, 15 B.R. 217, 255 (1947) (CM 227239). Note that reciprocal jurisdiction is a different question. UCMJ art. 17(a). R.C.. 201(e) generally limits the court-martial for a member of one service by a court convened by a member of another service to circumstances where a commander of a joint command or task force has been specifically empowered to do so or the accused can be delivered to the appropriate service without "manifest injury to the armed forces." This limitation is not a jurisdictional prerequisite but is a significant policy prohibition.

[118] UCMJ art. 67(f).

[119] United States v. Robbins, 39 C.M.R. 86, 88–90 (C.M.A. 1969). The court referred to LTR, JAGM CM 353869, 8 Apr 53 (sic) wherein The Judge Advocate General expressed the opinion that when the original convening authority receives a case with the option of ordering a rehearing or dismissing the charges, and the accused has been transferred out of the command in the interim, an order by the *original* convening authority to rehear the case does not deprive the officer then exercising general court-martial jurisdiction over the accused of his or her power to decide whether a rehearing is practicable in his or her command. *Id.* at 89 (emphasis added). In United States v. Martin, 41 C.M.R. 211, 213 (C.M.A. 1970), the court held that referral of a case for rehearing to other than the original convening authority is not a jurisdictional defect.

[120] *See* R.C.M. 1209.

[121] UCMJ art. 76.

[122] *Id.*

[123] UCMJ art. 73.

[124] UCMJ art. 74.

[125] UCMJ art. 76; *see* U.S. Const. art. II, § 2, c1. 1.

[126] UCMJ art. 69(b); *see*Smith v. Secretary of the Navy, 506 F.2d 1250 (8th Cir. 1974) (mandamus action for vacation of 1942 court-martial conviction dismissed for failure to exhaust article 69 remedy).

b. Review of courts-martial proceedings outside the military justice system.

(1) *By Federal courts.* In enacting article 76 of the Code, Congress expressed its intent that, so far as Federal judicial review is concerned, courts-martial proceedings are final and conclusive, "[s]ubject only to a petition for writ of habeas corpus in Federal court."[127] In the case of In re Yamashita,[128] the Supreme Court stated that:

> [M]ilitary tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court … They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."[129]

Statements such as these led some to argue that "with respect to court-martial proceedings and convictions, Article 76 acts as a pro tanto repealer of [28 U.S.C.] § 1331 and all other statutes, with the exception of [28 U.S.C.] § 2241, conferring subject-matter jurisdiction on Article III courts."[130]

For a number of years the Supreme Court managed to avoid ruling on the effect of article 76.[131] Not until Schlesinger v. Councilman[132] did the Supreme Court consider the finality provisions of article 76.[133] In Schlesinger v. Councilman the Court held that Congress in passing the UCMJ evinced no intent to preclude collateral relief other than habeas corpus.[134] The Court noted,"Article 76, however, does not expressly effect any change in the subject- matter jurisdiction of Article III courts. Its language only defines the point at which military court judgments become final and requires that they be given res judicata effect."[135] Thus, the Court concluded that collateral remedies, in addition to habeas corpus, are available to petitioners charged with court-martial offenses.

The Military Justice Act of 1983 authorized the United States Supreme Court to review by a writ of certiorari a decision of the Court of Military Appeals.[136] This review process will be available for those cases which pass the threshold for substantive review under article 67, that is, mandatory review of death penalty impositions, cases certified by The Judge Advocate General, and cases in which the Court of Military Appeals grants a petition for review for good cause shown.

(2) *By administrative correction of military records.* Section 1552(a) of Title 10, United States Code, provides that the Secretary of a military department, under procedures established by the Secretary and acting through boards of civilians may correct any military record of the department "when he considers it necessary to correct an error or remove an injustice."[137] Pursuant to this authority, Army regulations have been promulgated establishing the Army Board for Correction of Military Records (ABCMR) and setting forth the procedures to be followed in making application, and in the consideration of applications, for the correction of military records by the Secretary of the Army.[138]

While the statute extends to court-martial proceedings, it does not permit the reopening of the proceedings, findings, and sentences of courts-martial so as to disturb their finality. Thus, the Army Board for Correction of Military Records may not question the validity of courts-martial proceedings nor recommend that they be declared null and void.

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[127] S. Rep. No. 486, 81st Cong., 1st Sess., 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess., 35 (1949); *cited in* Schlesinger v. Councilman, 420 U.S. 738, 751 n.23 (1975); *see* UCMJ art. 76;*see also* 5 U.S.C. § 701(b)(1)(F) (1982) (specifically excludes courts-martial from the operation of the Administrative Procedure Act).

[128] 327 U.S. 1 (1946).

[129] *Id.* at 8;*see also* Burns v. Wilson, 346 U.S. 137, 140-42 (1953); Goldstein v. Johnson, 184 F.2d 342, 343 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 879 (1950); Alley v. Chief, Fin. Center, United States Army, 167 F. Supp. 303 (S.D. Ind. 1958). *Contra*, Jackson v. McElroy, 163 F. Supp. 257 (D.D.C. 1958).

[130] Schlesinger v. Councilman, 420 U.S. 738, 745 (1975).

[131] *See* Secretary of the Navy v. Avrech, 418 U.S. 676 (1974); United States v. Augenblick, 393 U.S. 348 (1969). *Cf.* Gosa v. Mayden, 413 U.S. 665 (1973).

[132] 420 U.S. 738 (1975).

[133] Article 53 of the Articles of War, Act of June 24, 1948, cap. 625, § 223, 62 Stat. 639, which was the immediate statutory predecessor of article 76 and which contained identical language was construed by the Supreme Court in Gusik v. Schilder, 340 U.S. 128 (1950), as not precluding habeas corpus collateral attack on court-martial convictions.

[134] 420 U.S. at 751–53. A suit for back pay in the Court of Claims is an example of collateral relief other than habeas corpus. *See, e.g.*, Hooper v. United States, 326 F.2d 982 (Ct. Cl. 1964). *See also* Smith v. Secretary of Navy, 506 F.2d 1250 (8th Cir. 1974).

[135] 420 U.S. at 749.

[136] UCMJ art. 67(h).

[137] 10 U.S.C. § 1552(a) (1982).

[138] AR 15–185, Board, Commissions, and Committees Army Board for Correction of Military Records (18 May 1977). The Board frequently requests the opinion of The Judge Advocate General on questions of law arising in cases pending before it.

However, if the Board determines that an injustice has occurred in a particular case, it may afford some relief by recommending to the Secretary the "correction of a record to reflect actions taken by reviewing authorities" under the Uniform Code of Military Justice.[139] The Board may, of course, also recommend corrective "action on the sentence of a court-martial for purposes of clemency."[140]

[139] 10 U.S.C. § 1552(f)(1).
[140] 10 U.S.C. § 1552(f)(2).

Chapter 9
Inception and Termination of Court-Martial Jurisdiction

9–1. Introduction

The point of inception and termination of court-martial jurisdiction over persons who possess some form of military status has been the subject of significant litigation in recent years. The general source of jurisdiction over all military personnel on active duty is the following provision from article 2 of the Uniform Code of Military Justice:

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

By means of this provision, Congress has defined when a soldier becomes subject to military jurisdiction and when that jurisdiction ends.

9–2. Court-martial jurisdiction

Jurisdiction is the power of a court to try and determine a case.[2] If a court has the power to try and determine a case, its judgment is valid. If a court does not have the power to decide a case, its judgment is void. Court-martial jurisdiction therefore is the power to conduct proceedings and render a judgment that is binding on the parties.

In order for the judgment of a court-martial to be valid, five elements must be established. These elements are as follows: (1) the court-martial must be convened by an official empowered to convene it; (2) the membership of the court must be in accordance with the law with respect to the number and competency to sit on the court; (3) the court must have had the power to try the person; (4) the court must have the power to try the offense charged; and (5) the charges before the court must have been referred to it by competent authority. In other words, for the judgment of a court-martial to be valid it must be established that the court was properly convened, that it was legally constituted, that the charges were properly referred, and that it had jurisdiction over the person and the offense charged.

In this chapter and in chapter 10, the rules concerning jurisdiction over soldiers and civilians will be discussed. The law of jurisdiction over the offense will be discussed in chapter 11.

a. Jurisdiction over the person. To have jurisdiction over the person, the accused must not only be a person subject to the Code at the time of the offense and at the time of trial by court-martial, but also the accused's status must not validly have been terminated between these two events. With respect to the latter requirement, there are some exceptions which permit the exercise of court-martial jurisdiction over persons when there has been a valid interruption of the accused's military status.[3]

b. Jurisdiction over the offense. To have jurisdiction over the offense, the crime must be cognizable under the Uniform Code of Military Justice. The location of the offense is irrelevant.[4]

9–3. When jurisdiction attaches

a. Inductees.[5] Inductees are subject to the Code from the time of their actual induction. For the induction to be complete, the accused must have participated in the induction ceremony to the extent required by law.

(1) *The induction ceremony.* In Billings v. Truesdell,[6] the petitioner had been convicted by general court-martial of willful disobedience of a lawful order. After an unsuccessful application for exemption as a conscientious objector, the accused reported for induction, but refused to take the oath prescribed as part of the induction process. On appeal the Supreme Court ruled that, because the prescribed induction ceremony had not been completed, the accused had not been inducted properly into the military and the military had no jurisdiction over him.[7]

In United States v. Ornelas,[8] the accused moved at his court-martial to dismiss all charges and specifications against

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[1] UCMJ art. 2(a)(1). Article 2 also lists 11 other groups of individuals who are subject to the Code.

[2] *See supra* chap. 7, note 1.

[3] *See infra* sec. 9–4.

[4] Solorio v. United States, 483 U.S. 435 (1987). For a discussion of the Supreme Court's decision in *Solorio*and the subject of jurisdiction over the offense *see infra* chap. 11.

[5] On 29 March 1975, President Gerald R. Ford signed a proclamation terminating registration procedures under the Military Selective Service Act. Proclamation No. 4360, Mar. 29, 1975, 40 Fed. Reg. 14,567 (1975),*reprinted* in 50 U.S.C.A. app. § 453 (1978) (Supp.).

In the case of those who refused induction during the Vietnam era, it should be noted that failure of the Department of Justice to include a potential accused on the list of those eligible for the President's Clemency Program (39 Fed. Reg. 33,293 *reprinted in* 1974 U.S. Code Cong. and Admin. News 8216) may exempt him from later prosecution. *See* United States v. Zimmerman, 403 F. Supp. 481 (D.N.J. 1975) (defendant's name was not on list because he had attained Canadian citizenship and was arguably not eligible for clemency program).

[6] 321 U.S.542 (1944).

[7] *Id.* at 550.

[8] 6 C.M.R. 96 (C.M.A. 1952). *Cf.* Machado v. McGrath, 193 F.2d 706 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 948 (1952).

him on the ground that he did not take the oath of allegiance during his induction into the Armed Forces. The law officer denied the motion and refused a subsequent defense request to submit the issue to the court. The Court of Military Appeals held that the defense motion was legally sound and should have been submitted with appropriate instructions to the triers of fact for their determination of the factual issue of whether the accused had completed the induction ceremony.[9]

An exception to the rule requiring completion of the induction ceremony is illustrated in United States v. Rodriguez,[10] decided the same day as Ornelas. Prior to arraignment, the accused challenged the jurisdiction of the court-martial on the grounds that he was a Mexican citizen who had not been inducted lawfully. More specifically, he argued that he was not advised of his rights as a Mexican citizen and that he did not take the oath of allegiance.

The court found no error in the failure to inform the accused of his rights as a Mexican citizen, which would not have exempted him from service in any event.[11] With respect to the second contention, the court distinguished the accused's case from Ornelas on the ground that no factual issue was raised. In Ornelas the accused claimed not to have been returned home immediately after his physical examination. In Rodriguez the accused admitted that he did everything but take the oath, that he did not object to induction and that he "voluntarily entered upon the Army duty assigned" him.[12] Although the expression was not used in the decision, the court seemed to find a"constructive induction."

In United States v. Hall,[13] the Court of Military Appeals observed that:

> [W]here an accused refuses to submit to induction;… does not participate in any ceremony at all; and continually thereafter protests the attempt nonetheless to subject him to military service, no "constructive induction" exists in spite of the accused's acceptance of pay, execution of an allotment for his wife and his wearing the uniform.[14]

The Court of Military Appeals, therefore, has limited the concept of "constructive inductions" to situations where: (1) there is an induction ceremony, albeit a defective one; and where (2) the accused manifests by his or her actions voluntary submission to a military status.

(2) *Failure to meet minimum standards for induction.* There have been unsuccessful attempts to construe the statutory standards set forth in the Selective Service Act[15] as precluding, and therefore making void and of no effect for jurisdiction purposes, the induction of selectees who do not meet these requirements.

In United States v. Martin,[16] the accused scored nine points on the Armed Forces Qualification Test. Despite his failing score, it was determined administratively that he was acceptable for induction. The accused was inducted and subsequently absented himself without leave on three occasions. The first two absences were tried by special court-martial; the last absence, a little over 6 months, was tried by general court-martial. The accused pleaded guilty to absence without leave and was convicted.

On appeal the accused contended that in view of his failing induction test scores, the statutory provisions[17] of the Selective Service Act precluded his induction. The director of Selective Service filed a brief as amicus curiae in support of the Government's contention that the statute was intended to prevent the exclusion of certain categories of persons from induction. Chief Judge Quinn, speaking for an unanimous court, reviewed the history of the statute and agreed with the Government. Chief Judge Quinn noted:

> In summary, the provision of the Universal Military Training and Service Act under consideration was intended to enlarge the number of persons called to actual service, and to eliminate the "scandalous" and "shocking"situation in which a substantial percentage of registrants were avoiding actual service because of failure on the administra-

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[9] 6 C.M.R. at 99.

[10] 6 C.M.R. 101 (C.M.A. 1952). *See also* Hibbs v. Catovolo, 145 F.2d 866 (5th Cir. 1944); Mayborn v. Heflebower, 145 F.2d 864 (5th Cir. 1944) *cert. denied,*325 U.S. 854 (1945); United States *ex rel.* Seldner v. Mellis, 59 F. Supp. 682 (M.D.N.C. 1945); United States v. Scheunemann, 34 C.M.R. 259 (C.M.A. 1964).

[11] 6 C.M.R. at 104.

[12] *Id.*

[13] 37 C.M.R. 352 (C.M.A. 1967).

[14] *Id.* at 355.

[15] 50 U.S.C. app. § 454(a) provides in part that:

> No person shall be inducted into the Armed Forces for training and service or shall be inducted for training in the National Security Training Corps under this title… until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense;*Provided,* That the minimum standards for physical acceptability established pursuant to this subsection shall not be higher than those applied to persons inducted between the ages of 18 and 26 in January 1945; *Provided further,* That the passing requirement for the Armed Forces Qualification Test shall be fixed at a percentible score of 10 points….

[16] 26 C.M.R. 348 C.M.A. 1958).

[17] *Supra* note 15.

tively prescribed mental test.[18]

The court ruled that the test result "did not make… [the accused] ineligible for induction,"[19] and held that the court-martial had jurisdiction under article 2(1).

In Korte v. United States,[20] the defendant had refused to report for induction, claiming exemption because he had been convicted of a felony. In upholding his conviction for failure to report for induction, the court stated that the exemption of convicted felons was a permissive exemption only, created not for the benefit of the inductees, but for the benefit of the Armed Forces, which could waive the disability.[21]

(3) *Failure to assert right to exemption before induction.* The general rule is that a valid right to a draft exemption, not asserted through the Selective Service System, will not bar court-martial jurisdiction over the person after he or she has been inducted. In United States v. McNeill,[22] the accused went absent without leave after his induction. He was apprehended, tried and convicted of desertion. The accused had prior military service, a fact which, if known to his selection board, would have exempted him from induction. The accused, however, had never furnished the information to his local draft board. The Court of Military Appeals held that the accused was subject to military law:

> [H]e failed to show any reason for an exemption, he reported for duty, he was housed, fed, clothed and possibly paid for six weeks and then, when selected for possible overseas duty, he went absent. To allow an exemption to be exercised in that manner and at that late date would allow an inductee to enter upon his duties as a soldier and then abandon the service according to his own whims without fear of punishment.[23]

Because he failed to raise his exemption, he was deemed by the court to have waived it.

In Pickens v. Cox,[24] the petitioner failed to inform his local selective service board that he was the sole surviving son of a family which had a son who was killed in military service. This fact entitled petitioner Pickens to an exemption from induction. He was inducted and later convicted by general court-martial of absence without leave and disobedience of a superior officer. On a writ of habeas corpus, the accused attacked the jurisdiction of the court-martial. The Tenth Circuit Court of Appeals noted that the accused had failed to establish his right to an exemption from induction before he was inducted. When his induction occurred, he became a member of the military in active service, and as such was subject to military jurisdiction. In denying the accused's petition for habeas corpus, the court noted that:

> [H]e could have applied for release on the grounds of erroneous induction. Having failed both to claim exemption at the time of induction and to utilize the administrative procedure available to obtain release after induction, Pickens may not assert his claimed right for the first time on this application for habeas corpus.[25]

A draft exemption must be asserted prior to induction into military service. As the decisions in McNeil and Pickens illustrate, the failure to raise a draft exemption through the Selective Service System, or to request release from active duty on the grounds of an erroneous induction prior to being charged with offenses under the Uniform Code of Military Justice, results in waiver. If the accused protests his or her induction at the time of induction, however, he or she does not necessarily waive the protest even if one then accepts military benefits and obeys orders.

b. Enlistees. Since July 1, 1973, the military has operated with an "all volunteer" force.[26] All newly recruited soldiers on active duty pursuant to an enlistment in the regular forces, or in the Reserve forces with a subsequent or concurrent call to active duty, are subject to the jurisdiction of the UCMJ.[27] Normally an enlistment presents no problems and the individual soldier is deemed amenable to jurisdiction. Problems may arise when the enlistment is violative of a statute, regulation, or public policy considerations.

(1) *Enlistments in violation of a statute.*

(a) Introduction. Numerous statutory provisions determine who may enlist and thereby enter into a contractual relationship with the Government. As a general rule, if an individual is under 17 years of age, insane, intoxicated, a felon, or a deserter, the enlistment will be void.[28] Where, however, an enlistment is defective only in a procedural

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[18] 26 C.M.R. at 353. Hence, "the provision is a restriction on the services to *prevent them from excluding* certain persons from induction."*Id.* at 350.*But see* United States v. Burden, 1 M.J. 89 (C.M.A. 1975) (induction held void where accused could not read or write English and failed to pass Armed Forces Qualification Test).

[19] *Id.* at 573, 26 C.M.R. at 353.

[20] 260 F.2d 633 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

[21] *Id.* at 637.

[22] 9 C.M.R. 13 (C.M.A. 1953).

[23] *Id.* at 17.

[24] 282 F.2d 784 (10th Cir. 1960).

[25] *Id.* at 786.

[26] J. Horbaly, Court-martial Jurisdiction 34 (1986).

[27] UCMJ arts. 2(1), (3). *See generally*Schlueter,*The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1 (1977).

[28] "No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force.

sense, the courts can find that a constructive enlistment has occurred. A constructive enlistment can be found, for example, where a 17-year-old has enlisted without parental consent[29] or where a waivable regulation has been violated in the recruiting process.[30] In such cases, the concept of constructive enlistment permits the courts to find that a military status was created, based on the mutual intent of the parties, in spite of a defect in the enlistment process.

(b) Constructive enlistment. For the individual enlisting in the Armed Forces, military status is achieved upon participation in an enlistment ceremony. The concept of constructive enlistment is in effect a "legal fiction"; it is "based upon the philosophy that a man is presumed to have promised to do what he ought to do to fulfill the contract."[31] A person's intent is crucial in the determination of constructive enlistment.[32] Certain factors are often presumed indicative of the intent to become a member of the service. They include: (1) a voluntary submission to military authority; (2) performance of military duties;[33] (3) receipt of pay and allowances; and (4) acceptance of Government services.[34]

If these factors are established, intent will be assumed, and courts will find that an implied contract between the individual and the Government has been effectuated. This implied contract establishes the same rights and obligations as the typical enlistment contract.

(c) Minority enlistments. A statutory provision which has caused numerous problems in the past is the provision which specifies the required age of the enlistee. The Secretary of the Army may accept original enlistments from males and females who are not less than 17 years of age. However, no male or female under 18 years of age may enlist without the written consent of his or her parent or guardian.

A person may not enlist validly in the United States Army if he or she is under 17 years of age. Such an enlistment is void and does not change the minor's civilian status. If an offense proscribed by the UCMJ is committed by the minor before his or her 17th birthday, there is no jurisdiction to try the offender by court-martial. Such a person, under the current statute, has no competence to acquire military status and therefore is not subject to military law.

In United States v. Blanton,[36] the accused enlisted in the Army when he was 14 years old. He absented himself without authority before his 16th birthday. Four years later he was apprehended and convicted by general court-martial of desertion. The Court of Military Appeals held that the accused was never on active duty at an age when he was competent to serve in the Army. His enlistment was void, and the court-martial had no jurisdiction over him.[37]

In United States v. Overton,[38] the accused enlisted at 16 years of age, without his parents' or guardian's consent, by using his brother's name and birth certificate. After finding military life not to his liking, the accused went to his commanding officer to disclose his true age and identity in an attempt to straighten out his records. Next he absented himself without leave in order to obtain his birth certificate. He was convicted by a special court-martial for absence without leave and while serving confinement for the absence without leave, he was charged with willful disobedience of a lawful order and convicted upon his guilty plea. The accused had reached the age of 17 before the willful disobedience offense was committed. His family, especially his mother, had been trying to obtain a minority discharge for the accused before the last offense was committed.

The Court of Military Appeals ruled that the court-martial lacked jurisdiction over the person at the time of trial. Before the accused reached his 17th birthday, his enlistment was void. The court noted that if his status changed after his 17th birthday, that fact may be established affirmatively by the prosecution. In Overton, the court found that the prosecution had failed to show a " 'constructive'… enlistment by the accused or consent by [his] parent."[39]

An important development in the subject of minority enlistments occurred in United States v. Brown.[40] In Brown, the United States Court of Military Appeals announced that once the issue of an underage enlistment is brought to the attention of government officials, the Government must take action immediately to resolve the issue. The accused in Brown enlisted in the Army at 16 years of age by using a false birth certificate indicating that he was really 17 years

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However, the Secretary concerned by authorized exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies." 10 U.S.C. § 504 (1982); "[N]o person under 18 years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control." 10 U.S.C. § 505 (1982) (*see, e.g.*, DAJA–AL 1976/5073, 30 July 1976 (age requirements of the enlistee). Another factor closely related to that of age is that of education: the Secretary of the Army may temporarily prohibit the enlistment of persons who lack a high school diploma. DAJA–AL 1976/4895, 23 June 1976. *But see* DAJA–AL 1977/4856, 24 June 1977). "[N]o person shall be accepted for enlistment after he has received orders for induction." 50 U.S.C. app. § 465(d) (1970); and "In time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of Chapter 12 of title 8." 10 U.S.C. § 3253 (1976).

[29] United States v. Mills, 47 C.M.R. 460 (A.C.M.R. 1971).

[30] United States v. Valadez, 5 M.J. 470 (C.M.A. 1978).

[31] United States v. King, 28 C.M.R. 243, 249 (C.M.A. 1959).

[32] *See* Schlueter, *Constructive Enlistment: Alive and Well*, The Army Lawyer, Nov. 1977, at 6.

[33] *See, e.g.*, United States v. Brodigan, 50 C.M.R. 419 (N.C.M.R. 1975); United States v. Alston, 48 C.M.R. 733 (A.C.M.R. 1974).

[34] *See* DA Pam 27–21, paras. 3–41 and 3–42 (1 Oct. 1985).

[35] *See generally* 10 U.S.C. 505 (1982).*See* United States v. Lenoir, 40 C.M.R. 99 (C.M.A. 1969).

[36] 23 C.M.R. 128 (C.M.A. 1957).

[37] *Id.* at 131.

[38] 26 C.M.R. 464 (C.M.A. 1958).

[39] *Id.* at 468. Judge Latimer, dissenting, was satisfied that a "constructive" enlistment had been shown and that the mother's action came too late to terminate her son's military status. *See* United States v. Graham, 46 C.M.R. 75 (C.M.A. 1976) (17-year-old's conviction by court-martial reversed because accused enlisted underage and was unsuccessful in attempting to secure his release before going absent with leave).

[40] 48 C.M.R. 778 (1974).

old and by forging his father's signature on the parental consent form. The accused's recruiting sergeant completed the paperwork for the enlistment but failed to either witness or have notarized the father's signature on the consent form.

The accused informed his company commander that he had fraudulently enlisted, that he was 16 years old, that his parents did not know he was in the Army, and that he did not want to remain in the Army. The company commander instructed the accused to obtain a valid birth certificate, but did nothing more.

Within 60 days after the accused turned 17, he was charged with attempted robbery, robbery, and assault and battery. He was tried and convicted by a general court-martial and sentenced to a bad conduct discharge, total forfeitures, and confinement at hard labor for 3 years.

On appeal, the Army Court of Military Review affirmed the accused's conviction.[41] The Court of Military Appeals, however, reversed the accused's conviction on the grounds that the military did not have jurisdiction to try the accused.

In reaching its decision the court restated the general rule that 16 year olds cannot serve in the United States Army and cannot acquire military status. The court then announced that upon receiving notice that a member of his command was 16 years old, the commanding officer had a responsibility to determine the enlistee's true age. In addition, the court stated that, if while this is being accomplished the accused turns 17, no constructive enlistment will arise. A policy to the contrary, the court noted, "would give encouragement to those who would attempt fraudulently to enlist at age 16, as well as to the recruiting of such persons in the hope that, if everyone keeps silent, the fraudulent enlistment will soon mature into a constructive enlistment."[42]

Because of the improper recruitment practice and the company commander's inaction, the court ruled that a constructive enlistment did not attach and that the court-martial did not have jurisdiction to try the accused. With its decision in Brown, the Court of Military Appeals established that a 16 year old should not be made to bear the burden of proving his or her true age in order to show that the enlistment was improper.

Similarly, in cases where a 16 year old alleges that he or she enlisted as a result of recruiter negligence or misconduct, "the government cannot thereafter assert constructive enlistment as the basis for establishing its jurisdiction over the individual."[43]

(d) Voidable minority enlistments. A person enlisting when he or she is less than 17 years old, and serves beyond the 17th birthday can acquire military status through a "constructive" enlistment by accepting benefits and voluntarily performing military duties. This "constructive" enlistment is voidable, but only at the option of the enlistee's parents or guardians.

If a person enlists when he or she is over 17 years old, but less than 18 years old without written parental (or guardian) consent, the enlistment is voidable, again only the parents or guardian may attack such an enlistment.[44]

The right in the parent or guardian to apply for the minor's discharge may be forfeited, if by their conduct, they ratify or acquiesce in the enlistment. The timing of the parental demand for release therefore is crucial. If the parent or guardian does not request the minor's release by minority discharge until after the individual has committed an offense, the parent's right to custody of their child will be subordinated to the Government's right to hold the minor soldier responsible for his or her crime. In United States v. Scott,[45] the accused enlisted after his 17th birthday, but before his 18th birthday, with the help of forged signatures on the parental consent form. He was charged with taking indecent liberties with a 13- year-old boy. The offense occurred before the accused had reached 18 years of age. A month after the offense and a week before the trial, the accused's parents expressed a desire to have their son released because they had not given written consent to his enlisting. The facts disclosed that the parents knew their son was in the Army, had corresponded with him, and had even accepted a Class E allotment of $25.00 from him.

The Court of Military Appeals held that the court-martial had jurisdiction over the accused. In reaching its decision the court stated that the accused's enlistment contract was voidable. The court also noted that under the enlistment contract the accused's parents could apply for their son's discharge so long as their conduct in no way indicated ratification of the enlistment. After reviewing the facts in the case the court concluded that the accused's parents had ratified and benefited from their son's enlistment, and that their motive in seeking their son's release was to avoid his prosecution.[46] For these reasons, the court ruled the accused was tried properly by military court-martial and his conviction was affirmed.

In United States v. Bean,[47] the accused enlisted soon after his 17th birthday, with the consent of his guardian who stated that the whereabouts of either natural parent was unknown to him. While on active duty, the accused was charged with murder before his 18th birthday. The accused was tried by general court-martial and convicted of the lesser included offense of voluntary manslaughter. After the case had been referred to trial, the accused's natural mother addressed a letter to the convening authority stating that she had just learned of her son's enlistment and

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[41] United States v. Brown, 47 C.M.R. 748, 751 (A.C.M.R. 1973).
[42] 48 C.M.R. at 781.
[43] United States v. Howard, 1 M.J. 557 (A.F.C.M.R. 1975).
[44] 10 U.S.C. § 1170 (1982). *See* United States v. Mills, 44 C.M.R. 460 (A.C.M.R. 1971). *See also* United States v. Garback, 50 C.M.R. 673 (A.C.M.R. 1975) (extension of enlistment while under 18 years of age without parental consent is voidable only on the application of the parents).
[45] 29 C.M.R. 471 (C.M.A. 1960).
[46] *Id.* at 473–74.
[47] 32 C.M.R. 203 (C.M.A. 1962).

demanded his release.

On appeal, the Court of Military Appeals ruled that the mother's request for the release of her son was not timely and that the accused was subject to court-martial jurisdiction. In affirming the conviction, the court said:

> The enlistment of a minor of the statutory age, even though without the required consent, is valid, and he thereby becomes de jure and de facto a soldier, subject to military jurisdiction A nonconsenting parent is not entitled to custody of the minor prior to the expiration of the latter's crime, when the parent has not sought his discharge until after commission of an offense triable by court-martial and punishable by military law. The parent's right to the minor's custody and service is, under those circumstances, subordinate to the right of military authorities to hold the minor soldier to answer for his crime.[48]

The decisions in Scott and Bean reveal that the right of parents to apply for a minor's discharge may be forfeited if by their conduct, the parents ratify or acquiesce in the enlistment. In this area, therefore, the conduct of the parents and the timing of their request for release are critical factors in determining whether an accused should be released.

The rule that a soldier's enlistment at 17 without parental consent is voidable only upon the parents' request is applicable to an extension of the soldier's enlistment, as well as the initial enlistment. Thus, in United States v. Garback,[49] the accused, who had enlisted without parental consent and extended that enlistment prior to his 18th birthday without consent, was subject to court-martial jurisdiction. Although the accused argued that the extension of his enlistment was void, the court held that it was voidable; and because the parents of the accused never attempted to obtain his release from the service, he was subject to court-martial jurisdiction. His own application for release was "neither effective nor timely."[50]

(e) Overage enlistments. In United States v. Grimley,[51] the accused was over the statutory age when he volunteered for enlistment. He was 40 years old and falsely represented that he was 28 years old. While serving on active duty, Grimley deserted. He was subsequently tried by military court-martial and convicted of desertion and sentenced to 6 months' confinement.

In upholding the exercise of court-martial jurisdiction over the accused, the Supreme Court compared enlistment to marriage, noting that both create or change the "status" of the party. It concluded that the accused cannot--

> renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy or other disability which, in its nature, disables a party from changing his status or entering into new relations.[52]

In the Court's opinion, the statutory age for enlistment merely announced a policy rather than establishing a standard for the competence of a person to acquire a military status.

(f) Limitations on constructive enlistments. Under some circumstances the courts may refuse to find a constructive enlistment. Interlopers, for example, may not be subject to the UCMJ or found to have constructively enlisted. In United States v. King,[53] the accused had been separated previously from the service with an undesirable discharge. Later he returned pursuant to a fraudulent set of orders, assumed the status of an Army noncommissioned officer, performed duties as such and drew pay. The Government argued constructive enlistment, but the Court of Military Appeals held that the accused was merely an interloper masquerading as a soldier and that the court-martial had no jurisdiction over his person.[54]

In addition, a constructive enlistment cannot be based on time spent in confinement,[55] or while awaiting the processing of a minority discharge.[56] Whether time spent in pretrial restriction awaiting trial by court-martial is voluntary service indicating a desire to assume military status giving rise to a constructive enlistment is an issue which

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[48] *Id.* at 207.

[49] 50 C.M.R. 673 (A.C.M.R. 1975).

[50] *Id.* at 674.

[51] 137 U.S. 147 (1890).

[52] *Id.* at 152–53.

[53] 28 C.M.R. 243 (C.M.A. 1959).

[54] *Id.* at 247. The court held in *King* that there was no mutuality of understanding as to status of the accused; thus importing contractual doctrine into this area of the law, the court failed to find jurisdiction. *Id.* at 24, 28 C.M.R. at 247. As mentioned, some of the elements from which constructive enlistment may be inferred, are:

(1) receipt of pay and benefits (United States v. Catlow, 48, C.M.R. 758, 762 (C.M.A. 1974)).

(2) voluntary submission to military authority (*id.*; *cf.* United States v. Hall, 37 C.M.R. 352 (C.M.A. 1967)) (active protest to military service defeated constructive induction theory even where pay and allowances accepted and uniform was worn).

(3) acceptance of service by the military (United States v. King, 28 C.M.R. at 247);

(4) actual performance of military duties (*id.*).

[55] United States v. Graves, 39 C.M.R. 438, 439 (A.C.M.R. 1968).

[56] United States v. Brown, 48 C.M.R. 778 (C.M.A. 1974); United States v. Graham, 46 C.M.R. 75 (C.M.A. 1972); United States v. Adams, 49 C.M.R. 678 (A.C.M.R. 1974).

is not yet resolved.[57]

The vitality of the decision in United States v. King, although not overruled, and cases following its rationale, is questionable in light of the congressional intent to overrule it in amending article 2 of the UCMJ in 1979.[58] It may now be fairly argued that an interloper may, through a constructive enlistment under article 2(c), UCMJ, become subject to court-martial jurisdiction.[59]

(2) *Enlistments violative of a regulation.*

(a) Involuntary enlistment. In past years military appellate courts have ruled on the practice of civilian authorities allowing individuals to join the military as an alternative to trial or confinement on criminal charges. In most cases, local recruiters have worked with civilian judges and prosecutors in arranging to have individuals, in trouble with civilian law, enlist in the Armed Forces.

The leading case condemning this practice is United States v. Catlow.[60] In Catlow, the accused was arrested by civilian authorities and charged with loitering, resisting arrest, carrying a concealed weapon, and assault. When Catlow appeared before the civilian judge of the juvenile court, the judge informed him that he could elect to be tried on the charges, with the possibility of being confined up to 5 years if convicted, or, in the alternative, he could elect to enlist in the Army for 3 years. Reluctantly, Catlow opted for the 3-year enlistment. An Army recruiter contacted him and secured his release from civilian confinement. After completing the required paperwork, Catlow was enlisted in the United States Army, and the juvenile court charges against him were dismissed.

Within a short time after entering on active duty, Catlow was charged with disobedience of orders and absence without leave. He was tried by general court-martial at Fort Dix, convicted of the charges, and sentenced to a dishonorable discharge, total forfeitures, and 6 months' confinement at hard labor.

On appeal, Catlow contended that the court-martial which convicted him lacked jurisdiction because his enlistment was void. The Court of Military Review rejected his contention.[61] While the court noted that the accused's enlistment was in violation of Army regulations, the court nevertheless concluded that the enlistment was voidable at the option of the Army, because the regulation violated and the resulting disqualification were solely for the benefit of the Army.

The Court of Military Appeals disagreed with the Court of Military Review, and ruled that Catlow's enlistment was void.[62] In reaching its decision the court concluded that the accused's enlistment was not the product of his own volition. In addition, the court rejected the argument that the accused's acceptance of pay and allowances constituted a constructive enlistment. On the contrary, the court noted, Catlow's "protestations against continued service" indicated his intent not to become a soldier.[63] The Court of Military Appeals therefore reversed the Court of Military Review decision and ordered the charges against Catlow dismissed.

The Catlow decision reflects the court's interest in recruiting practices, and a desire to eliminate coerced and forced enlistments. Since the court's decision in Catlow, numerous other cases have been decided by the appellate courts involving recruiter misconduct, forced enlistments, and recruiting violations.

One of the cases, decided shortly after the announcement of the Catlow decision, was United States v. McNeal.[64] In McNeal, the accused had been convicted of two specifications of absence without leave and sentenced to a bad conduct discharge, confinement at hard labor for 12 months and a forfeiture of $200 pay per month for 12 months.

At his trial and on appeal the accused contended that because he was recruited into the Army from reform school, he was not subject to court-martial jurisdiction and could not be tried for military offenses. The accused maintained that while he was in reform school, he and others were approached by an Army recruiter and a reform school counselor who talked with them about enlisting in the Army. According to the accused he was told that he would have to serve another year or more in the reform school, unless he wanted to enlist in the Army, in which case he would be released immediately. Because the Army was a way "to get out of jail"[65] the accused agreed to enlist. The reform school

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[57] *See* United States v. Brodigan, 50 C.M.R. 419 (N.C.M.R. 1975).

[58] MCM, 1984, R.C.M. 202(a) (1984 analysis).

[59] R.C.M. 202(a) discussion.

[60] 23 C.M.A. 142, 48 C.M.R. 758 (1974).*See also*United States v. Barrett, 50 C.M.R. 493 (C.M.A. 1975) (enlistment in Army to avoid 4-year term in reformatory following conviction on juvenile charges held void); United States v. Dumas, 49 C.M.R. 453 (C.M.A. 1975) (enlistment of 17-year-old to avoid civilian confinement held void); United States v. Bunnel, 49 C.M.R. 64 (A.C.M.R. 1974) (enlistment in Army held void where recruiter and accused concealed accused's civilian conviction). *But see* United States v. Frye, 49 C.M.R. 703 (A.C.M.R. 1975) (constructive enlistment found where accused alleged that he enlisted to avoid going to jail, but offered no evidence other than his statement in the post trial interview to support the assertion); United States v. Parker, 47 C.M.R. 762 (C.G.C.M.R. 1973) (court-martial jurisdiction over accused upheld where recruiter assisted accused in enlisting even though accused had civilian convictions for juvenile and felony offenses).

[61] United States v. Catlow, 47 C.M.R. 617 (A.C.M.R. 1973).

[62] 48 C.M.R. 758 (C.M.A. 1974).

[63] *Id.* at 762. *But see* United States v. Barksdale, 50 C.M.R. 430 (N.C.M.R. 1975) (although accused entered service to avoid civilian charges, court found constructive enlistment).

[64] 49 C.M.R. 668 (A.C.M.R. 1974).

[65] *Id.* at 669.

counselor signed the accused's consent form, since McNeal was 17 years old, and the recruiting sergeant processed him into the Army.

At his court-martial, McNeal argued that the court-martial lacked jurisdiction over his person because his enlistment into military service was coerced. The trial judge denied the motion on the grounds that the accused's enlistment was voidable and that a constructive enlistment has occurred.

On appeal the Army Court of Military Review, relying on the Catlow decision, reversed the trial judge's ruling. The Court of Review concluded that the accused's enlistment was void. In reaching its decision the court observed that the accused's consent form was signed by the reform school counselor and not by the accused's parents or legal guardian as required by Army regulations. In addition, the court noted that juveniles with serious criminal records are not permitted to enlist in the Army and that under the circumstances, the court would not assume the accused did not have a juvenile record. For these reasons, the court held that the accused's enlistment was void and ordered the finding and sentence set aside and the charges against the accused dismissed.[66]

In short, if a soldier does not voluntarily join the service, but is involuntarily enlisted, a formal defect in the enlistment exists and this could invalidate the Government's attempt to impose court-martial jurisdiction over the person.

In United States v. Lightfoot,[67] the accused's enlistment was upheld. Here counsel for the accused, a juvenile, told him that a charge of burglary would probably be dropped for mere probation if he informed the judge of a desire to enlist. The recruiter was not involved in the proceedings up to that time and subsequently processed the appellant's enlistment without knowledge of counsel's advice. The proceedings were dismissed against the accused because of his military enlistment. This contingency did not invalidate the accused's enlistment by making it involuntary. The Court of Military Appeals stated:

> We believe it would be unreasonable to extend Catlow to embrace the situation in which a criminal defendant, on the advice of counsel, instigates the proposal of military service as an alternative choice to confinement. Moreover, there can be no legitimate finding of a lack of voluntariness in the sense of Catlow in the present case on the facts found by the Court of Military Review due to the total absence of intimidation or improper influence by agents of the government. The appellant's enlistment was voluntary.[68]

If an Army regulation[69] is violated to effectuate an enlistment, the validity of the enlistment may be questioned. Although the Government must follow its own regulations, this does not necessarily mean that the enlistment which violates a regulation will be automatically invalid. If the court determines that the soldier acted in bad faith,[70] suffered no prejudice,[71] or if the regulation is not for the soldier's benefit,[72] or if the regulation violation is a mere "formal defect,"[73] courts generally will hold the violation of the regulation to be insignificant. In United States v. Wagner[74] the court held that the enlistment of the accused--who enlisted to avoid civilian prosecution--was voluntary and valid when it originated with the accused and was not the result of recruiter misconduct. In Wagner the accused had enlisted in an attempt to avoid criminal prosecution in his home state. The court found no recruiter or Government misconduct. Thus, the enlistment would remain voidable unless the individual committed an offense. The court emphasized that violation of a regulation in and of itself would not void an enlistment.

(b) Recruiter misconduct. A violation of a regulation combined with intentional recruiter misconduct may void an enlistment on public policy grounds. In United States v. Russo,[75] the Court of Military Appeals addressed the problem of misconduct on the part of recruiters in enlisting persons in to the Armed Forces. In Russo, the accused suffered from dyslexia, a disease which severely impaired his ability to read. The accused wanted to enlist in the United States Army and talked with an Army recruiter about enlisting. According to Russo, the recruiter provided him with a list of numbers and letters to put on the Armed Forces Qualification test to assure his eligibility for enlistment, and processed him for enlistment. While serving on active duty, the accused was charged with a criminal offense and tried by court-martial. At his trial, the accused alleged that the court-martial lacked jurisdiction over him because of the recruiter's

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[66] *See also* United States v. Martinez, 2 M.J. 1255 (A.C.M.R. 1976) (court-martial lacked jurisdiction over accused where the accused was given the choice of either joining the Army or risking added juvenile proceedings, and the Army recruiter participated in effecting the accused's involuntary enlistment) and United States v. Dumas, 23 C.M.R. 278, 49 C.M.R. 453 (1975), (court-martial was held without jurisdiction; the accused's enlistment was held void when evidence showed that the recruiter, the accused's probation officer, and the judge conspired and presented the accused with the option of enlistment or confinement in a civilian juvenile detention camp and his mother, who was his legal guardian, not only had not consented, but did not know of the enlistment).

[67] 4 M.J. 262 (C.M.A. 1978).

[68] *Id.* at 263 (footnotes omitted);*see also* United States v. Ghiglieri, 25 M.J. 687 (A.C.M.R. 1987).

[69] The Army regulation which governs enlistments is AR 601–210, (14 Feb. 1990).

[70] Wier v. United States, 474 F.2d 617 (Ct. Cl.),*cert. denied*, 414 U.S. 1066 (1973).

[71] United States *ex rel.*Stone v. Robinson, 431 F.2d 548 (3d Cir. 1970).

[72] Allgood v. Kenan, 470 F.2d 1071, 1073 (9th Cir. 1972).

[73] Johnson v. Chafee, 469 F.2d 1216 (9th Cir. 1972),*cert. denied* 411 U.S. 966 (1973).

[74] 5 M.J. 461 (C.M.A. 1978). *See*Schlueter, *Wagner, Valadez and Harrison: A Definitive Enlistment Triology?*, The Army Lawyer, Jan. 1979, at 2.

[75] 1 M.J. 134 (C.M.A. 1975).

misconduct in processing him for enlistment. The accused's motion to dismiss on the grounds of lack of jurisdiction was denied and he was convicted of the charges against him.

On appeal the accused argued that his enlistment was void. In response, the Government argued vigorously that Army regulations setting "minimum mental requirements [for enlistment were]… solely for the protection and benefit of the armed forces"[76] and could be waived by the Government if it so desired. In rejecting the Government's contention, the court ruled that the regulations prescribing minimum mental standards for enlistment in the Army are not solely for the benefit of the Army. On the contrary, the court stated, the regulations were also, a means of protecting applicants who do not meet specified mental, physical, and moral standards for enlistment by barring their access to an environment in which they may be incapable of functioning effectively.[77] The court found that the recruiter's misconduct was in violation of recruiting regulations and contrary to the public interest. For these reasons the court ruled that the accused's enlistment was fraudulent and void.[78] Accordingly, the court ordered the conviction of the accused set aside and the charges against him dismissed.

In United States v. Little,[79] the court again addressed the problem of recruiter misconduct. The accused, who had been convicted of consensual sodomy, attacked his conviction on the grounds that his recruiter had known that he was illiterate and had fraudulently enlisted him. The court held that the accused's enlistment was not void even though the recruiter continued to recruit the accused after having been informed by the accused's mother that her son was illiterate. After all, "to force recruiters to make subjective determinations with respect to literacy"[80] is unreasonable, and negates the value of the Armed Forces Qualifying Test. Yet the recruiter's self-acknowledged assistance to the accused on the test was held sufficient to invalidate the enlistment. By explaining the meaning of some of the words and questions of the exam, the recruiter "made it virtually impossible to resolve whether the accused could read and write,"[81] and "destroy[ed] the only vehicle available to determine literacy, one of the essential prerequisites for enlistment."[82] Thus, the charge against the accused was dismissed for lack of military jurisdiction.

In United States v. Hurd,[83] an accused enlisted in the United States Navy "on the promise that he would go to hospitalman 'A' school."[84] When it came time to report for schooling, the accused "was told that he was now scheduled for mess management school rather than hospitalman"[85] school. When he complained about the switch in schools, he was told"that it was too late and he was now in the Navy for better or worse."[86]

The evidence showed that the documents regarding the accused's schooling had been tampered with. The Navy Court of Military Review also was "unpersuaded by the Government witnesses."[87] After reviewing the testimony and the documentary evidence, the court concluded that the accused "was fraudulently enlisted, that he was told he would be a hospitalman, and that his papers were changed to reflect enlistment as a mess management specialist without his knowledge."[88] For these reasons, the court found "his enlistment was involuntary and void."[89]

If the enlisted soldier previously served in the Armed Forces, was discharged, and was barred from reenlistment, his subsequent enlistment will violate the regulations. For example, in United States v. Huddleston[90] the accused had served previously in the United States Marine Corps and had been discharged with a bar to reenlistment. Later, at the age of 20, the accused enlisted in the United States Army after indicating on his enlistment papers that he had no prior service.

While on active duty in the Army, the accused was charged with a number of criminal offenses. He was tried by general court-martial at Fort Ord and on pleas of guilty was convicted of fraudulent enlistment, absence without leave, 40 specifications of worthless checks and wrongfully impersonating a noncommissioned officer with intent to defraud. The accused was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for 4 years.

On appeal the accused argued "that the court-martial lacked jurisdiction to try him because of allegedly fraudulent

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[76] *Id.*

[77] *Id.* at 136.

[78] *Id.* at 137. *See*United States v. Muniz, 1 M.J. 151 (C.M.A. 1975) (enlistment held void where recruiter accepted a bribe from the accused for answers to the entrance exam); United States v. Burden, 1 M.J. 89, 50 C.M.R. 649 (C.M.A. 1975) (induction void where accused disclosed inability to read and write); United States v. Brogan, 50 C.M.R. 807 (N.C.M.R. 1975) (Navy regulations not violated where examiner of accused at the time of enlistment found accused's personality disorder not to be disqualifying); United States v. Jones, 50 C.M.R. 92 (A.C.M.R. 1975). (Project 100,000 accused held to have met minimum mental standards at time of his enlistment). *See generally,* United States v. Chappell, 41 C.M.R. 236 (C.M.A. 1970) (accused became a member of the Armed Forces under the Project 100,000 Program).

[79] 1 M.J. 476 (C.M.A. 1976).

[80] *Id.* at 478.

[81] *Id.*

[82] *Id.*

[83] 8 M.J. 555 (N.C.M.R. 1979).

[84] Id.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 556.

[88] *Id.*

[89] *Id.*

[90] 50 C.M.R. 99 (A.C.M.R. 1975).

practices by Army recruiters."[91] An Army Court of Military Review rejected his contention that the court-martial which tried him lacked jurisdiction over his person. The court found that the accused was 20 years old when he enlisted and that his enlistment was voluntary and not coerced. While the court recognized that a bar to reenlistment is a nonwaivable disqualification, it also recognized that the disqualification is for the benefit of the Army only. Thus, the court concluded, while the "Army could have avoided the enlistment at its option,… Huddleston did not have that privilege once he changed his status."[92] In addition, the court concluded that the recruiter who enlisted the accused was not aware of the bar to reenlistment issued the accused. For these reasons, the court ruled that the accused's enlistment was voidable and that the accused was tried properly by military court-martial.

In United States v. Stone,[93] the Court of Military Appeals limited the rule announced in Russo to cases involving intentional recruiter misconduct coupled with nonwaivable defects. Under Stone, the unlawful acts of a recruiter will void an enlistment only where the defect, either statutory or regulatory, is nonwaivable. If the defect is nonwaivable, the enlistment may still be valid under existing case law, if the recruiter's action constituted only negligence and not intentional misconduct.[94]

(c) Effects of recruiter misconduct: Estoppel. Recruiter or other misconduct by Government agents may affect whether a court will apply the doctrine of constructive enlistment. If the recruiter or other Government agent has no knowledge of an improper enlistment procedure, then courts uniformly apply the doctrine of constructive enlistment. However, if the recruiter either should have known, or knew of irregularities in the enlistment process, courts may refuse to apply the doctrine of constructive enlistment, and claim that the Government, because of its misconduct, is estopped from arguing constructive enlistment.

Simple negligence in processing an individual will probably not estop the Government from showing a valid and binding constructive enlistment if the factors of constructive enlistment can be established. For example, in United States v. Valadez,[95] the recruiter's negligence in not realizing that a combination of specific factors made the accused ineligible for enlistment was not deemed recruiter misconduct. Also, in United States v. Harrison,[96] the recruiter's failure to detect the accused's scheme to effectuate an underage enlistment was not considered "recruiter misconduct."

If the recruiter's conduct is grossly negligent, the court could decide that such negligence estops the Government from arguing constructive enlistment, such being tantamount to actual malfeasance. If the recruiter's conduct constitutes malfeasance, amounting to a violation of article 84, UCMJ, the enlistment is void.[97]

(d) Amendment to article 2, UCMJ. In 1979, while investigating the problem of recruiter misconduct, Congress examined the foregoing rules which, in effect, voided court-martial jurisdiction where a recruiter had enlisted a soldier fraudulently. In November 1979, article 2 of the UCMJ was amended to allow for jurisdiction over individuals with defects in their enlistments.[98] Article 2 was amended as follows:

1. by inserting "(a)" before"The" at the beginning of section; and

2. by adding at the end thereof the following new subsections:

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

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

1. submitted voluntarily to military authority;

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

3. received military pay or allowances; and

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

As noted the changes to article 2 occurred as a result of hearings conducted in 1978 and 1979 by the Senate Armed Services Committee on the continuing problem of recruiter misconduct. During its inquiry, the committee learned of the Court of Military Appeals position on fraudulent enlistments. In the committee's report on the proposed amendments, the "serious" problem created for the military by those decisions was addressed. The committee stated:

Several instances came to the committee's attention where accused military members raised the issue of recruiter

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[91] *Id.* at 101.

[92] *Id.* at 102–103.

[93] 8 M.J. 140 (C.M.A. 1979).

[94] United States v. Buckingham, 11 M.J. 184 (C.M.A. 1981); United States v. Valadez, 5 M.J. 470 (C.M.A. 1978).

[95] 5 M.J. 470 (C.M.A. 1978).

[96] 5 M.J. 476 (C.M.A. 1978).

[97] United States v. Russo, 1 M.J. 134 (C.M.A. 1976); United States v. Harrison, 5 M.J. 476 (C.M.A. 1978). The recruiter may of course be convicted for his misconduct. *See* United States v. Hightower, 5 M.J. 717 (A.C.M.R. 1978).

[98] The amendment was a part of the Defense Authorization Act of FY 1980 (S. 428). Pub. L. No. 96–107 (9 Nov 1979). The amendment's language represents the Senate's original version. *See* Congressional Record, S. 428, 96th Cong., 1st Sess, 125 Cong. Rec. S7272 (1979). The amendment is discussed in detail at Schlueter, *Personal Jurisdiction Under Article 2, UCMJ: Whither Russo, Catlow, and Brown?*, The Army Lawyer, Dec. 1979 at 3.

malpractice after commission of an offense, succeeded in obtaining a ruling of no jurisdiction, and were thereupon returned to duty for a time [before administrative separation could be effected] completely immune from military discipline. This situation is made intolerable in the case of alleged recruiter malpractice by the fact that the burden of proof on the jurisdictional issue shifts to the Government after being raised by the accused, forcing the Government to prove that there was no recruiter malpractice many months or years after the fact, with the recruiter miles away or out of the service. The committee learned that in many instances accused military members were simply discharged after raising the defense because of the difficulty of affirmatively proving that the enlistment was valid, thereby escaping just punishment for their offenses.[99]

The original provision in article 2 became subsection (a) in the new amendment to article 2. Subsection (b) was designed to codify the Supreme Court of the United States decision in In re Grimley.[100] The purpose of subsection (b) is to establish criteria for a "valid" enlistment under subsection (a) of article 2. If the individual possesses the "capacity to understand the significance of enlistment in the armed forces" and voluntarily enlists, that individual is considered amenable to jurisdiction. In proposing this amendment the committee intended to overrule the rule in United States v. Russo[101] that an enlistment could be voided if a recruiter had intentionally effected a fraudulent enlistment. The amendment was not intended to condone a recruiter misfeasance or malfeasance but rather to reaffirm the Supreme Court's decision in Grimley.[102]

Subsection (c) codifies the doctrine of constructive enlistment: If for any reason there is an "invalid" enlistment, a constructive enlistment will occur as soon as the four criteria are satisfied-- notwithstanding the disqualification whether statutory or regulatory.[103] According to the committee, this section overrules the "estoppel" theory which had in the past prevented the Government from relying on a constructive enlistment rationale to establish jurisdiction over the person. It also overrules those decisions which held that an uncured regulatory disqualification could prevent a constructive enlistment.[104]

In United States v. Quintal,[105] the Army Court of Military Review assessed the amendment to article 2 and noted that it expressed a new public policy concerning fraudulent enlistments.[106] In Quintal, the accused was convicted in a general court-martial of larceny, housebreaking, disrespect toward an officer, and offering evidence against and assaulting an officer. The sentence imposed was "a bad conduct discharge, confinement at hard labor for two years, and forfeiture of all pay and allowances."[107]

On appeal, the accused argued that he was not subject to court-martial jurisdiction because of recruiter misconduct. While the accused acknowledged that the amendment to article 2 changed the law in this area, he nevertheless argued that the change did not apply to him because the amendment did not become effective until after the conclusion of his trial.[108]

The Army Court of Military Review rejected the accused's argument and decided to apply the "general rule… 'that an appellate court must apply the law in effect at the time it renders its decision.' Thorpe v. Housing Authority of Durham, 393 U.S. 268, 281… (1969)."[109] Applying this rule, the court concluded that the amendment applied and that the court-martial had jurisdiction over the accused at the time of the trial "regardless of the claimed misconduct of his recruiter."[110]

In Woodrick v. Divich,[111] the Court of Military Appeals looked at the court-martial's competence to determine enlistment contract claims, matters not generally within the court-martial's expertise. Woodrick, charged with desertion, claimed that his enlistment contract was a nullity because it was induced by material misrepresentations of agents of the Air Force. He filed an application for extraordinary relief with the Court of Military Appeals. The Court of Military Appeals held that while "a court-martial is competent to determine whether Woodrick's enlistment was voidable,"[112] it was not the most convenient forum to handle the matter because the issues involved were not the type in which courts-martial have special competence and the court-martial did not have the power to grant the basic relief requested in this

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[99] Senate Report 96–197, Defense Authorization Act 1980 (S. 428) at 121 [hereinafter cited as Senate Report].
[100] 137 U.S. 147 (1890). Senate Report *supra* note 99, at 121.
[101] *Id. Russo*is discussed *supra* at 75–78, and accompanying text.
[102] Senate Report*supra* note 99, at 121.
[103] *See* United States v. Hirsch, 26 M.J. 800 (A.C.M.R. 1988) (constructive enlistment can cure recruiter misconduct at time of oath); United States v. Ernest, 32 M.J. 135 (C.M.A. 1991) (constructive enlistment applies to reservists and cures regulatory violations in bringing the reservists onto active duty).
[104] *See* Schlueter, *Personal Jurisdiction Under Article 2, UCMJ: Whither Russo, Catlow, and Brown*, the Army Lawyer, Dec. 1979, at 3 for a discussion of the legislative history and the impact of the amendments. The amendment was also intended to overrule that portion of United States v. Valadez, 5 M.J. 470 (C.M.A. 1978), which stated that an uncured regulatory defect not amounting to a lack of capacity or voluntariness prevented application of the doctrine of constructive enlistment. Senate Report, *supra* note 99.
[105] 10 M.J. 532 (A.C.M.R. 1980).
[106] *Id.* at 535.
[107] *Id.* at 533.
[108] *Id.* at 535.
[109] *Id.*
[110] *Id.*
[111] 24 M.J. 147 (C.M.A. 1987).
[112] *Id.* at 151.

case-- release from active duty.[113] Accordingly, the court stayed the trial proceedings until Woodrick's claims were fully adjudicated in the civilian court system.[114]

(e) Retroactivity and ex post facto effect. In United States v. McDonagh,[115] the Army Court of Military Review addressed the issue of the amendment to article 2's retroactivity and ex post facto effect. After a thorough discussion of the matter the court concluded that the amendment did not apply to enlistments entered into before the effective date of the amendment. A majority of the court also concluded that section (b) of the amendment (article 2(b)) did not violate the ex post facto clause of the Constitution as to offenses committed prior to the amendment.[116] The Navy Court of Military Review, however, reached the opposite conclusion on the issue of the amendment's ex post facto effect.[117] In United States v. Marsh,[118] the accused was convicted by special court-martial of a 2 1/2-month absence without leave and was sentenced to a bad- conduct discharge, confinement at hard labor for 3 months, forfeiture of $150.00 per month for 3 months and reduction to the lowest enlisted grade.

At trial the accused argued that the court-martial lacked jurisdiction over him because of recruiter misconduct that occurred in the enlistment process of the accused--misconduct which took place prior to 9 November 1979, the effective date of the amendment to article 2.[119] The trial judge denied the defenses motion to dismiss for lack of jurisdiction over the person on the ground that the issue of lack of jurisdiction due to recruiter misconduct "was foreclosed by the Article 2 amendments."[120]

On appeal, the Navy Court of Military Review noted that in Russo "the Court of Military Appeals raised a judicial bar to the trial of those accused who the Court concluded had been enlisted through the misconduct of the services' own recruiters."[121]

The Navy Court of Military Review also recognized that the purpose of article 2 was, in part, to overrule the United States Court of Appeals decision in Russo and to do away with the judicial bar to trying those who had been enlisted as a result of recruiter misconduct.[122]

After an extensive analysis of the legislative history to the amendment of article 2, the Navy Court of Military Review concluded that the change to article 2 was "a real change in the laws, [and] not a mere restatement."[123] For this reason, the court concluded that the "Congressional act, as applied [namely the amendment to Article 2], violates the ex post facto prohibition because it deprives one charged with crime of [a] defense available according to law at the time when the act was committed… Beazell v. Ohio, 269 U.S. 167, 169-170… (1925)."[124] In light of this finding, the court ordered the findings and the sentence in the accused's case set aside and the case returned to The Judge Advocate General for a rehearing.[125]

In United States v. McDonagh,[126] the United States Court of Military Appeals concluded "that Congress intended the amendment to Article 2 to apply to all pending cases and to be as fully retroactive as would be constitutionally permissible."[127] The Court of Military Appeals, however, drew a distinction between purely military offenses--that is, offenses in"which disputed factual issues about the accused's status as a servicemember must be decided by the trier of fact"[128] and offenses not purely military--that is, offenses in "which the question of jurisdiction over the person is resolved by the military judge as an interlocutory matter."[129]

In the case of purely military offenses, the court concluded that the retroactive application of article 2 raises "serious ex post facto"[130] problems. This is because when article 2 is given retroactive application, an element of a purely military offense is changed--namely the issue concerning the nature of the military status of the accused. The law in effect after the Russo decision (1 August 1975) and before the effective date of the amendment to article 2 (9 November 1979) provided that in a purely military offense, the element of the military status of the accused would have to be submitted to the trier of fact and proved beyond a reasonable doubt. The effect of the amendment to article 2 was to take this issue away from the trier of fact and not to require the Government to prove the element beyond a reasonable doubt. Because this "involves changing an element of the crime to be punished,"[131] the court found that a

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[113] *Id.* at 153.
[114] *Id.*
[115] 10 M.J. 698 (A.C.M.R. 1981), *aff'd* 14 M.J. 415 (C.M.A. 1983).
[116] *Id.* at 711–12.*See also* United States v. Boone, 10 M.J. 715 (A.C.M.R. 1981).
[117] United States v. Marsh, 11 M.J. 698 (N.M.C.M.R.)*modified on reconsideration*, 11 M.J. 782 (N.M.C.M.R. 1981), *rev'd* 15 M.J. 252 (C.M.A. 1983).
[118] *Id.*
[119] 11 M.J. at 700.
[120] *Id.*
[121] *Id.* at 708 (emphasis added).
[122] *Id.* at 701.
[123] *Id.* at 711.
[124] *Id.*
[125] *Id. But see* 11 M.J. 782 and 15 M.J. 252.
[126] 14 M.J. 415 (C.M.A. 1983).
[127] *Id.* at 419.
[128] *Id.* at 422.
[129] *Id.*
[130] *Id.*
[131] *Id.*

serious ex post facto problem existed.

The Court of Military Appeals had no problem, on the other hand, "where the offense involved is not of a peculiarly military nature."[132] This is because with such offenses "it has never been necessary to submit a disputed issue of military status to the trier of fact or for the Government to establish military status beyond a reasonable doubt."[133] In short, the court concluded that in cases "where status is not an element . … Congress was not prohibited from applying the 1979 amendment of Article 2 to cases pending on appeal when it took effect."[134]

Because the accused's offenses in McDonagh did not involve an element of military status, namely, the sale and transfer of cocaine, the court ruled that the amendment to article 2 could be applied retroactively to cover the offenses with which the accused was charged.[135]

Judge Cook rejected the purely military offense--not purely military offense distinction and would overrule Russo.[136] Judge Fletcher did not need to decide the retroactivity question because the facts, he thought, were "outside the scope of the Russo doctrine."[137]

In United States v. Marsh,[138] a purely military offense, absence without leave, was charged. The military status of the accused, thus, was an element which had to be submitted to the trier of fact and proved by the Government beyond a reasonable doubt. In reversing the decision of the Navy Court of Military Review, the Court of Military Appeals ruled that the retroactive application of the amendments to article 2 would violate the ex post facto prohibition in this case.[139]

c. National Guard and reservists.

(1) *Introduction.* The armed forces of the United States depend on over 1 1/2 million Ready reservists in addition to its active forces of over 2 million members. The Reserve components of the United States Army include the Army National Guard and the United States Army Reserve. And, as will be discussed in this section, both forces are potentially subject to Federal court-martial jurisdiction depending on the status of the soldier or the soldier's unit.

(2) *Active duty v. active duty for training.* In the past, as an alternative to induction, a prospective inductee has been permitted to enlist in the National Guard of one's state, serve a tour of "initial active duty for training," and complete one's military obligation by satisfactory performance with the State National Guard in a drill status. There have been cases where the accused claimed that by the technical language of the statute, they were subject only to the jurisdiction of the State National Guard. These claims were based on the fact that they were ordered to"active duty for training," while the statute conferred jurisdiction over them when ordered to "active duty."

In the case of In re Taylor[140] the petitioner, a member of the North Carolina National Guard, was ordered to 6 months' active duty for training with his consent and the consent of the Governor of North Carolina. During the 6 months for which he was ordered to active duty, the petitioner absented himself without authority. After his conviction, the petitioner filed a petition seeking a writ of habeas corpus alleging that the court-martial had no jurisdiction over him, and claiming that, as a member of the National Guard on"active duty for training" as distinguished from"active duty," he was not subject to the Uniform Code of Military Justice. The Federal district court rejected any distinction between how the order read ("active duty for training") and what the statute said ("active duty"). Instead, the court found that the petitioner became subject to military law on the date he was ordered to active duty.[141]

In United States v. Carroll[142] two accused, who were members of the National Guard, volunteered and were ordered by Department of the Army, National Guard Bureau, to 6 months' active duty training. While on active duty training, the accused were tried in a common court-martial for larceny and were found guilty. The accused claimed that the Armed Forces Reserve Act provided that National Guardsmen were subject to Federal control only when they were ordered to "active duty," as distinguished from "active duty for training," and hence, the court-martial had no jurisdiction over them.

An Army Board of Review held that the accused were subject to court-martial jurisdiction. The court reasoned that Congress intended to include Federal duty such as full-time training duty within the definition of "active duty," and that while serving their six months' active duty for training, the accused were on active duty in the Federal service and

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[132] *Id.*
[133] *Id.*
[134] *Id.* at 423.
[135] *Id.*
[136] *Id.* at 424–25 (Cook, J., concurring in part).
[137] *Id.* at 425 (Fletcher, J., concurring in the result).
[138] 15 M.J. 252 (C.M.A. 1983).
[139] *Id.* at 254.
[140] 160 F. Supp. 932 (W.D. Mo. 1958).
[141] *Id.* at 937.
[142] 26 C.M.R. 598 (A.B.R. 1958).

subject to the UCMJ.[143]

(3) *Unauthorized retention on active duty.* In United States v. Peel,[144] an accused member of the Army National Guard was retained without proper authorization by State officials, after spending an authorized term on active duty. Because amending orders were not sought from the appropriate authority, the retention of the soldier on active duty and his assignment were administratively erroneous. Thus, the court-martial, which had found the accused guilty of numerous offenses, lacked jurisdiction, and the charges were dismissed.[145]

(4) *Order to active duty for missing scheduled drills.* The President of the United States is empowered under the United States Code to "order to active duty any member of the Ready Reserve of an armed force who is not 'participating satisfactorily' in a unit of the Ready Reserves."[146] A Ready Reserve is defined, in part, in 10 U.S.C. 269(b) (1982) which provides: "The units and members of the Army National Guard of the United States… are in the Ready Reserve of the Army… " By Executive Order the President has delegated to the Secretary of Defense the authority to activate reservists who are not participating satisfactorily in the Reserve program.[147] In the same Executive Order, the President also gave the Secretary of Defense the power to delegate to the service secretaries authority to activate reservists who perform unsatisfactorily.[148]

The requirements for satisfactory participation are set forth in Army regulations.[149] Currently, if reservists fail to attend regularly scheduled inactive duty training sessions or annual "summer camp" training, they may not be called to active duty to serve the remaining portion of their service obligation. Formerly, in cases where an Inactive reservist was called to active duty as a result of unsatisfactory participation, the Government had to comply strictly with the regulations prescribing the procedures for call-up. If the power to call reservists to active duty involuntarily for unsatisfactory inactive duty performance is ever revived, this same strict adherence to procedural requirements should be observed.[150] Moreover, this case law may have new significance in light of the involuntary recall of soldiers for punitive measures which is discussed in detail at paragraph (6), below.

In United States v. Kilbreth,[151] the accused was ordered to active duty because he failed to attend the scheduled training meetings of his National Guard unit. The accused failed to report for active duty and was apprehended and placed under military control. He was tried by special court-martial on a charge of absence without leave. He pleaded guilty and was sentenced to a reduction to E1 and 150 days' confinement at hard labor. The confinement was suspended, and the accused was ordered to report to Fort Hood. He failed to report and was charged with absence without leave. He was again returned to military control and tried by special court-martial. At trial the defense counsel moved to dismiss the charge and specification on the ground that the accused improperly was ordered to active duty. More specifically, the defense contended that the"procedures prescribed by AR 135-91 as to the determination of unsatisfactory performance were not followed, with the result that the accused was not properly a member of the Army, and therefore, was not subject to the Uniform Code."[152]

The accused testified that he never received warning notices about missed meetings and that he was never contacted regarding the absences. Nor was he informed of his right to appeal the notice he received ordering him to report to active duty. The Government offered no evidence to rebut or impeach these statements, but did argue that the accused was not entitled to relief.

On appeal the United States Court of Military Appeals concluded "that the Government's failure to follow its own positive commands were prejudicial to the accused in his call-up to active duty."[153] In reaching its decision the court found that "not only was the accused never informed of his right to appeal, but that he never in fact appealed, and

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[143] 26 C.M.R. at 600–601."Active duty" is defined in 10 U.S.C. § 101(22), which states:

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

[144] 4 M.J. 28 (C.M.A. 1977).

[145] Note that court-martial jurisdiction over National Guard soldiers on active duty for training may be secured by appropriate legal action against them prior to release from active duty. United States v. Pearson, 13 M.J. 140 (C.M.A. 1982); United States v. Self, 13 M.J. 132 (C.M.A. 1982); United States v. Hudson, 5 M.J. 413 (C.M.A. 1978).

[146] Hoersch v. Froehlke, 382 F. Supp. 1235, 1237 (E.D. Pa. 1974). 10 U.S.C. § 673a (1982) provides in part:

> (a) Notwithstanding any other provisions of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
> (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve…

[147] Exec. Order No. 11,366, 32 C.F.R. 11,411 (1967).

[148] *Id.*

[149] AR 135–91, chap 3 (10 July 1989).

[150] On 1 March 1980, the Army eliminated involuntary active duty and involuntary active duty training. *See*United States v. Arthur, 2 M.J. 481 (A.C.M.R. 1975).

[151] 47 C.M.R. 327 C.M.A. 1973).

[152] *Id.* at 328.

[153] *Id.* at 329.

never had the opportunity to present to the officials competent to consider an appeal, any excuse he may have had for any missed meeting."[154]

Because the Government failed to comply strictly with the procedural requirements for activating reservists set forth in Army regulations, the court ruled the accused was denied procedural due process and, accordingly, was called up improperly to active duty. For these reasons, the court ordered the charges against the accused dismissed and the sentence set aside.[155]

In United States v. Barraza,[156] the accused was not deemed to have waived his constitutional objection to involuntary activation by failing to raise the issue before military administrative agencies; the court refused to "blindly apply the exhaustion doctrine" in the absence of the showing of a compelling Government interest. Yet the court did apply the doctrine of waiver of constitutional rights, and construed Army regulations to

> [R]equire at the very least, that the Reservist take some steps within a reasonable time period and without the right of counsel to preserve his objection to the call-up based upon due process claims stemming from the violations of these regulations. It is not unreasonable to view failure by the [accused] to comport with these immediate appeal requirements as evidence of waiver of these due process rights… [He] must at the very least put the Government on notice of these objections to the call-up in order to preserve his claim.[157]

Although the court recognized that this lack of notice to the Government was but one factor in the waiver analysis, and that the particular facts and circumstances of each case had to be examined to justify the use of the waiver doctrine, it found that, because of the facts of this case, the accused had waived his rights. Here the accused had received a registered letter notifying him of his orders to active duty and informing him of his right to protest his order to active duty. The accused did nothing with respect to this notification, and there was no evidence that the accused "protested his activation prior to, during, or immediately after his entrance into active duty."[158] The accused did not raise his constitutional challenge to his activation orders until 6 months after his call-up, at a court-martial for drug offenses which were unrelated to his initial order to report for active duty.

(5) *Involuntary order to active duty for 45 days.* Another problem arises with respect to the provision for an involuntary order to active duty for 45 days of reservists who fail to perform their inactive duty training satisfactorily.[159]

In the case of In re La Plata's Petition,[160] a Ready reservist in the United States Marine Corps was ordered without his consent to 45 days' active duty. When he failed to comply with the orders, he was apprehended by the Marine Corps Military Police. The accused argued that he was unlawfully taken into custody by military authorities and he

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[154] *Id.*

[155] *See generally* United States v. Dolan, 42 C.M.R. 893 (A.C.M.R. 1970) (accused in Denmark did not receive notice to report to active duty). *See also* Hall v. Fry, 509 F.2d 1105 (10th Cir. 1975) (failure to follow notification requirements set forth in regulations for unsatisfactory performance); White v. Callaway, 501 F.2d 672 (5th Cir.) *reh. denied,* 503 F.2d 1403 (1974) (accused's Reserve commander properly determined that accused absences were unexcused); Rohe v. Froehlke, 500 F.2d 113 (2d Cir. 1974) (in appealing order directing the accused to report for active duty, accused had no right to examine adverse factual allegations placed in his file); Hoersch v. Froehlke, 382 F. Supp. 1235 (E.D. Pa. 1974) (accused properly ordered to active duty because of unsatisfactory performance): Tobiczyk v. United States, 381 F. Supp. 345 (E.D. Mich. 1974) (habeas corpus proceeding seeking to have involuntary activation set aside because accused reservist was not medically examined to the extent required by regulations for condition he was suffering from granted): Lizzio v. Richardson, 378 F. Supp. 986 (E.D. Pa. 1974) (reservist contesting order to active duty because of medical problems must present himself to the induction center for examination); Mellinger v. Laird, 339 F. Supp. 434 (E.D. Pa. 1972) (reservist ordered to active duty because of unsatisfactory performance in Reserve unit); United States *ex rel.* Niemann v. Greer, 394 F. Supp. 249 (D.N.J. 1975) (where defendant systematically avoided claiming correspondence from his Reserve unit, attempts to reach him by mail sufficed); Zillman, *Federal Court Challenge to Reservists Involuntary Activation: Mellinger v. Laird, 339 F. Supp. 434 (E.D. Pa. 1972).* The Army Lawyer, Oct. 1972 at 6. In the following case, a rehearing was ordered on the issue of whether the Government strictly complied with regulations prescribing procedures for activating reservists who perform unsatisfactorily, United States v. Burke, 48 C.M.R. 246 (A.C.M.R. 1974). For a discussion of the effect of failing to follow regulatory procedures regarding involuntary activation of reservists serving in the Ready Reserve Mobilization Reinforcement Pool, *see* United States v. Arthur, 2 M.J. 481 (A.C.M.R. 1975).

[156] 5 M.J. 230 (C.M.A. 1978); cf. United States v. Arthur, 2 M.J. 481 (A.C.M.R. 1975).

[157] 5 M.J. at 234.

[158] *Id.* at 235. A similar result was reached in United States v. Bridgeford, 9 M.J. 79 (C.M.A. 1980) (reservist did not raise involuntary activation deficiency prior to offense).

[159] 10 U.S.C. § 270(b) (1982) provides that:

> A member of the Ready Reserve… who fails in any year to satisfactorily perform the training duty prescribed… may be ordered without his consent to perform additional active duty for training for not more than 45 days. *But see supra* note 101. Persons called to active duty under this provision have been held to be subject to the UCMJ.

[160] 174 F. Supp. 884 (E.D. Mich. 1959).

petitioned the Federal District Court for the Eastern District of Michigan for a writ of habeas corpus.

The Federal district court ruled that the apprehension of the accused was lawful, and held that the petitioner was subject to the UCMJ from the date he was ordered to active duty.[161]

In a similar case,[162] a Coast Guard reservist, who failed to perform his drill obligation satisfactorily, was ordered to active duty for training for 45 days. He failed to obey the orders and was convicted by a summary court-martial of absence without leave and failure to obey an order. The summary court-martial held that as a "person lawfully called or ordered into duty" in the Armed Forces, he, [this reservist] was a person subject to court-martial jurisdiction pursuant to UCMJ, Art. 2(1).[163]

(6) *The UCMJ and the Reserve components.*

(a) Historical background. In response to significant problems with jurisdiction over the Reserve components, Congress passed legislation governing the Reserve components as part of the Military Justice Amendments of 1986.[164] In order to understand the significance of this legislation, however, it is first necessary to understand the historical background of Reserve jurisdiction. The previous rules governing Reserve jurisdiction were adopted with the initial enactment of the Uniform Code of Military Justice.[165] And, notwithstanding the then- existing view that the Reserve components were a"separate force," some disciplinary controls were established.[166]

For example, article 2(a)(1), UCMJ, provided for jurisdiction over persons ordered to active duty. Thus, the ordering of any individual or unit of the Reserve forces to active duty included the extension of court-martial jurisdiction over that person or unit.[167] Article 2(a)(1) also covered Reserve soldiers ordered to active duty for training. Thus, all short duration active duty training also produced Federal court-martial jurisdiction.[168] Article 2(a)(1) is not changed by the new Reserve component legislation.

What about inactive duty training (IDT)--the weekend drill? Article 2(a)(3) provided statutory authority for court-martial jurisdiction over the Reserve forces on weekend drill, but only if a restrictive four-part test was first satisfied: the person must actually be performing inactive duty training; the IDT must be detailed in written orders; the orders must be voluntarily accepted by the soldiers; and the order must specify that the person is subject to the UCMJ during the inactive duty training period.[169] The Army, however, throughout the history of the UCMJ, elected not to use this power while the Navy has.

During the initial hearings on the UCMJ in 1949, the Army and Air Force indicated that they did not need this power over inactive duty training, a power heretofore unavailable to them under the Articles of War.[170] The Navy, on the other hand, wanted to retain the broad jurisdictional power that it had under the Articles for the Government of the Navy, which provided:

> All members of the Naval Reserve when employed on active duty, authorized training duty with or without pay, drill or other equivalent instruction or duty, or when employed in authorized travel to or from such duty or appropriate duty, drill or instruction, or during such time as they may by law be required to perform active duty or while wearing a uniform prescribed for the Naval Reserve, shall be subject to the laws, regulations, and orders for the Government of the Navy.[171]

As a compromise between these antipodal positions, having no jurisdiction over Reserves on inactive duty training

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[161] Id. at 887. The applicable portion of UCMJ art. 2(a)(1) reads:

> The following persons are subject to this chapter:
>
> (1)… other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

[162] OGCCG 1957/2, 15 Dec. 1957, in "Courts-Martial" 7 Dig. Ops. JAG § 45.7 (1957–58).

[163] *Id. See* Keister v. Resor, 462 F.2d 471 (3d Cir. 1972).

[164] Pub. L. No. 99–661, §§ 801–808, 100 Stat. 3816, 3905–10 (1986) (signed into law by President Reagan on 14 Nov. 1986). For a complete discussion of this legislation *see* Williams, *Reserve Component Jurisdiction: New Powers for the Reserve Component Commander and New Responsibilities for the Reserve Component Judge Advocate*, The Army Lawyer, July 1987, at 5.

[165] 10 U.S.C. §§ 801–940 (1982). The Uniform Code of Military Justice, first enacted in 1949, consolidated and revised the existing laws governing the separate branches of the service (Articles of War, Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard), into one standard code.

[166] For an excellent discussion of the history of this legislation, see Clevenger, *Federal Court-Martial Jurisdiction Over Reserve Component Personnel*, 33 Fed. B. News & J. 418 (1986).

[167] *Id.* at 418. National Guard soldiers are subject to these rules and the new Reserve component legislation, but only while in "Federal service." *See, e.g.*, 10 U.S.C. § 672 (1982).

[168] Clevenger,*supra* note 158.3, at 418.

[169] UCMJ art. 2(a)(3).

[170] *See* Duncan v. Usher, 23 M.J. at 32.

[171] *See id.*(quoting 34 U.S.C. § 855).

and having complete jurisdictional powers, article 2(a)(3) was added to the UCMJ.[172] The law's purpose was to provide disciplinary controls over reservists who were weekend operators of dangerous and expensive equipment.[173] Army reservists are routinely entrusted with state-of-the-art weapon systems--Abrams tanks, Bradley fighting vehicles, and Blackhawk helicopters--that are certainly both dangerous and expensive equipment. Nevertheless, over the history of the UCMJ, the Army, consistent with its position during the legislative hearings, opted not to exercise this power. The Navy, in comparison, has continuously exercised this grant of authority under article 2(a)(3).[174] Perhaps the Navy's furthest attempted extension of this power occurred in United States v. Caputo,[175] the case that led to new Reserve jurisdiction legislation.

(b) United States v. Caputo. Caputo, who had prior Navy enlisted service, enlisted in the Navy Reserve for a 2-year tour. On 7 February 1983, pursuant to his obligation as a reservist, he was ordered from his home in New York to active duty training at the Naval Supply Center at Pearl Harbor, Hawaii. He reported as ordered. Six days later, he was stopped and arrested by civilian police for drinking in public. During the arrest, he was searched and found to be in possession of a large amount of LSD. Two days later, however, local authorities, without taking any action against Caputo, returned him to military control. His unit knew about his arrest and the charges, but released him from active duty training and permitted him to go home. On 2 March 1983, well after his active duty training was over, charges against Caputo were prepared and sworn to at the Naval Reserve Center at Staten Island, N.Y. On 12 March 1983, Caputo reported for his regularly scheduled weekend drill at his assigned unit. He was apprehended and placed in pretrial confinement. The Navy then extended his inactive duty training status and referred the charges to a special court-martial. Caputo filed an application for extraordinary relief, alleging that the court had no jurisdiction over him. The Court of Military Appeals agreed.

The Court of Military Appeals, relying on the 1969 Manual for Courts-Martial,[176] held that jurisdiction as to an offense committed during a period of service or status once terminated cannot be revived by the accused's subsequent return to duty.[177] In this case, the court found that Caputo's separation from active duty training terminated his active duty and that jurisdiction could not be revived by Caputo's subsequent return to weekend drill or inactive duty training.[178] Thus, despite continuous military status as a reservist, the Court of Military Appeals dismissed the offenses for a lack of personal jurisdiction.

(c) The Military Justice Amendments of 1986. Caputo was the catalyst that pushed Reserve jurisdiction problems to the attention of Congress. In fact, many call the new Reserve jurisdiction provisions the Caputo legislation. The amendments to Reserve disciplinary controls bridge the jurisdictional gaps recognized in Caputo and provide new authority during inactive duty training.

The legislation has several major provisions. First, the act deletes the restrictive requirements of article 2(a)(3). The previous article 2(a)(3), as noted earlier, provided statutory authority to exercise jurisdiction over inactive duty periods, but only if a demanding four-part test was first satisfied. The new standard extends jurisdiction over reservists on all types of training--inactive duty training or active duty training--without any threshold requirements.[179] If the member is training, he or she is subject to in personam jurisdiction.[180]

Training in the Tile 10 duty status for active duty (AD), active duty for training (ADT), annual training (AT), Active Guard/Reserve (AGR), confers UCMJ jurisdiction. Orders for 19 days of ADT or two weeks of AT would confer jurisdiction over the Reservist for the entire period covered by the orders, to include evening hours past the close of business when the Reservist might be at home or away for a weekend. Jurisdiction based on weekend drills (IDT) would at a minimum include those hours listed on a unit's training schedule that defined the unit training assembly (UTA). Lunch breaks as well as overnight bivouacs would be included as part of the assembly.[181] Time spent traveling directly to and from an IDT duty station would arguably be subject to UCMJ jurisdiction if the standard used is the line of duty casualty reporting requirement.[182] The Saturday evening happy hour or promotion party held during a (MUTA 4) drill weekend, where unit members normally return to their homes, is not as clearly a period of UCMJ jurisdiction.

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[172] *See id.*

[173] *See id.* at 33.

[174] Clevenger, *supra* note 158.3, at 418.

[175] 19 M.J. 259 (C.M.A. 1984).

[176] Manual for Courts-Martial, United States, 1969 (rev. ed.).

[177] 18 M.J. at 266.

[178] *Id.* There are exceptions to this general rule. For example, jurisdiction can be "revived" if the discharge is fraudulently obtained, (Wickham v. Hall, 1 M.J. 145 (C.M.A. 1981)), or if the soldier returns to active duty, the offense is punishable by 5 or more years' confinement, and the offense is not cognizable by a United States civilian court (UCMJ art. 3(a)).

[179] UCMJ art. 2(a)(3). For National Guard soldiers, the training must be in the Federal service to subject them to jurisdiction. Personal jurisdiction attaches at 0001 of the date specified in the Federal orders. United States v. Cline, 29 M.J. 83 (C.M.A. 1989).

[180] A court-martial may have personal jurisdiction over an accused because of his or her service status, yet lack subject-matter jurisdiction because the charged offense was committed before the accused was on active duty and subject to the Code. *See* United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990).

[181] AR 27–10, para. 21–2.

[182] AR 600–8–1, para. 3–2c. See also, para. 41–9.

If the event is listed on a unit's training calendar, held at the training site, and attended in uniform by unit members, UCMJ jurisdiction should be present. A Saturday evening, voluntarily-attended social event not listed on the training schedule, where unit members out of uniform attend with their spouses, would less clearly confer UCMJ jurisdiction. Reserve unit commanders' policies on these events may be determinative.

The legislation's second purpose was to resolve problems with losing jurisdiction because a soldier's training status terminated when he or she went home. Article 2(d), UCMJ now authorizes ordering to involuntary active duty Reserve component soldiers who violate UCMJ provisions for article 32 investigations, courts-martial, and even nonjudicial punishment.[183] Third, it amends article 3, UCMJ, by exempting a member of a Reserve component who violates the UCMJ, while subject to the Code, from termination of his or her amenability to court-martial jurisdiction by his or her release from active duty or inactive duty training.[184]

Thus, there should no longer be the problem of discovering that a crime has been committed by a member of the Reserve components, only to discover that he or she has been released by self-executing orders. Jurisdiction over the person as to the crimes committed is not revived, it simply never stops. The reservist's continuing status as a reservist provides the requisite jurisdictional nexus.

There are two collateral issues covered as well in the legislation. First, under article 136, UCMJ, officers in inactive duty training status are added to the list of persons who can administer oaths.[185] Therefore, Reserve component commanders who have access to a Reserve component judge advocate or adjutant can investigate crimes and initiate sworn charges over Reserve component and active duty soldiers while the commander is still in an inactive duty training status.

Second, the act also seeks to protect Reserve component soldiers by extending the article 137 educational process to reservists, to ensure that they are properly introduced to the new disciplinary provisions of the Reserve jurisdiction legislation.[186] The previous article 137 provides certain articles of the UCMJ must be explained to active component members at the time of enlistment, 6 months after enlistment, and on reenlistment.

d. Burden of proof. When the accused claims at trial that his or her enlistment is void, the Government has the "affirmative obligation" to establish jurisdiction over the accused.[187] Jurisdiction in all instances must be proven, not presumed.[188]

The same standard of proof used to establish jurisdiction must be employed both at trial and at any subsequent appeals.[189] Although generally factual disputes in interlocutory questions are decided by the military judge in applying the standard of preponderance of the evidence, there is some question as to whether the military judge should decide factual issues where the military status of the accused is a critical element of the charged offenses, applying a standard of proof beyond a reasonable doubt. In United States v. Bailey,[190] the Navy Court of Military Review held that regardless of the fact that the charged offense, for example, desertion, involves an element of military status, "the standard of proof on all motions to dismiss for lack of personal jurisdiction when presented to the military judge … remains a preponderance of the evidence."[191] Of course, the issue of military status may be raised again during trial on the merits, "and at that time the Government must prove beyond a reasonable doubt that the accused is a member of the military."[192]

In United States v. Marsh,[193] the Court of Military Appeals reaffirmed this conclusion. While the military judge's ruling on the existence of court- martial jurisdiction as an interlocutory matter is governed by the preponderance of evidence standard, for purely military offenses where status as a soldier is an element of the offense[194] that element must be proven to the satisfaction of the finder of fact beyond a reasonable doubt.

9–4. Continuing jurisdiction

a. After expiration of enlistment. The UCMJ provides that members of the Armed Forces remain subject to military jurisdiction while "awaiting discharge after expiration of their terms of enlistment."[195] In addition, the discussion to R.C.M. 202(c) of the Manual for Courts-Martial also provides that:

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[183] UCMJ art. 2(d)(1). It should be noted that involuntary recall may not be necessary in all cases. If the Reserve component soldiers are performing active duty or active duty training, they may simply be retained by taking an "action with a view toward trial"prior to the termination date of the orders. *See*United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983). This would eliminate the need to get secretarial approval for post-trial confinement.

[184] UCMJ art. 3(d).

[185] UCMJ art. 136.

[186] UCMJ art. 137.

[187] *See, e.g.*, Runkle v. United States, 122 U.S. 543, 556 (1887); United States v. Barrett, 1 M.J. 74, 75 (C.M.A. 1977); United States v. Russo, 1 M.J. 134 (C.M.A. 1975); United States v. Graham, 46 C.M.R. 75 (C.M.A. 1972); United States v. Singleton, 45 C.M.R. 296 (C.M.R. 1972); United States v. Jessie, 5 M.J. 573 (A.C.M.R. 1978).

[188] United States v. Busby, 3 M.J. 753 (N.C.M.R. 1977).

[189] United States v. Jessie, 5 M.J. 573, 574 (A.C.M.R. 1978).

[190] 6 M.J. 965 (N.C.M.R. 1979).

[191] *Id.* at 969.

[192] *Id.*

[193] 15 M.J. 252 (C.M.A. 1983).

[194] *See, e.g.*, UCMJ arts. 85 and 86.

[195] UCMJ art. 2(a)(1).

> Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial. When jurisdiction attaches over a servicemember on active duty, that servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the code during the entire period.[196]

Thus, the Code and the Manual clearly provide for the continuation of court-martial jurisdiction over soldiers beyond the expiration of their term of service (ETS).

As a general rule, soldiers are entitled to be discharged from the Armed Forces at the end of their enlistment or at the end of their period of obligated service. There are, however, circumstances under which the Government is permitted to either readjust a soldier's discharge date or hold the soldier beyond the discharge date.[197] Some of these circumstances are set forth in Army Regulation 635-200,[198] and include the following:

> a. To make good time lost, in accordance with 10 USC § 972 (paragraph 1-23);
> b. When investigation has been initiated with a view to trial by court-martial, or while awaiting trial or the results of trial (paragraph 1-24);
> c. When the individual is en route to the United States from overseas (paragraph 1-25);
> d. When he is retained for completion of medical care (paragraph 1-26), or for a determination of whether the disease or injury requiring continued medical care or hospitalization was incurred incident to service or
> e. When held by the military to await disposition of civil charges at the request of friendly foreign Governments under current jurisdictional agreements (para 1-20).

In each of these situations a soldier is held beyond the scheduled separation date, and in each situation the soldier remains subject to the UCMJ and court-martial jurisdiction.

Despite the apparent simplicity of the continuing jurisdiction concept, the military appellate courts have had to resolve numerous issues in deciding what is"action with a view to trial"; what is the effect of administrative "flagging" action which prevents the issuance of a discharge; what circumstances show that an accused has remained voluntarily in the service beyond his or her ETS date; and who has the burden of proof as to jurisdiction where the accused is tried beyond the ETS date.[199]

In United States v. Klunk,[200] the accused's period of absence without leave extended from a date prior to his ETS to a date after his ETS. In holding that the accused could be charged for the entire period of the unauthorized absence, the Court of Military Appeals used language arguably broader than was necessary to resolve the issue presented on appeal.[201] In part the court stated:

> One's amenability to military law and court-martial jurisdiction does not necessarily cease with the mere expiration of the period of enlistment. Certain formalities of discharge are distinctly contemplated--and, while a military person is awaiting their accomplishment, he remains fully subject to the terms of the Uniform Code of Military Justice as specifically provided in its Article 2(1)… As a matter of common sense and basic necessity, the procedure of discharge or separation must be an orderly one … Hence--until the regular processes of discharge have been completed, a Naval enlisted man's status as one subject to military control remains unchanged, the expiration of his enlistment through lapse of time notwithstanding.[202]

The effect of the court's broad statement has been to cause military judges and the Courts of Military Review to find continuing jurisdiction in all cases where no award of a formal discharge has been made. For example, in United States v. Shenefield[203] the accused was charged with three specifications of larceny on 21 November 1967, well beyond the accused's ETS date. The accused was convicted of all three specifications and was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for 2 years.

On appeal the accused alleged that at the time he was charged with the offenses, he was past his ETS date and that

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196 R.C.M. 202(c) discussion.

197 Taylor v. Resor, 42 C.M.R. 7 (C.M.A. 1970); United States v. Hout, 41 C.M.R. 299 (C.M.A. 1970); Hadick v. Commandant, 40 C.M.R. 245 (C.M.A. 1969); United States v. Speller, 24 C.M.R. 173, 176–79 (C.M.A. 1957); United States v. Sippel, 15 C.M.R. 50, 54 (C.M.A. 1954).

198 AR 635–200, paras. 1–23 to 1–29 (1 Dec. 1988).

199 United States v. Hudson, 5 M.J. 413 (C.M.A. 1978).

200 11 C.M.R. 92 (C.M.A. 1953). *See also* United States v. Downs, 11 C.M.R. 90 (C.M.A. 1953).

201 The specific question appealed to the court was"whether a legal sentence may be imposed on the basis of the entire term of the absence, or whether it must be adjudged only on that of the period up to and including the date of expiration of the enlistment." 11 C.M.R. at 93.

202 *Id.* at 94; *see also* United States v. Dickenson, 20 C.M.R. 154 (C.M.A. 1955).

203 40 C.M.R. 393 (A.B.R. 1968), *rev'd on other grounds,* 40 C.M.R. 165 (C.M.A. 1969).

he was in the process of "ETSing." In ruling on the issue of whether the accused was subject to court-martial jurisdiction at the time charges were preferred, the Army Court of Military Review restated the general rule that "mere expiration of the regular period of enlistment does not alter a serviceman's status as a person subject to the Code… "[204]

In addressing the accused's contention that he was"ETSing" at the time he was charged, the court, citing Klunk, stated that "[c]ertain formalities of discharge are distinctly contemplated; e.g., security debriefing, medical examination, administrative clearance, etc., and while a serviceman is awaiting their accomplishment he remains subject to military law…"[205]

After reviewing the accused's record of trial and finding no "evidence of any purported pre-discharge activity or any other indicia of discharge,"[206] the court concluded that the accused was subject to court-martial jurisdiction at the time charges were preferred against him.[207]

In United States v. Hutchins,[208] the Court of Military Appeals held that the court-martial had retained jurisdiction over the accused's person even though the trial took place after the expiration of the accused's term of military service. Here, the accused did not object to his retention beyond his ETS, and did not even raise the issue until after findings of guilty had been announced. Furthermore, the accused did not take action to separate himself from the service. Because of these factors, the accused's military status was not terminated, and military jurisdiction was retained. The argument of the accused that AR 635-200, paragraph 2-4, C43, 10 April 1974 required the convening authority, or his designee, "to take some affirmative action prior to his ETS date to retain court-martial jurisdiction" was rejected. The court reasoned that the regulation did not specifically require any particular procedure for the retention of a soldier.

In United States v. Cole[209] charges of larceny were not preferred against the accused until 66 days after the expiration date of his enlistment. Prior to the preferral of charges, the accused was not apprehended, arrested or confined. Nor was he discharged from military service on the date of the expiration of his service. The accused pleaded guilty to the charges in a general court-martial.

On appeal the accused alleged that the court-martial which tried him lacked jurisdiction since the charges were preferred after expiration of his enlistment. In rejecting the accused's contention, an Air Force Board of Review relied on the provisions of paragraph 11d of the 1969 Manual and Judge Brosman's language in Klunk to justify the exercise of court-martial jurisdiction over the accused. The board in addition, noted that not only had the accused not been discharged from military service, but also that the accused had not taken "any action to compel his discharge on the date set for expiration of service."[210] If anything, stated the board, the accused "continued to serve in full pay status and to perform military duties assigned to him during this continuation of his service."[211] In view of these circumstances the board concluded that the accused voluntarily extended his enlistment and therefore was subject to court-martial jurisdiction.

In 1970 the United States Court of Military Appeals, in United States v. Hout,[212] adopted the voluntary extension rationale. In Hout, the accused was an Air Force sergeant whose enlistment expired on 14 January 1968. Three days prior to the expiration of his time of service, the accused was placed on administrative hold. On 30 September 1968, more than 8 months after his ETS date and while still on administrative hold, the accused was charged with seven specifications of larceny of Government money. He pleaded guilty in a general court-martial.

On appeal the accused alleged that he could not be tried by court-martial because "military jurisdiction over his person ended by operation of law,"[213] sometime after 14 January 1968 and before the date of preferral of charges.

In denying the accused's appeal the United States Court of Military Appeals (per Chief Judge Quinn) noted that a discharge date is merely the date upon which a soldier is entitled to be released from active duty in the military service. Thus the court concluded that service on or beyond a discharge date does not affect a soldier's status. In this regard the court noted that"Article 2(1) [of the Uniform Code of Military Justice] … provides that persons "awaiting discharge after expiration of their terms of enlistment remain subject to the Uniform Code and trial by court-martial."[214]

In addition, the court stated that where a soldier serves beyond the discharge date and demands release from military service, the Government must accede to the soldier's request for discharge unless for some good reason it is deemed necessary to hold the soldier beyond the expiration date. Also the court observed that consent to continued service can be implied where a soldier performs regularly assigned duties and accepts military pay and benefits.

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[204] *Id.* at 394.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] 4 M.J. 190 (C.M.A. 1978). Some modifications were later made to AR 635–200: The provision was redesignated as para. 2–5 and the requirement of action by the GCM authority, or designee, to hold a soldier was deleted. "Approval" by the GCM authority to hold a member beyond 30 days after the ETS date remains. *See*AR 635–200, para. 1–24*a.* Still, the provision, according to *Hutchins* does not terminate jurisdiction.
[209] 39 C.M.R. 987 (A.F.B.R. 1969).
[210] *Id.* at 989.
[211] *Id.*
[212] 41 C.M.R. 299 (C.M.A. 1970).
[213] *Id.* at 301.
[214] *Id.*

Thus, in Hout, the court found that the accused consented to continued service by performing duties and drawing pay and "retained the unqualified status of a person on active duty subject to the Uniform Code of Military Justice."[215]

Judge Darden concurred with this result, but for different reasons. Judge Darden concluded that the accused was subject to court-martial jurisdiction because the Government had commenced action with a view toward a trial of the accused prior to his 14 January 1968 date of discharge. Inasmuch as the accused was a suspect in a long and complex investigation, Judge Darden reasoned the Government was entitled to exercise continuing jurisdiction over him. Judge Darden refused to hold that an accused's liberty must be restrained before the Government could invoke the provisions of paragraph 11d of the 1969 Manual authorizing the exercise of continuing jurisdiction over an accused.[216]

In dissent, Judge Ferguson argued that the accused was improperly placed on administrative hold. Mere suspicion of commission of an offense, Judge Ferguson contended, was not sufficient reason to deny a soldier his "liberty to again become a civilian."[217] Because the Government acted illegally in holding the accused beyond his discharge date, Judge Ferguson argued that the Government "lost its right to … exercise court-martial jurisdiction over [the accused]."[218]

The language of Chief Judge Quinn in Hout is somewhat different from the court's language in Klunk. In Klunk, the court indicated that one remains subject to court-martial jurisdiction until the formalities of discharge are completed. In Hout, Judge Quinn stated that "[s]hould the serviceman indicate a desire to be discharged, as provided by his enlistment, the Government must comply with his request within a reasonable time or risk the conclusion that his continued performance of duty was not consensual but involuntary."[219] Thus under Hout, if no good cause exists to hold a soldier beyond the expiration of the enlistment, the soldier may demand release and the Government is bound to grant it.

Following Judge Quinn's reasoning in Hout, a Navy Court of Military Review in United States v. Larson[220] ruled that the military did not have jurisdiction to try an accused approximately two months after his enlistment expired who requested release from military service on his date of discharge, but was not discharged because he was in a "legal hold" status.

On appeal the accused alleged that the court-martial which tried him lacked jurisdiction over his person. In reviewing the accused's claim, the appellate court found that an investigation report on the accused's involvement in a drug offense had been received by the accused's commander on 4 December 1969. In addition, the court found that on the date of the expiration of his enlistment, 13 January 1970, the accused requested release from military service. Marine Corps officials, however, determined that the accused was in a "legal hold" status, and denied his request. On 10 February 1970, charges arising from the offense were prepared and served on the accused and he subsequently was tried by special court-martial. In an attempt to justify the exercise of continuing jurisdiction over the accused, the Government argued that action with a view toward trial had commenced prior to the expiration of the accused's enlistment. The court, however, concluded that the actions referred to by the Government amounted to no more than legal maneuvering. Because the Government "failed to sustain its burden to show commencement of action prior to the expiration of the [accused's] enlistment sufficient to preserve jurisdiction,"[221] the court set aside the findings and sentence in the accused's case and dismissed the charge and specifications against him.

Similarly in United States v. Smith,[222] the Court of Military Appeals found that a court-martial lacked jurisdiction because the Government failed to show sufficient action with a view towards trial, prior to the expiration of the accused's enlistment. The court explained that the mere expiration of a period of enlistment does not alter the individual's status under the UCMJ. Furthermore, if jurisdiction had attached prior to discharge, it continues until the time of prosecution. Finally, although it was not necessary for the trial actually to have begun prior to the discharge date in order for jurisdiction to attach, some affirmative action, "some precise moment [when] the sovereign … authoritatively signaled its intent to impose its legal processes upon the individual"[223] must occur prior to the discharge date. In the instant case, only the writing down of proposed charges took place before the discharge date. This was not a sufficiently official manifestation by the Government of its intent to prosecute.

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[215] *Id.* at 302.

[216] Judge Darden's reasoning was adopted by the Navy Court of Military Review in United States v. Cox, 49 C.M.R. 350, 353 (N.C.M.R. 1974), which held that the commencement of disciplinary action against an accused prior to the termination of his period of enlistment was sufficient to permit the military to exercise court-martial jurisdiction over the accused after his term of service had expired.

[217] 41 C.M.R. at 305 (Ferguson, J., dissenting).

[218] *Id.*

[219] *Id.* at 301.*Cf.* United States v. Simpson, 1 M.J. 608 (A.C.M.R. 1975) (accused repeatedly sought discharge while hospitalized after his ETS date; on trial for AWOL after release from hospital, the court held that he was retained involuntarily).

[220] 42 C.M.R. 941 (N.C.M.R. 1970).

[221] *Id.* at 942. In*United States v. Cox*, 49 C.M.R. 350 (N.C.M.R. 1974), a Navy Court of Military Review ruled that the appearance of the accused before his battalion commander prior to the termination of the accused's enlistment was evidence of commencing action with a view toward trial and was sufficient to distinguish the case from the court's holding in*Larson. See also* United States v. Anderson, 1 M.J. 498 (A.F.C.M.R. 1975).

[222] 4 M.J. 265 (C.M.A. 1978).

[223] *Id.* at 267.*See, e.g.*, United States v. Beard, 7 M.J. 452 (C.M.A. 1979) (charge filed prior to expiration date of enlistment); United States v. Wheeley, 6 M.J. 220 (C.M.A. 1979) (Government took actions with view toward trial and accused sought reenlistment); United States v. Self, 8 M.J. 519 (A.C.M.R. 1979), *aff'd,* 13 M.J. 132 (C.M.A. 1982); United States v. Bowman, 9 M.J. 676 (A.C.M.R. 1980) (records flagged 1 day before ETS and accused consented to remain on active duty while German charges against him were still pending); Allen v. Steele, 759 F.2d 1469 (9th Cir. 1985) (sufficient action taken with a view toward trial to establish court-martial jurisdiction over the accused).

The Court of Military Appeals and Courts of Military Review continue to apply an "official" action test in determining whether termination of status has been stayed. If charges are preferred, personnel files flagged, or pretrial restraint imposed prior to termination date, jurisdiction will normally be found.[224]

In United States v. Fitzpatrick,[225] the Court of Military Appeals summarized the law on retention of jurisdiction beyond the ETS date in three general rules. First, the Government will lose jurisdiction unless "prior to [the] date of separation, some official action has been taken" which signals an intent to impose legal processes upon the soldier so held.[226] Second, if no such action is taken before the date of separation, but after the date of separation the soldier does not object to being retained in service, then jurisdiction is not lost.[227] Third, if, after the date of separation, the soldier objects to retention and demands a discharge or release, then the Government must take"official action with a view to prosecution within a reasonable time" after the objection is raised.[228]

In United States v. Douse,[229] the court considered the reasonableness aspect of the third principle of law noted above. One critical aspect of Douse is that while the service member had earlier objected to retention on station at an overseas location, those protests did not count in measuring the reasonableness of the Government's response. Only when the service member gave a clear objection to retention in the Armed Forces was the Government's duty to take action with a view to trial triggered. Using a"totality of relevant circumstances test," the court found that the preferral of charges, 18 days after a valid objection to retention was made, satisfied the duty to act within a reasonable time.[230]

In United States v. Williams,[231] the accused was retained past his ETS based on his apprehension for larceny charges, some 12 days prior to his scheduled ETS. Williams argued that his court-martial lacked jurisdiction, not because he was improperly initially retained, but because AR 635-200, para. 1-24(a) provided "if charges have not been preferred, the member will not be retained more than 30 days beyond the ETS unless the general court-martial convening authority approves."[232] Charges against Williams were not preferred until 33 days after his ETS and the general court-martial convening authority was not consulted. The Army Court of Military Review, however, held that the Army's failure to follow its regulations must be tested for prejudice and none was established in this case.

The Court of Military Appeals re-examined and overturned the rules of Fitzpatrick in United States v. Poole.[233] The court held"that jurisdiction to court-martial a servicemember exists, despite delay-- even unreasonable delay--by the Government in discharging that person at the end of an enlistment… "[234] Chief Judge Everett, writing the opinion for the court, based the ruling on a strict interpretation of Article 2, UCMJ, where the statute indicates that the military has jurisdiction over"[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment."[235] Military jurisdiction, therefore, exists over servicemembers even if they object to being held past their ETS date, until their status terminates by discharge.

b. Self-executing orders. A soldier who has been given self-executing orders will be separated from military service on the date indicated in the orders without further action, unless the term of service is extended by proper authority. The effect of a self- executing order is that jurisdiction over the soldier terminates automatically on the specified date absent some action on the part of one in authority to extend the term of service. Cases in this area have generally involved Reserve component soldiers who have self- executing orders and who are charged with committing offenses while on active duty.

Today, however, with the recent amendment to article 3(d), UCMJ, discussed previously in para. 9-3c, jurisdiction over Reserve component soldiers for offenses committed while subject to the UCMJ does not terminate at the end of that period of duty, but continues as long as the soldier retains status as a member of the Reserve components. Thus, problems with retaining jurisdiction because of self-executing orders should not be an issue except in those cases where the soldier has actually been discharged from all further military service.

9–5. When jurisdiction over the person terminates

a. General rule. The Manual for Courts-Martial in its nonbinding discussion of R.C.M. 202(a) sets forth the general rule on the termination of jurisdiction over the person. In part it provides "the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction."[236] Military jurisdiction, therefore, ends upon the award of a discharge or the termination of military status.

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[224] *Id.* at 267.
[225] 4 M.J. 394 (C.M.A. 1983).
[226] *Id.* at 397, citing *Smith.*
[227] *Id.*
[228] *Id.*, citing *Hutchins.*
[229] 12 M.J. 473 (C.M.A. 1982).
[230] *Id.* at 478. *See also* United States v. Freeman, 23 M.J. 820 (N.M.C.M.R. 1987) (taking 15 days to prefer charges after objection was reasonable) and United States v. Morrison, 22 M.J. 743 (N.M.C.M.R. 1986) (6-month delay in trial was reasonable where case was exceedingly complicated).
[231] 21 M.J. 524 (A.C.M.R. 1985).
[232] AR 635–200, para. 1–24*a* (1 Dec. 198).
[233] 30 M.J. 149 (C.M.A. 1990).
[234] *Id.* at 151.
[235] U.C.M.J. art 2(a)(1).
[236] R.C.M. 202(a) discussion. *See* Zeigler, *The Termination of Jurisdiction over the Person and the Offense,* 10 Mil. L. Rev. 139 (1960).

b. Termination of military status. Military status for purposes of court-martial jurisdiction generally ends on the delivery of a valid discharge certificate. A question may arise whether after delivery is made, jurisdiction is terminated or may be revived by revocation of the discharge or the orders, regardless of what service regulations purport to allow.

In United States v. Scott[237] the accused was discharged for unfitness and given a general discharge. After the general discharge certificate was delivered to him, he confessed to stealing a radio. The discharge orders were revoked and charges were preferred against him. He was tried by special court-martial and found guilty of larceny. An Air Force Board of Review affirmed the accused's conviction. The Court of Military Appeals, however, reversed and held that jurisdiction over the accused ended with the delivery of the discharge to the accused.

In United States v. Howard[238] the accused "was issued a General Discharge Certificate and a DD Form 214 (Certificate of Release or Discharge from Active Duty)"[239] early on the morning of August 22, 1984. By midmorning, the accused had finished his "out- processing" and had "signed out of the command and was on his way home."[240] Later on the same day, the accused's commander learned that the accused was being investigated for the wrongful possession of a military identification card.

> Acting under the belief that [the accused's] discharge was not effective until midnight on August 22, 1984, as provided by paragraph 1- 31(d), AR 635-200, the responsible commander directed that the appellant's discharge be revoked. The revocation order was prepared at approximately 10:00 p.m. on August 22, 1984; however [the accused] was not notified of this action until August 31, 1984 when he was located in Detroit, Michigan.[241]

The accused subsequently was brought to trial by general court-martial on charges of "wrongful possession of the military identification card and additional offenses of larceny, forgery, and false swearing, in violation of articles 134, 121, and 123."[242]

At his trial, the accused argued that the court-martial did not have jurisdiction to try him. The trial judge agreed and ruled "that personal jurisdiction to try [the accused] had been lost when the Government gave him a discharge certificate, processed him for separation, permitted him to leave Fort Devens, and did not notify him of the revocation until 9 days later."[243]

The Government appealed the trial judge's ruling and the Army Court of Military Review reversed, holding that "the military judge erred in dismissing the charges for lack of in personam jurisdiction."[244] The accused then appealed to the Court of Military Appeals.

The Court of Military Appeals reviewed the facts of the case and the law concerning the process of discharge from the Armed Forces and concluded that when the accused received his discharge, military jurisdiction over the accused ended and, thus, the accused could not be tried for the offenses with which he was charged.[245] "Delivery" the court noted,"has significant meaning."[246] Its effect is to show that the transaction or relationship is complete. For this reason, the court concluded that a"[d]ischarge is effective upon delivery of the discharge certificate."[247]

With regard to the Army Regulation (AR 635-200) which provides that a discharge is not effective until midnight on the day it is awarded, the court stated that the regulation "would have authorized the commander to retain [the accused] within his command until midnight on the date of discharge."[248] In this case, however, the court found that "the commander made an informed decision to allow [the accused] to be discharged at an earlier time when he authorized him to pick up his discharge certificate, as well as his DD Form 214 and travel pay, and allowed him to be released from the boundaries of the military reservation before any action was taken with a view to trial by court-martial."[249] For these reasons, the court reversed the decision of the Army Court of Military Review and reinstated the ruling of the trial judge which dismissed the charge for lack of jurisdiction over the person.

In United States v. Justice,[250] the accused was convicted by general court-martial of receiving bribes. This conviction was reversed because after the offense was committed the accused had been discharged from the Armed Forces. This discharge acted as a bar to a subsequent trial for offenses occurring prior to discharge, regardless of the

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[237] 29 C.M.R. 462 (C.M.A. 1960).
[238] 20 M.J. 353 (C.M.A. 1985).
[239] *Id.*
[240] *Id.*
[241] *Id.* at 354.
[242] *Id.*
[243] *Id.*
[244] United States v. Howard, 19 M.J. 795, 797 (A.C.M.R. 1985).
[245] 20 M.J. at 354–55.
[246] *Id.* at 354.
[247] *Id.*
[248] *Id.*
[249] *Id.* at 354–55.*See also* United States v. Poole, 20 M.J. 598, 599–601 (N.M.C.M.R. 1985) (trial by court-martial of reservist for offenses committed just before he was discharged from active duty service held to be without jurisdiction).
[250] 2 M.J. 344 (A.F.C.M.R. 1976) *modified* 2 M.J. 623 (A.F.C.M.R.), *aff'd,* 3 M.J. 451 (C.M.A. 1977).

subsequent reenlistment or an extension of the original enlistment term.

In United States v. Brown,[251] the accused had completed 4 years' active duty as a Navy reservist. After he received orders transferring him to the Ready Reserve and directing him to proceed to his home, he departed his ship. An hour later, it was discovered that he was involved in selling the solutions to competitive examinations for enlisted promotions. His orders were revoked, and he was apprehended later in the day. The court held that jurisdiction to try the accused depended on his continued service on active duty and not on lack of discharge. His membership in the Reserve was not a sufficient military connection to support military jurisdiction. The court, therefore, ruled that court-martial jurisdiction terminated with the delivery to the accused of the orders discharging him on that day. For the court, the orders relieving him from active duty were considered analogous to a discharge certificate. This decision, however, may be of limited vitality in light of recent amendments to article 3(d), UCMJ.[252]

In United States v. Thompson,[253] the Army Court of Military Review extended the discharge rule to the delivery of a DD Form 214 that released the accused from active duty. Thompson was being separated from the Army for unsatisfactory performance pursuant to level status, that is he had not served 180 days on active duty, Thompson was not entitled to a discharge certificate but only a certificate of release from active duty. Thompson cleared post, picked up his certificate of release from active duty, turned in his military identification card, and picked up his final pay. He then returned to the unit orderly room to pick up his luggage. On his return, he was apprehended and later court-martialed. Thompson appealed, alleging that jurisdiction terminated with the delivery of the DD Form 214. The Army Court of Military Review agreed, finding the certificate of release from active duty to be the functional equivalent of the discharge certificate.[254]

In United States v. Brunton,[255] the Navy Marine Court of Military Review faced the problem of erroneous delivery of the discharge certificate. Brunton was home on terminal leave awaiting his scheduled discharge on March 31, 1985. On March 28th, however, he received his discharge in the mail. Later that same day, he was telephonically ordered back to active duty for criminal misconduct. Brunton, relying on United States v. Howard,[256] argued that the delivery of his discharge terminated the Navy's jurisdiction over him. The Navy Court disagreed, holding the erroneous early delivery of a discharge is not effective on delivery and that United States v. Howard must be distinguished on its facts.[257]

Finally, in United States v. Ray,[258] the Air Force Court of Military Review upheld jurisdiction over an airman on appellate leave awaiting his punitive discharge from a prior court-martial. Moreover, the court upheld jurisdiction despite evidence that the accused would have been discharged but for governmental error in failing to issue the discharge.

c. Exceptions to the general rule. Some exceptions to the general rule are set forth in the discussion of R.C.M. 203(a) of the Manual. The exceptions include article 3(a) offenses, persons in custody serving a court-martial sentence,[259] persons obtaining a discharge fraudulently,[260] and deserters who receive a discharge for a subsequent period of service.[261]

(1) *Article 3(a) offenses.*[262]

(a) Background. In United States ex rel. Hirshberg v. Cooke,[263] the accused was serving a second enlistment in the

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[251] 31 C.M.R. 279 (C.M.A. 1962).

[252] *Id.* at 281.*See* Taylor v. Resor, 42 C.M.R. 7 (C.M.A. 1970); United States v. Hout, 41 C.M.R. 299 (C.M.A. 1970); Hadick v. Commandant, 40 C.M.R. 245 (C.M.A. 1969). *Cf.* United States v. Porter, 1 M.J. 506 (A.F.C.M.R. 1975) (order issuing bad conduct discharge, adjudged in absentia, was never cut; thus, court had jurisdiction over the accused, although the discharge had been ordered executed by the convening authority).

[253] 21 M.J. 854 A.C.M.R. 1986).

[254] *Id.* at 856.

[255] 24 M.J. 566 (N.M.C.M.R. 1987).

[256] 20 M.J. 353.

[257] The Court of Military Appeals also has held that an erroneous early delivery of a discharge does not terminate UCMJ jurisdiction over the soldier. United States v. Garvin, 26 M.J. 294 (C.M.A. 1988).

[258] 24 M.J. 657 (A.F.C.M.R. 1987).

[259] UCMJ, art. 2(a)(7).

[260] UCMJ art. 3(b).

[261] UCMJ art. 3(c).

[262] Article 3, UCMJ, provides in part:

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

[263] 336 U.S. 210 (1949).

Navy when he was taken prisoner upon the surrender of the United States forces on Corregidor in 1942. After the war ended, he was liberated and returned to the United States. After hospitalization, he was restored to duty in January 1946. On 26 March 1946 he was granted an honorable discharge because of the expiration of his prior enlistment. The next day he reenlisted. In February 1947, a little less than a year after his reenlistment, the accused was charged with crimes committed during the period November 1942 and March 1944 while he was a prisoner of war. He subsequently was tried by general court-martial on charges of maltreating his fellow prisoners of war and convicted. The court sentenced him to 10 years' confinement at hard labor, a dishonorable discharge and a reduction from chief signalman to apprentice seaman. The accused ultimately appealed his conviction to the Supreme Court of the United States. The Court held that the court-martial lacked jurisdiction to try the accused for an offense committed during his prior enlistment and reversed his conviction.

Aroused by the effect of the decision in the Hirshberg case, Congress was determined to remedy the situation by granting jurisdiction to try certain individuals who had been discharged from the service.[264] This grant of authority, embodied in article 3(a), allows the military to exercise jurisdiction over discharged soldiers—provided two prerequisites were satisfied. First, the offense must be punishable by confinement of 5 years or more, and second, the offense must not be triable in a civilian court of the United States, or of a state, territory, or the District of Columbia.

The article did not contain any requirement that the accused be a person of military status, subject to the Code at the time of trial by court-martial. The new article remedied the situation that arose in Hirshberg, but Congress also went further and subjected persons to court-martial jurisdiction who committed offenses prior to discharge and who never returned to military service.

United States v. Gladue[265] is the leading case dealing with an article 3(a) offense. Here the accused, who had been convicted of possession of heroin and of conspiracy to introduce the heroin into a military aircraft to effectuate its transfer to the United States, challenged his conviction because he had not been charged until after his discharge and subsequent reenlistment. The Court of Military Appeals held, however, that the accused could be tried for possession because the offense was punishable by confinement in Thailand, and was not triable in civilian courts. Although the accused argued that his possession offense was triable in civilian court because Congress intended the statute against possession to have extraterritorial application, the court ruled, under the rationale of United States v. Bowman,[266] that because the possession of a controlled substance affected the peace and good order of the community only, and that as Congress had not specifically provided otherwise, the statute had no extraterritorial effect. Finally, the court held that although the effect of the accused's discharge on the specification alleging conspiracy was to require that at least one overt act be shown to have been committed during his current enlistment, numerous such acts had been committed.

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[264] *Hearing on H.R. 2498 before a Subcommittee of the Committee on Armed Services, House of Representatives*, 81st Cong. 1st Sess. 617 and 1262 (1949):

MR. ELSTON. I would like to ask you this question. I think it was since you completed your hearings that a case has been decided by the Supreme Court of the United States.
DR. MORGAN. The Hirshberg case?
MR. ELSTON. Yes. To the effect that a person who has left the service, that is, who has been separated from the service, cannot be tried subsequently by a military court for an offense committed prior to such separation.
MR. KILDAY. Even though he has reenlisted?
MR. ELSTON. Even though he has reenlisted.
DR. MORGAN. That is right.
MR. ELSTON. Now, you have not anything in your bill covering that?
DR. MORGAN. If he has deserted in the earlier service, then the fact that he has been discharged from a later service does not deprive the court of jurisdiction.
MR. ELSTON. Yes. He may have even committed a murder within 3 days of his separation from the service.
DR. MORGAN. That is right. We have not covered that.
MR. ELSTON. He reenlists and cannot be tried for it.
DR. MORGAN. That is right.
MR. ELSTON. I think this committee can write something into the law that will take care of that ridiculous situation.
DR. MORGAN. Of course, the Supreme Court put it on the basis of the interpretation of the present statute, as I remember it, and that is that Congress did not intend to have the jurisdiction exercised over the man after he had once been discharged.
MR. ELSTON. Well, I do not think Congress ever intended anything of the kind.
DR. MORGAN. I know, but that is what they said. There was not anything in the statute which saved the jurisdiction, and, of course, they interpreted it that way…
MR. SMART (reading): Subject to the provisions of article 43—this will be too long to write down, Mr. Chairman—any person charged with having committed an offense against this code punishable by confinement for 5 years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia while in a status in which he was subject to this code, shall not be relieved from amenability to trial by court-martial by reason of the termination of such status. Now, that will get the Hirshberg case where he reenlisted. It would get Hirshberg even though he had not reenlisted.
MR. BROOKS. That will close up the loophole?
MR. SMART. In my opinion it will, sir.
MR. BROOKS. What is your opinion?
MR. ELSTON. I am inclined to feel it would.
MR. BROOKS. All right, if there is no objection, then, we will adopt that language.

See also United States v. Gallagher, 22 C.M.R. 296, 299–300 (C.M.A. 1957).

[265] 4 M.J. 1 (C.M.A. 1977).

[266] 260 U.S. 94 (1922).

Thus the court-martial had jurisdiction to try the conspiracy offense.

In United States v. Mosley,[267] the accused argued that the court-martial which tried him did not have jurisdiction over the offenses with which he was charged because they were committed during a prior enlistment. In addressing this issue the Army Court of Military Review noted the general rule that "[o]nce a service member is discharged from the Armed Forces, that discharge operates as a bar to a subsequent trial for offenses occurring prior to discharge, except in those situations expressly saved by Article 3(a), of the Code."[268] To be saved by article 3(a), an offense must be "punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States… "[269]

In Mosley, the accused was charged "with forgery of a U.S. postal money order and receipt of a stolen U.S. postal money order in violation of Articles 123 and 134."[270] Since the penalty for receipt of stolen property was only 1 year's confinement at hard labor, the court ruled that the first part of the article 3(a) test had not been met with regard to this offense. Accordingly, the court ruled that the court-martial lacked jurisdiction to try the accused for the offense of receipt of stolen property.[271]

Forgery was punishable by 5 years' confinement at hard labor and, thus, satisfies the first part of the article 3(a) test. The court then looked to see if the accused could be tried in the courts of the United States for committing the offense of forgery in Germany. The court determined that the accused could be tried in the United States courts for forgery under 18 U.S.C. § 500 (1972) and that the statute had extraterritorial application.[272] For this reason, the court concluded that the courts of the United States had jurisdiction over the forgery offense and that the offense could not be tried by court-martial under the provisions of article 3(a) of the Code.[273]

(b) Jurisdiction over civilians under article 3(a). A dramatic use of this expanded jurisdiction over a former serviceman by the Air Force brought a constitutional challenge to article 3(a) in the case of United States ex rel. Toth v. Quarles.[274] The accused, Toth, had been honorably discharged from the Air Force and was working in Pittsburgh, Pennsylvania, when Air Force authorities arrested him on charges of murder and conspiracy to commit murder. The accused was alleged to have committed the offenses while he was an airman on active duty in Korea.

At the time of his arrest, however, the accused had no connections with the military. He was returned to Korea and placed in confinement pending trial by general court-martial under the provisions of article 3(a).

The accused petitioned the United States Supreme Court for a writ of habeas corpus alleging that he was confined improperly by military authorities. In an opinion written by Justice Black, the Court ruled article 3(a) unconstitutional. In reaching his decision Justice Black stated that "Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians," he noted, "are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution."[275] It made no difference to Justice Black that Toth could not be prosecuted in any way by the Federal Government for the offenses committed while in Korea.[276]

The Hirshberg and Toth cases illustrate the necessity of jurisdiction over the person and over the offense for the exercise of court-martial jurisdiction. In Hirshberg the accused, as a member of the Navy, was subject to military jurisdiction at the time of trial. He was a person who could be tried by court-martial. Court-martial jurisdiction was defeated because the intervening discharge had terminated jurisdiction over the offense charged.

On the other hand, Toth was a person who could not be subjected constitutionally to trial by court-martial. Jurisdiction over his person was lacking because he was a civilian who had severed all connections with the military. Although jurisdiction over the offense might not have been extinguished because of article 3(a), some military status on the part of the accused was necessary to justify a trial by court-martial. Because there was no military status, the Supreme Court ruled that Toth was not subject to trial by court-martial.

(c) Applicability of article 3(a) to persons having military status. Since the Toth decision, the military successfully has exercised article 3(a) jurisdiction over persons who have reenlisted in the Armed Forces and have been charged with offenses committed during their prior enlistments. The practice of permitting the Government to try active duty soldiers for offenses committed during previous enlistments was upheld by the Court of Military Appeals in United States v. Gallagher.[277]

In Gallagher the alleged offenses occurred while the accused was being held by the Chinese Communists as a prisoner of war in Korea. In 1953, after his release, the accused was returned to the United States, where he was given a discharge so that he could reenlist, as his term of enlistment had expired while a prisoner. Two years after his

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[267] 14 M.J. 852 (A.C.M.R. 1982).
[268] *Id.* at 854.
[269] *Id.* at 854 (emphasis in original).
[270] *Id.* at 853.
[271] *Id.* at 854.
[272] *Id.* at 856.
[273] *Id.*
[274] 350 U.S. 11 (1955).
[275] *Id.* at 23 (emphasis added).
[276] *Id.* at 21.
[277] 22 C.M.R. 296 (C.M.A. 1957).

reenlistment, charges for unpremeditated murder, maltreatment of fellow prisoners, collaboration with the enemy, and misconduct as a prisoner of war were brought against Gallagher. He was tried subsequently by general court-martial and convicted for the alleged offenses. Upon review, an Army Board of Review dismissed the charges on the ground of the court-martial's lack of jurisdiction over the offenses. The Judge Advocate General of the Army certified the question of jurisdiction to the United States Court of Military Appeals.

The Court of Military Appeals, after reviewing the legislative history of article 3(a) concluded it was"abundantly clear that Congress intended to preserve jurisdiction over men like Gallagher."[278]

The defense argued that article 3(a) was unconstitutional and that the holding in Hirshberg was applicable to Gallagher. The Court of Military Appeals, however, rejected the defense arguments and ruled that article 3(a) was constitutional when applied to persons, like Gallagher, who reenlisted and were subject to military jurisdiction.[279] In support of its decision the court stated that the Supreme Court's decision in Hirshberg indicated Congress had the power to confer military jurisdiction over persons who had reenlisted.[280] For these reasons the Court of Military Appeals concluded that the Supreme Court's decision in Toth ruled article 3(a) unconstitutional only as it applied to civilians, like Toth, and did not apply to soldiers like Gallagher.

Although the holding in Gallagher was limited to the constitutional validity of article 3(a) in situations regarding reenlistment, subsequent decisions have indicated that in order to base court-martial jurisdiction on article 3(a), the requirements of the provisions of the article must be met: that is, the offense must be punishable by 5 years' confinement or more, and the offense cannot be triable in either Federal or State courts.[281]

(d) Applicability of article 3(a) to a reservist released from active duty. Because court-martial jurisdiction historically terminated on the release of a reservist from active duty, it was important to determine whether an Inactive reservist still has sufficient status to be tried for an offense committed while on active duty and whether court-martial jurisdiction is revived when the reservist returns to active duty.

In United States v. Wheeler,[282] the accused was an enlisted man who successfully had completed his active duty tour and had been transferred to an inactive Reserve status for completion of his military service obligation. While serving in the inactive Reserve status, the accused was charged with having committed a murder on active duty prior to being transferred to inactive Reserve status.

The Secretary of the Air Force, pursuant to applicable departmental regulations, ordered the accused to return to active duty for the purpose of being tried by court-martial. The accused executed a voluntary request to return to active duty and he was later tried and convicted by court-martial for the offenses charged.

The Court of Military Appeals held that the court-martial had jurisdiction to try the accused under article 3(a) notwithstanding the limitations thereon delineated in United States ex rel. Toth v. Quarles,[283] because Judge Latimer, writing for the court, interpreted the Toth case to preclude only trial of those persons who completely sever their military ties by discharge. Where any military relationship remains, however, jurisdiction exists under article 3(a).[284] Chief Judge Quinn and Judge Ferguson concurred, reasoning that the accused voluntarily had returned to active duty status, and citing the court's decision in Gallagher as precedent.[285]

In United States v. Brown,[286] the Court of Military Appeals held that an enlisted member, whose active duty status had been terminated by the delivery of orders transferring him to an inactive Naval Reserve status, was not amenable to trial by court-martial for a conspiracy offense committed on active duty before he was transferred to the inactive Reserves. Because the accused was not subject to the provisions of article 3(a), the court found that the military lacked jurisdiction over his person and, accordingly, set aside the accused's conviction. The court noted, however, that the accused could be prosecuted by Federal authorities in a Federal district court for the offense with which he was charged.

It is apparent from the decisions in Wheeler and Brown that the presence of an inactive Reserve status continuing after the termination of an active duty period may have some jurisdictional significance. The presence of continuing inactive Reserve status may be sufficient to permit the military to exercise jurisdiction over an accused through the provisions of article 3(a). The use of article 3(a) to procure jurisdiction over a Reserve component soldier in an inactive Reserve status was often criticized, since its principal proponent, Judge Latimer, was no longer a member of the Court of Military Appeals. Its vitality, however, has been strengthened by recent amendments to article 3(d), UCMJ,

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[278] *Id.* at 300.
[279] *Id.* at 303.
[280] *Id.* at 302.
[281] United States v. Gladue, 4 M.J. 1 (C.M.A. 1977); United States v. Steidley, 33 C.M.R. 320 (C.M.A. 1963); United States v. Frayer, 29 C.M.R. 416 (C.M.A. 1960). The two conditions, however, need not exist in the case of a continuing offense interrupted by a discharge.*See* United States v. Noble, 32 C.M.R. 413 (C.M.A. 1962); United States v. Martin, 28 C.M.R. 202 (C.M.A. 1959).
[282] 28 C.M.R. 212 (C.M.A. 1959). *See* Wheeler v. Reynolds, 164 F. Supp. 951 (N.D. Fla. 1958).
[283] 350 U.S. 11 (1955). The Supreme Court held that Article 3(a) courts-martial jurisdiction may not be constitutionally exercised over discharged soldiers for offenses committed while on active duty.
[284] 28 C.M.R. at 220.
[285] *Id.* at 223–25 (Quinn, C.J., and Ferguson, J., concurring).
[286] 31 C.M.R. 279 (C.M.A. 1962).

exempting a member of the Reserve components from termination of court-martial jurisdiction by their subsequent release from active duty training. Moreover, in light of the broad mandate of article 3(d), UCMJ, article 3(a) may no longer be necessary to procure jurisdiction over Reserve component soldiers. Article 3(d), standing alone, provides a statutory basis to retain jurisdiction as long as the soldier retains some military status.[287]

(2) *Persons in custody serving a court-martial sentence.* Article 2(a)(7) of the Code provides that"[p]ersons in custody of the Armed Forces serving a sentence imposed by a court-martial"[288] are subject to the Code. The Manual also states that such persons remain subject to military jurisdiction even after the execution of a discharge.[289]

The United States Supreme Court upheld the constitutionality of a similar provision in 1921.[290] The present provision has withstood attacks on its validity in the Federal courts,[291] the Courts of Military Review,[292] and the Courts of Military Appeals.[293]

(3) *Persons obtaining a discharge fraudulently.* Persons who obtain fraudulent discharges from the military remain subject to court-martial jurisdiction for offenses committed prior to the issuance of the discharge. Article 3(b) of the Code addresses the problem of fraudulent discharges and provides in part that:

> Each person discharged from the Armed Forces who is later charged with having fraudulently obtained his discharge is, subject to … (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the Armed Forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.[294]

The application of this provision is limited in two ways. First, the provision does not permit the military to exercise jurisdiction over offenses committed during the time period between the fraudulent separation and apprehension. The second limitation is that jurisdiction over offenses committed before the issuance of the fraudulent discharge may not be exercised until after the accused has been convicted of fraudulent discharge.

In Wickham v. Hall,[295] the petitioner was a female private first class in the Army who obtained a discharge before the end of her enlistment on the ground of pregnancy.[296] Information subsequently received suggested that the petitioner may have deliberately defrauded the Government concerning her condition. The discharge was revoked and charges under article 83 for fraudulent separation were preferred and referred. At trial, the petitioner sought a continuance to petition for extraordinary relief.

The Court of Military Appeals addressed the question of whether article 3(b) was constitutional. Petitioner claimed that Congress could not subject her, a civilian, a discharged ex-soldier, to court-martial jurisdiction. The Government argued that article 3(b) was a necessary and proper exercise of Congress' power to raise and maintain as well as to regulate the Armed Forces. Judge Cook authored the lead opinion and found article 3(b) to be a constitutionally sound basis for court-martial jurisdiction. Judge Fletcher voted to dismiss the petition until a record of the relevant facts was made in the trial court.[297] Chief Judge Everett dissented from the denial of relief. He found article 3(b) to be unconstitutional in that it made civilians subject to court-martial jurisdiction.

As a result of the denial of her petition, PFC Wickham petitioned for a writ of habeas corpus in the Federal district court. Her petition was denied and the denial was upheld on review by the Fifth Circuit Court of Appeals.[298] Ultimately, the Army granted the petitioner's request for a discharge for the good of the service.[299]

In United States v. Cole,[300] the Court of Military Appeals revisited the problems of Wickham v. Hall. Cole, knowing he was facing punitive measures, signed off on his own post clearance papers, obtained his discharge, and went home.

Three months later, however, Cole was forcibly taken from his home in Winter Haven, Florida and taken back for

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[287] *See* Murphy v. Garrett, 29 M.J. 469 (C.M.A. 1990) (jurisdiction existed over Marine Corps Reserve officer for offenses committed on active duty prior to his entering the Reserves).

[288] UCMJ art. 2(a)(7).

[289] R.C.M. 203.*Se*e United States v. Holston, 41 C.M.R. 589 (A.C.M.R. 1969).

[290] Kahn v. Anderson, 255 U.S. 1, 7 (1921); Carter v. MClaughry, 183 U.S. 365, 383 (1902).

[291] Ragan v. Cox, 320 F.2d 815 (10th Cir. 1963); Simcox v. Madigan, 298 F.2d 742 (9th Cir.), *cert. denied,* 370 U.S. 964 (1962). *See also* Simcox v. Harris, 324 F.2d 376 (8th Cir. 1963); Lee v. Madigan, 248 F.2d 783 (9th Cir. 1957), *rev'd on other grounds,*358 U.S. 228 (1959).

[292] United States v. Sylva, 5 M.J. 753 (A.C.M.R. 1978).

[293] United States v. Ragan, 33 C.M.R. 331 (C.M.A. 1963); United States v. Nelson, 33 C.M.R. 305 (C.M.A. 1963). Ragan was convicted of assault on a fellow prisoner (art. 128) and assault upon a person in the execution of military police duties (art. 134). Nelson was convicted of offering violence to a superior officer (art. 90). Judge Ferguson, in a concurring opinion in *Nelson* doubted the validity of the exercise of such jurisdiction, but concurred because of the Supreme Court's undisturbed *Kahn* decision.*See* Peebles v. Froehlke, 46 C.M.R. 266 (C.M.A. 1973) (jurisdiction over the person continues for purposes of a rehearing despite an intervening dishonorable discharge).

[294] UCMJ art. 3(b).

[295] 12 M.J. 145 (C.M.A. 1981).

[296] *See* AR 635–200, chap. 8.

[297] 12 M.J. at 153–54 (Fletcher, J., concurring in the result). Judge Fletcher also advised the petitioner that the Federal district court was available to review her claim.

[298] Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983).

[299] *See* AR 635–200 chap. 10.

[300] 24 M.J. 18 (C.M.A. 1987).

trial at Fort Stewart, Georgia. Cole challenged jurisdiction alleging that he was now a civilian and civilian courts should have the responsibility of determining whether his discharge was lawful.

The Court of Military Appeals disagreed. Judge Sullivan writing for the majority held that a court- martial has jurisdiction to determine if a soldier fraudulently procures a discharge, while noting that a soldier can seek habeas corpus in the Federal district courts without exhausting military remedies.[301] Consistent with his dissent in Wickham v. Hall, Chief Judge Everett forcefully dissented noting that Cole's DD Form 214 was not forged and was voluntarily given to Cole by military authorities.[302] Significantly, however, the case was denied certiorari by the Supreme Court on October 5, 1987.

(4) *Deserter who received a discharge for a subsequent period of service.* Soldiers who desert from the Armed Forces remain subject to the jurisdiction of the Code even if separated from a subsequent period of service.[303] This is true regardless of the type of separation from the subsequent period of service.[304]

(5) *Effect of uninterrupted status as a person subject to the Code.* As noted earlier, a soldier's discharge normally terminates jurisdiction. What if the discharge is immediately followed by a reenlistment which in effect permits an uninterrupted status? Although the Manual for Courts-Martial and some early case authority[305] permitted the exercise of jurisdiction over offenses committed during the prior period of service, the Court of Military Appeals at one time adopted a rule which might be stated as follows: Upon discharge and subsequent reenlistment, a soldier cannot be tried by court-martial for an offense committed during the prior service unless the offense meets the criteria of article 3(a) UCMJ. This blanket prohibition of the exercise of court-martial jurisdiction after any discharge (but for offenses saved under article 3(a)) also defeated jurisdiction in the case of a "short term" discharge. This occurs when a soldier is granted a discharge before the normal expiration date of a term of enlistment for the purpose of allowing the soldier to immediately reenlist. A short term discharge creates no significant or practical break in active duty service. Typically, the discharge certificate is not delivered until after the reenlistment has been accomplished.

This rule was derived from the Court of Military Appeals decision in United States v. Ginyard.[306] In Ginyard the accused was assigned to duty in the United States, and wanted to be transferred to Europe with his dependents. Because the time remaining on his enlistment was too short to permit such assignment, the accused signed "an intent to reenlist." The signing of the short term discharge and reenlistment the following day, was accomplished in Germany. After his reenlistment, the accused was charged with six specifications of making false military pay vouchers during his prior enlistment and tried by general court-martial. At his trial, the accused argued that the charged offenses were committed during a prior enlistment and that they were not subject to court-martial jurisdiction. The court-martial ruled that it had jurisdiction over the offenses and denied the accused's motion. The accused then pleaded guilty to the charges and specifications and was sentenced to confinement at hard labor for 1 year and reduction to E1.

An Army Board of Review affirmed the accused's conviction,[307] but the Court of Military Appeals reversed it, and held that the court-martial did not have the jurisdiction to try Ginyard for the charged offenses. In an attempt to eliminate further confusion in cases involving discharges and immediate reenlistments, the court proposed the rule discussed above.[308]

This rule of termination of jurisdiction would not apply, however, where the offense in question was of a continuing nature and carried over into the new period of service. A good example of the application of both the general rule and the continuing offense exception is United States v. Gladue,[309] noted in the earlier discussion on application of article 3(a). An overseas possession of heroin charge, committed prior to discharge, was subject to jurisdiction under article 3(a). A charge alleging conspiracy to import heroin was also subject to jurisdiction because it was a continuing offense which carried over into the new period of enlistment.

The rule adopted in Ginyard was reversed in United States v. Clardy.[310] The Court of Military Appeals conducted an extensive review of the development of the rule in Ginyard's case and concluded that it was an unjustified expansion of the Supreme Court's ruling in United States ex rel Hirshberg v. Cooke.[311] The court left little doubt that a discharge after completion of the original term of obligated service would terminate court-martial jurisdiction even if the soldier then immediately reenlists. But, where the discharge is granted before the end of the original term of service for the benefit of both the Government and the soldier, and there is no break or hiatus in actual service, there should be no termination of jurisdiction. This is clearly consistent with the intent of Congress to limit the circumstances in which a

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[301] *Id.* at 19–23.
[302] *Id.* at 27–31.
[303] UCMJ art. 3(c).
[304] *See* United States v. Huff, 22 C.M.R. 37 (C.M.A. 1956).
[305] *See, e.g.*, United States v. Noble, 32 C.M.R. 413 (C.M.A. 1962) (discharge certificate did not terminate continuing jurisdiction); United States v. Solinsky, 7 C.M.R. 29 (C.M.A. 1953) (jurisdiction existed where discharge was for purposes of reenlistment).
[306] 37 C.M.R. 132 (C.M.A. 1967).
[307] 36 C.M.R. 683, 687 (A.B.R. 1966).
[308] 37 C.M.R. at 136. The court's straightforward rule placed emphasis on the discharge itself and not the reasons or purposes of the discharge. The rule is discussed in detail at Woodruff, *The Rule in Ginyard's Case—Congressional Intent or Judicial Field Expedient,*21 A.F.L. Rev. 285 (1979).
[309] 4 M.J. 1 (C.M.A. 1977).
[310] 13 M.J. 308 (C.M.A. 1982).
[311] 336 U.S. 210 (1949).

soldier who commits a serious offense while in military service may escape punishment by a court-martial.[312]

In United States v. King,[313] the Court of Military Appeals held that for a discharge for the purpose of reenlistment to be effective, three elements must exist: the delivery of a valid discharge certificate, a final accounting of pay, and the completion of the clearing process required under appropriate service regulations to separate the soldier from the military service. In King, the accused submitted a request for an early reenlistment and during his reenlistment ceremony, he was given a discharge certificate. Thereafter, King refused to complete the reenlistment ceremony and left his unit without authority. At his court-martial, King contended that he had been validly discharged and was no longer subject to the Uniform Code of Military Justice. The Court of Military Appeals disagreed. The court found that of the three prerequisites for an effective discharge, only one was satisfied, that being the delivery of the discharge certificate.[314] Thus, court-martial jurisdiction was not lost.

(6) *Jurisdiction over retired soldiers.* Retired soldiers of the Armed Forces drawing retired pay are subject to the Uniform Code of Military Justice and can be tried by court-martial for offenses committed while in a retired status. The Uniform Code of Military Justice specifically provides that military jurisdiction applies to "[r]etired members of a regular component of the Armed Forces who are entitled to pay,"[315] "[r]etired members of a Reserve Component who are receiving hospitalization from an Armed Force,"[316] and"[m]embers of the Fleet Reserve and Fleet Marine Corps Reserve."[317]

The validity of these provisions was challenged in United States v. Hooper.[318] In Hooper a retired rear admiral was charged with sodomy, conduct of a nature to bring discredit upon the Armed Forces, and conduct unbecoming an officer and a gentleman. He was tried and convicted by general court-martial and sentenced to dismissal and total forfeitures.

On appeal, the Court of Military Appeals upheld the exercise of court-martial jurisdiction over the accused. In support of its decision the court relied upon the language in article 2(a)(4) of the Code which provides in part that "[r] etired members of a regular component of the Armed Forces who are entitled to pay"[319] were subject to the UCMJ.

The court, in addition, stated that with respect to article 2(a)(4), no recall to active duty from the retired list was required as a condition precedent to jurisdiction.[320] In the court's opinion, jurisdiction attached when charges were served on the accused and he personally appeared before the court-martial.[321] The court also stated that a retired member of the regular component of the Armed Forces entitled to receive pay "is a part of the land and naval forces."[322]

Although the validity of these provisions has been upheld,[323] the United States Army rarely has tried retired persons by courts-martial because of a Department of the Army policy which provided that"[r]etired personnel subject to the Code will not be tried for any offenses by any military tribunal unless extraordinary circumstances are present linking them to the military establishment or involving them in conduct inimical to the welfare of the nation."[324] The effect of the Army's policy has been to eliminate the courts-martial of retired Army soldiers.

The Powell Committee [325] recommended doing away with the exercise of court-martial jurisdiction over retired soldiers. In part the Committee concluded:

> Retired members of the Armed Forces are merged with the general civilian population of the United States. They should be subject to the same laws as their neighbors with the same obligations and the same freedom of action. Courts-martial jurisdiction imposes an obligation to abide by a different set of laws. Good order and discipline in the Armed Forces are not benefited by continuing jurisdiction over retired members unless they are on active duty.[326]

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312 *See* R.C.M. 203(a) discussion.
313 27 M.J. 327 (C.M.A. 1989).
314 *Id.* at 329.
315 UCMJ art. 2(a)(4).
316 UCMJ art. 2(a)(5).
317 UCMJ art. 2(a)(6).
318 26 C.M.R. 417 C.M.A. (1958).
319 *Id.* at 425.
320 *Id.* at 420.
321 *Id.* at 421.
322 *Id.* at 422.
323 *See* United States v. Overton, 24 M.J. 309 (C.M.A. 1987) (jurisdiction over member of U.S. Fleet Marine Corps Reserve upheld under UCMJ art. 2(a)(6)); Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989) (jurisdiction over retired, enlisted airman upheld); Hooper v. United States, 326 F.2d 982 (Ct. Cl. 1964); Chambers v. Russell, 192 F. Supp. 425 (N.D. Cal. 1961); Hooper v. Hartman, 163 F. Supp. 437 (S.D. Cal. 1958).
324 JAGJ 1956/4914, 29 June 1956, "Courts-Martial," 7 Dig. Ops. JAG § 45.8 (1957–58). In 1989 this policy was placed in AR 27–10, para. 5–2b(3). Army policy now is that prior approval from HQDA must be obtained prior to referral of court-martial charges against retired soldiers.
325 In 1959, the Secretary of the Army, Wilber M. Bruckner, appointed a committee (1) to study the effectiveness of the Uniform Code of Military Justice, (2) to analyze any injustices or inequities existing under the Code, and (3) to submit proposals for improving the Code. The Committee became known as the Powell Committee for Lieutenant General Herbert B. Powell, USA, who headed the study. The Committee Report was submitted on 18 January 1960. *See* Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice (and) Good Order and Discipline in the Army (1960).

Despite the recommendations of the Powell Committee, retired personnel entitled to pay are still subject to the Uniform Code of Military Justice.[327]

[326] *Id.* at 175.
[327] UCMJ art. 2(a)(4).

Chapter 10
Jurisdiction Over Civilians

10–1. Peacetime jurisdiction

With the enactment of the Uniform Code of Military Justice, Congress exposed several categories of civilians to trial by courts-martial for offenses committed during peacetime. For example, article 2(a)(11) of the Code specifically provides for the exercise of military jurisdiction over "persons serving with, employed by, or accompanying the armed forces outside the United States. … "[1]

Attempts by the military to try civilians by courts-martial under the provisions of article 2(a)(11) of the Code, however, were not successful. The first in a number of decisions prohibiting the practice was rendered in 1957 when the Supreme Court of the United States held that the military did not have jurisdiction to try the wives of two American soldiers for capital offenses committed overseas.

In Reid v. Covert,[2] the wife of an Air Force sergeant stationed in England was tried by general court-martial and convicted of murdering her husband. In Kinsella v. Krueger,[3] a companion case, the accused was the wife of an Army officer stationed in Japan. Like Mrs. Covert, she was charged with the murder of her husband and was tried and convicted by general court-martial on the charge.

In both cases the women filed writs of habeas corpus contending that the provision of the UCMJ under which the Government asserted jurisdiction was unconstitutional. The Supreme Court agreed with the petitioners and held that the wives of servicemen"could not constitutionally be tried by military authorities,"[4] for capital offenses committed overseas. A majority of the Court determined that, as civilians charged with capital offenses in time of peace, they were entitled to trial in a civilian court under the procedural safeguards guaranteed by the Bill of Rights.[5]

The Court's decisions in these two cases caused others to question whether the military could exercise jurisdiction over civilian dependents committing noncapital offenses overseas and whether the military could exercise jurisdiction over civilian employees of the Armed Forces committing capital and noncapital offenses overseas.

In 1960, the Supreme Court in Grisham v. Hagen[6] applied the reasoning set forth in Reid v. Covert[7] and held that the military did not have jurisdiction to court-martial a civilian Army employee for a capital offense committed overseas during peacetime. In Grisham the accused was a civilian employed by the United States Army in France who was tried by general court-martial for premeditated murder. He was found guilty of the lesser included offense of unpremeditated murder and sentenced to life imprisonment.

The accused petitioned for a writ of habeas corpus alleging in part that "Article 2(11) [now 2(a)(11)] was unconstitutional as applied to him, for the reason that Congress lacked the power to deprive him of a civil trial affording all of the protections of Article III and the Fifth and Sixth Amendments of the Constitution."[8] In effect, Grisham argued that, as a civilian, he was entitled to the constitutional protections granted to those tried in civilian courts.

In Grisham, the Supreme Court determined that civilian employees are entitled to trial by jury, just as civilian dependents are, and accordingly, held that the military did not have jurisdiction to try the accused for a capital offense committed overseas in peacetime.[9]

In Kinsella v. United States ex rel. Singleton,[10] also decided in 1960, the accused and her husband, a soldier stationed in Germany, pleaded guilty in a trial by court-martial to charges of involuntary manslaughter in the death of one of their children. The accused later appealed her conviction on the grounds that the provision of the Code, authorizing prosecution by "court-martial trials of persons accompanying the Armed Forces outside the United States was unconstitutional as applied to civilian dependents charged with noncapital offenses."[11] The Supreme Court held

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[1] UCMJ art. 2(a)(11). The provisions of subsections (a)(2) through (12) of article 2 may all be said to assert a jurisdictional claim over persons who, because they are not serving on active duty as a member of an armed forces, may properly be called civilians. Article 2 of the UCMJ was amended in 1979 with the addition of subsections (b) and (c). *See supra* chap. 9. The original provisions of article 2 were then designated article 2(a). Earlier attempts to exercise court-martial jurisdiction over civilians had generally failed. *See*, *e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), (military commission, operating during civil war had no jurisdiction to try a civilian where civilian courts were open and operating).

[2] 354 U.S. 1 (1957). The Court reached the decision in this case and the companion case of Kinsella v. Krueger under rather complex circumstances. In 1956 the Supreme Court had sustained military jurisdiction over the accuseds under the provision which is now article 2(a)(11) in a 5–3 decision, with Mr. Justice Frankfurter reserving his opinion. See Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (1956). In 1957, the Court reversed the 1956 *Covert*and *Kinsella* decisions, with Justices Frankfurter, Harlan (who also changed his vote from 1956) and Brennan (who had joined the Court after the 1956 decisions) joining the 1956 dissenters to form the majority.

[3] 354 U.S. 1 (1957).

[4] *Id.* at 5.

[5] Chief Justice Warren and Justices Black, Douglas, and Brennan concluded that all peacetime military trials of civilians were unconstitutional. Justices Frankfurter and Harlan limited their concurrence to the trial of a civilian dependent for a capital offense.

[6] 361 U.S. 278 (1960).

[7] 354 U.S. 1 (1957).

[8] 361 U.S. at 279.

[9] *Id.* at 280. Mr. Justice Frankfurter and Mr. Justice Harlan concurred because the case involved a capital offense. Mr. Justice Whittaker and Mr. Justice Stewart dissented. They believed that there was a distinction between employees and dependents, that the civilian employees were part of the Armed Forces and that Congress constitutionally could make them subject to military jurisdiction.

[10] 361 U.S. 234 (1960).

[11] *Id.* at 235–36.

that the military could not exercise jurisdiction over civilian dependents charged with noncapital offenses,[12] and stated, in addition, that the test of jurisdiction is "one of status, namely, whether the accused in the court-martial proceedings is a person who can be regarded as falling within the term 'land and naval forces.' "[13]

In McElroy v. United States ex rel. Guagliardo[14] and Wilson v. Bohlender,[15] the petitioners were civilian employees of the Armed Forces who were tried by courts-martial for noncapital offenses. Both individuals were convicted and both appealed their convictions contending that the military did not have jurisdiction to try them for noncapital offenses committed overseas. The Supreme Court ruled that the military did not have jurisdiction to try a civilian employee who committed a noncapital offense overseas during peacetime.[16]

Through these decisions, the Supreme Court established the general rule that civilian offenders, who commit offenses while accompanying the Armed Forces overseas during peacetime, cannot be tried by military courts-martial under article 2(a)(11) of the Code.

Because of these decisions limiting court-martial jurisdiction, the resolution of criminal offenses by American civilians overseas is uncertain. Frequently, for often unclear or imprecisely articulated motives, the foreign prosecutorial authorities will institute criminal action. But, sometimes, even relatively serious criminal misconduct will not be prosecuted by the foreign authorities.[17] In such cases, the military commanders whose commands are adversely affected by the criminal activities of such persons must seek administrative or diplomatic resolution of the problem.

10–2. Wartime jurisdiction

Jurisdiction over "persons serving with, or accompanying an armed force in the field," in time of war, is granted expressly by the Code.[18] The Supreme Court has never denied military jurisdiction over civilians accompanying the Armed Forces in the field during time of war. In his opinion in Reid v. Covert,[19] Mr. Justice Black alluded to the exercise of military jurisdiction over civilians in time of war. In part he said:

> There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during time of war. To the extent that these cases can be justified, insofar as they involved trial of persons who were not "members" of the armed forces, they must rest on the Government's "war powers." In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.[20]

In United States v. Averette,[21] the accused, a civilian employee of an Army contractor in Vietnam, was tried and convicted by general court-martial for conspiracy to commit larceny and attempted larceny. On review the Court of Military Appeals held that Averette, a civilian, was not subject to trial by court-martial.

In reaching the decision, the court stated "that the words 'in time of war' mean, for the purposes of Article 2(a)(10), … a war formally declared by Congress."[22] Because Congress had not formally declared war in Vietnam, the court held that the accused was not subject to court-martial jurisdiction.[23] In addition the court was careful to note that it was

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[12] *Id.* at 249.

[13] *Id.* at 241. Mr. Justice Whittaker and Mr. Justice Stewart concurred. Mr. Justice Harlan and Mr. Justice Frankfurter dissented, asserting that in noncapital cases there was justification for the exercise of military jurisdiction over nonmilitary personnel because of the closeness of the relationship between the civilian defendant and the military establishment.

[14] 361 U.S. 281 (1960).

[15] *Id.*, a companion case decided the same day.

[16] *Id.* at 284. The majority determined that this result followed the rationale of the decisions in *Grisham, Kinsella*, and *Covert.* Mr. Justice Whittaker and Mr. Justice Stewart dissented, claiming that civilian employees of the armed services were "members"of the Armed Forces and had nearly the same effect on security and disciplinary problems as did military soldiers. Mr. Justice Harlan and Mr. Justice Frankfurter again dissented, distinguishing between noncapital and capital offenses.

[17] *See* Everett and Hourcle, *Crime Without Punishment—Ex-servicemen, Civilian Employees and Dependents.* 13 JAG L. Rev. 184 (1971). *See also*Report to the Judge Advocate General by the Wartime Legislation Team, at 13–16 (Sept. 1983), *reprinted in*104 Mil. L. Rev. 139 (1984).

[18] UCMJ art. 2(a)(10).*See* R.C.M. 202 (1984 analysis) concerning the interpretation of "in the field" and "accompanying." *See also* Latney v. Ignatius, 416 F.2d 821 (D.D.C. 1969); Perlstein v. United States, 57 F. Supp. 123 (M.D. Pa. 1944), *aff'd*, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777 (1946), *cert. dism'd as moot*, 328 U.S. 822 (1946); Hines v. Mikell, 259 F. 28 (4th Cir. 1919), *cert. denied,* 250 U.S. 624 (1919); *Ex parte* Jochen, 257 F. 200 (D. Tex. 1919); *Ex parte* Falls, 251 F. 415 (D.N.J. 1918); *Ex parte* Gerlach, 247 F. 616 (D.N.Y.); Shilman v. United States, 73 F. Supp. 648 (D.N.Y. 1947), *rev'd on other grounds*, 164 F.2d 649 (2d Cir. 1947); In re Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (D. Va. 1943); *In re*DiBartolo, 50 F. Supp. 929 (D.N.Y. 1943).

[19] 354 U.S. 1 (1957).

[20] *Id.* at 33. The Court said: "We have examined all the cases of military trials of civilians by the British or American Armies prior to and contemporaneous with the Constitution that the Government has advanced or that we were able to find by independent research. Without exception these cases appear to have involved trials during wartime in the area of battle—'in the field'—or in occupied enemy territory." *Id.* at 33, n.60.

In time of war it is clear that the military can exercise court-martial jurisdiction over civilians accompanying Armed Forces "in the field," and in a number of cases the exercise of such jurisdiction has been upheld. *See supra* note 18.

[21] 41 C.M.R. 363 C.M.A. 1970).

[22] *Id.* at 365.

[23] *Id*

not expressing--

> an opinion on whether Congress may constitutionally provide for court-martial jurisdiction over civilians in time of a declared war when these civilians are accompanying the armed forces in the field. Our holding is limited--for a civilian to be triable by court- martial in "time of war," Article 2(10) means a war formally declared by Congress.[24]

This strict construction of the term "in time of war" was almost immediately criticized as unjust by a lower military court. In United States v. Grossman,[25] the Army Court of Military Review dismissed the charges against a civilian employee of a Government contractor in Vietnam applying the Averette[26] holding. In that case the accused had been convicted of one specification of involuntary manslaughter and two specifications of assault with a dangerous weapon and sentenced to 5 years' confinement. The court noted that "[a]s far back as the Indian Wars, courts-martial jurisdiction has been exercised over civilians serving with armies in the field during hostilities which were not formally declared wars."[27] In referring to Averette, the court further stated, "[d]espite this and the fact that this accused will probably never be retried for the offenses involved in this case, we are constrained [by the decision in Averette] to hold that the court-martial lacked jurisdiction" over the accused.[28]

The Court of Military Appeals definition of "in time of war" was a matter of statutory construction and consequently does not necessarily also apply to the term "peacetime" as used in the Supreme Court's opinions restricting the exercise of court-martial jurisdiction under article 2(a)(11). It may be that, for purposes of exercising court-martial over "persons serving with, employed by, or accompanying the armed forces outside the United States… ,"[29] some less well defined state of armed conflict or hostilities is sufficient to invoke the level of "broad power over persons on the battlefront" that a military commander may properly exercise.[30]

10–3. Conclusion

Decisions of the United States Supreme Court and the United States Court of Military Appeals have held that peacetime courts-martial jurisdiction over civilian dependents and employees in overseas situations is unconstitutional. While neither the Supreme Court nor the Court of Military Appeals has ruled on the potential constitutional issue of whether civilian dependents and employees accompanying an armed force in a time of war are subject to court-martial jurisdiction, other Federal courts have upheld the exercise of military jurisdiction in such cases.[31]

The Court of Military Appeals, however, while not passing on the constitutionality of wartime jurisdiction, has strictly construed the term "time of war" to mean a time when war has been declared formally by Congress.

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[24] *Id.Accord*, Zamora v. Woodson, 42 C.M.R. 5 (C.M.A. 1970).
[25] 42 C.M.R. 529 (A.C.M.R. 1970).
[26] 41 C.M.R. 363.
[27] 42 C.M.R. at 530 (citing *Winthrop*at 101).
[28] 42 C.M.R. at 530.
[29] UCMJ art. 2(a)(11).
[30] Reid v. Covert, 354 U.S. 1, 33 (1957). *See* W. Winthrop at 101 (2d ed. 1920).
[31] *See supra* note 18.

Chapter 11
Jurisdiction Over the Offense

11–1. Constitutional provisions

As noted in previous chapters, the Constitution, specifically article I, provides in part that Congress has the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[1] It further provides that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers… "[2] These provisions indicate an awareness of the need for the military to have a system of procedural rules and regulations and protections that may be different from those prescribed by article III of the Constitution.

In cases not arising in "the land and naval forces," an accused is entitled to "the benefit of an indictment by a grand jury" and a "trial by jury" as guaranteed by the fifth and sixth amendments and article III of the Constitution.[3] The fifth amendment, as noted,"specifically exempts 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger' from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury."[4]

Under the fifth amendment, therefore, the protections of "indictment" and "trial by jury" are not available to persons tried in the military justice system.

The powers granted to the Congress mentioned above and the exemption of cases in the military justice system from the guarantees of the fifth amendment are the sources of military law which provide for the creation of a unique system of military justice permitting the exercise of court-martial jurisdiction over persons in the Armed Forces.

11–2. Historical perspective

Since the American Revolution, the military has been given broad discretion in dealing with matters relating to military justice.[5] The Supreme Court of the United States, as early as 1863, recognized the importance of the military's exercising jurisdiction over persons subject to courts-martial and, consequently, the Court traditionally refrained from involvement in cases where the military establishment has dealt with such cases.[6]

Consonant with a recognition of the broad discretion of the military, it generally was assumed that military status, that is, being subject to trial by courts- martial, was a sufficient basis for the exercise of military jurisdiction over an accused. In 1969, however, the Supreme Court in the case of O'Callahan v. Parker[7] rejected this assumption and significantly changed the law as it related to court-martial jurisdiction.

a. The service connection requirement - 1969 to 1987.

(1) *O'Callahan v. Parker.* In O'Callahan v. Parker[8] the accused was charged with attempted rape, housebreaking, and assault with intent to commit rape. He was tried and convicted by general court-martial and sentenced to a dishonorable discharge, 10 years' confinement at hard labor, and forfeiture of all pay and allowances. His conviction was affirmed by an Army Board of Review,[9] and the United States Court of Military Appeals denied O'Callahan's petition for review.[10]

The facts in the O'Callahan case are significant. In July 1956, O'Callahan was stationed at Fort Shafter, Hawaii. On the evening of July 20, 1956, he and a friend, both dressed in civilian clothes, left the post and went into Honolulu. After a few drinks at a Honolulu hotel bar, the accused entered the residential section of the hotel and broke into the room of a 14- year-old girl. The accused attempted to rape the young girl, who resisted and screamed for help. The accused fled the room and was apprehended by a hotel security guard who released him to the Honolulu police. Upon learning that the accused was a soldier, the police returned him to military authorities. After interrogation by the military police, O'Callahan confessed.

O'Callahan was court-martialed, served his confinement, and placed on parole. He was later reimprisoned as a parole

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[1] U.S. Const. art. I, § 8, cl. 14.

[2] U.S. Const. art. I, § 8, cl. 18.

[3] U.S. Const. art. III, § 2, provides

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any state, the Trial shall be at such Place or Places as the Congress may by Law have directed.

[4] O'Callahan v. Parker, 395 U.S. 258, 261 (1969) (emphasis added). In addition, Justice Douglas stated that "[a] court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote." *Id.* at 263. *See Ex parte Quirin,* 317 U.S. 1, 38–45 (1942).

[5] *See*Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. Rev. 181, 187 (1962).

[6] *Ex parte Vallandigham,* 68 U.S. (1 Wall.) 243 (1863).

[7] 395 U.S. 258 (1969).

[8] *Id.*

[9] United States v. O'Callahan, CM 393590 (A.B.R. 1956).

[10] United States v. O'Callahan, 7 C.M.A. 800 (1957). Ten years later, the United States Court of Military Appeals denied O'Callahan's petition for writ of error*coram nobis.* United States v. O'Callahan, 37 C.M.R. 188 (C.M.A. 1967).

violator. During this second incarceration, he filed a petition for a writ of habeas corpus alleging the military had no jurisdiction to try him for off-post, nonmilitary offenses committed while on evening pass. The case eventually wound its way to the Supreme Court and Justice William O. Douglas.[11] Justice Douglas, writing for the majority,[12] found that O'Callahan's offenses were not "service connected," thus the military could not try him.[13] Justice Douglas noted that O'Callahan was off post, off duty, and dressed in civilian clothing at the time of his offenses. In addition, his offenses were perpetrated against a civilian victim and were of no military significance. Justice Douglas further stated that O'Callahan's offenses were crimes committed during peacetime "within our territorial limits, not in the occupied zone of a foreign country."[14]

The majority opinion briefly, and unfavorably, compared military tribunals to civilian courts, noting the inadequacies and deficiencies of the military system. The opinion then discussed earlier Supreme Court decisions that excluded discharged soldiers,[15] civilian dependents,[16] and employees accompanying the Armed Forces overseas[17] from military jurisdiction. The Court concluded that a soldier's:

> crime, to be under military jurisdiction, must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the benefits of an indictment by a grand jury and a trial by a jury of his peers.[18]

Unfortunately, the Supreme Court did not define"service connection" and for 2 years, military courts struggled to fill that void. Then, in 1971, the Court attempted to clear up the uncertainty generated by O'Callahan in the case of Relford v. Commandant.[19]

(2) *Relford v. Commandant.* Relford was tried and convicted by general court-martial and sentenced to death for kidnapping and raping two women. His sentence was later reduced by an Army Board of Review to a dishonorable discharge, confinement at hard labor for 30 years and total forfeitures.

Relford appealed denial of his petition for writ of habeas corpus to the Supreme Court alleging that the military did not have jurisdiction to try him because, although the offenses for which he was convicted occurred on military reservation property, they were not service connected. In addressing the issue presented, Justice Blackmun reviewed the O'Callahan decision and the factors relied upon by the Court in finding that O'Callahan's offense was outside military jurisdiction. The Court then articulated several considerations that suggest a lack of service connection:

(1) The soldier's proper absence from the base.
(2) The crime's commission away from the base.
(3) Its commission at a place not under military control.
(4) Its commission within our territorial limits and not in an occupied zone of a foreign country.
(5) Its commission in peacetime and its being unrelated to authority stemming from the war power.
(6) The absence of any connection between the defendant's military duties and the crime.
(7) The victim's not being engaged in the performance of any duty relating to the military.
(8) The presence and availability of a civilian court in which the case can be prosecuted.
(9) The absence of any flouting of military authority.
(10) The absence of any threat to a military post.
(11) The absence of any violation of military property.
(12) The offense's being among those traditionally prosecuted in civilian courts.

After reviewing the facts in Relford's case and comparing them with the factors present in O'Callahan, the Court concluded that Relford's offenses were service connected and triable by court-martial. The Court therefore affirmed Relford's conviction by military court-martial. The significance of the Relford decision is that it identified important factors to be considered by courts in deciding whether offenses committed by military soldiers are service connected and triable by courts-martial.

In reaching this conclusion, the Court also identified nine separate factors, the existence of which would tend to establish court-martial jurisdiction over an offense. Those factors were:

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[11] The Federal district court denied relief, United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966), as did the circuit court of appeals, United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968).
[12] Chief Justice Warren and Justices Brennan, Marshall, and Black joined Justice Douglas in the 5-to-3 decision.
[13] 395 U.S. at 274.
[14] 395 U.S. at 273–74.
[15] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
[16] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957).
[17] 361 U.S. 281; Grisham v. Hagan, 361 U.S. 278 (1960).
[18] 395 U.S. at 272–73.
[19] 401 U.S. 355 (1971).

(a) The essential and obvious interest of the military in the security of persons and of property on the military enclave.

(b) The responsibility of the military commander for maintenance of order in the command and the authority to maintain that order.

(c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

(d) The conviction that article I, section 8, clause 14 of the Constitution, vesting in the Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest soldier-offenders and turn them over to the civil authorities. The term"Regulation" itself implies, for those appropriate cases, the power to try and to punish.

(e) The distinct possibility that civil courts, particularly non-Federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community.

(f) The very positive implication in O'Callahan itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.

(g) The recognition in O'Callahan that, historically, a crime against the person of one associated with the post was subject even to the General Article.

(h) The misreading and undue restriction of O'Callahan if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law.

(i) A court's inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a soldier-defendant's on-duty and off-duty activities and hours on the post.[20]

These 21 factors provided the basic outline for subject-matter jurisdiction for almost 20 years.

(3) *Schlesinger v. Councilman.* The third in a trilogy of jurisdiction cases decided by the Supreme Court was Schlesinger v. Councilman. In Councilman,[21] the Supreme Court was asked to determine whether the off-post possession, sale, and transfer of marijuana were service-connected offenses, and thus triable by a military court under the O'Callahan rationale. The accused had argued at a preliminary military hearing that the military court lacked subject-matter jurisdiction because the offenses were not service connected. His argument was rejected, his motion to dismiss denied, and his case set for trial. Thereafter he brought his objection before a Federal district court and obtained a permanent injunction of the military proceedings.

Because of these particular facts, the Supreme Court was able to avoid the substantive O'Callahan issue by raising the issue of equitable jurisdiction and basing its decision on the impropriety of allowing a Federal court to intervene in military proceedings. It reasoned that the exhaustion requirement in habeas corpus and the Federal equity rule barring intervention in pending State criminal and administrative proceedings applied to court-martial proceedings, and further noted that Congress, by creating military courts and systems of review, had already balanced military necessities against fairness to individual soldiers. The "congressional judgment must be respected … it must be assumed that the military court system will vindicate servicemen's constitutional rights … [and] when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention by way of injunction or otherwise."[22] The Supreme Court here not only refrained from addressing the O'Callahan issue, but it also failed to define "those circumstances, if any, in which equitable intervention into pending court-martial proceedings might be justified."[23] Although the Court effectively prevented a flood of litigation by soldiers seeking Federal injunctions against court-martial proceedings, it gave little real guidance to the resolution of O'Callahan issues.[24] In fact, the impact of Schlesinger v. Councilman is largely one of emphasis. The Court appears to give some extra weight to those factors which favor the exercise of court-martial jurisdiction over any offenses which may adversely impact "military discipline and effectiveness."[25]

b. "Service connection" and military appellate courts. The evolution of the service connection doctrine was mirrored in military appellate courts.[26] In fact, in two Court of Military Appeals decisions, United States v. Lockwood,[27] and United States v. Solorio,[28] that court freely recognized that the service connection doctrine was not

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[20] *Id.* at 365.
[21] 420 U.S. 738 (1975).
[22] *Id.* at 758.
[23] *Id.* at 761.
[24] *See* Bartley,*Military Law in the 1970's: The Effect of Schlesinger v. Councilman,* 17 A.F.L. Rev. 65, 71 (Winter 1975).
[25] 420 U.S. 738, 759.
[26] *See* Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker,* 25 A.F.L. Rev. 1 (1985).
[27] 15 M.J. 1 (C.M.A. 1983).
[28] 21 M.J. 251 (C.M.A. 1986).

static but as Chief Judge Everett stated, "should be reexamined periodically" so that its limiting purpose remains responsive to military discipline.[29] Later, in Solorio, the Chief Judge went on to explain that while service connection was still the key, O'Callahan permitted us to consider later developments in the military and society at large and take into account any new information that might bear on service connection.[30] Consequently, the military justice system experienced an expanding scope of service connection as the system moved to rectify disciplinary problems. The culmination of this movement was the Court of Military Appeals decision in United States v. Solorio.[31] Solorio's appeal, however, did not stop at the Court of Military Appeals, but was granted certiorari by the Supreme Court. On 25 June 1987, in Solorio v. United States,[32] a landmark decision by the Supreme Court, that Court rejected the "service-connection" doctrine and expressly overruled O'Callahan, making the trilogy of O'Callahan, Relford, and Schlesinger of historical value only.

11–3. Solorio v. United States--military status is the key

While Yeoman First Class Richard Solorio was on active duty in the Seventeenth Coast Guard District in Juneau, Alaska, he sexually abused two young daughters of fellow Coast Guardsmen. He continued to engage in this abuse over a 2-year period until he was transferred by the Coast Guard to Governors Island, New York. Coast Guard authorities learned of the Alaska crimes only after Solorio's transfer, and investigation revealed that he had later committed similar sexual abuse offenses while stationed in New York. The Governors Island commander convened a general court-martial to try Solorio for crimes alleged to have occurred in Alaska and New York.[33]

There is no "base" or "post" where Coast Guard personnel live and work in Juneau. Consequently, nearly all Coast Guard military personnel reside in the civilian community. Solorio's Alaska offenses were committed in his privately-owned home and the fathers of the 10-to-12-year-old victims in Alaska were active duty members of the Coast Guard assigned to the same command as Solorio. The New York offenses also involved daughters of fellow Coast Guardsmen, but were committed in Government quarters on the Governors Island base.

Solorio moved to dismiss the offenses committed in Alaska on the ground that the court lacked jurisdiction under O'Callahan v. Parker and Relford v. Commandant. The military judge agreed and dismissed the Alaskan offenses for a lack of subject-matter jurisdiction.

The prosecution appealed the military judge's ruling pursuant to article 62, UCMJ, and the Coast Guard Court of Military Review reversed that ruling.[34] In turn, Solorio petitioned the Court of Military Appeals for review which was granted. The United States Court of Military Appeals, however, affirmed the Court of Military Review's decision concluding that the Alaskan offenses were "service connected."[35]

Solorio next petitioned the Supreme Court for review pursuant to a writ of certiorari. That Court granted certiorari and, in a clear break from O'Callahan, affirmed.

a. The majority opinion. Chief Justice Rehnquist delivered the opinion of the Court, writing for a majority that included Justices White, Scalia, O'Connor, and Powell. In an abundantly clear fashion, the Court declared "[t]he jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces and not on the service connection of the offense charged. Thus, O'Callahan v. Parker is overruled."[36]

The Court looked first at the constitutional underpinnings of the Congress' power to regulate the Armed Forces, and noted that the power granted to Congress in article 1, section 8, clause 14 to make rules for the government of the land and naval forces appeared in the same sections as the powers to regulate commerce, coin money, and declare war. And there was no indication that the grant of power in clause 14 was any less plenary than the other grants of power to Congress.[37] Thus, in the majority's opinion, the plain meaning of clause 14 supported a military status test as the sole determinant of jurisdiction.[38] Moreover, the Court noted that this rule was in agreement with an unbroken line of precedent from 1866 to 1960 that viewed the Constitution as conditioning the proper exercise of court-martial jurisdiction on one factor: the military status of the accused.[39] The Court went on to explain that the O'Callahan court's rendition of the history of courts- martial was less than accurate, noting that the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries was far too ambiguous to justify the restriction on the plain language of clause 14 which O'Callahan imported into it.[40]

The Court further noted that civil courts are ill- equipped to establish policies regarding matters of military concern,

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[29] 15 M.J. at 10.
[30] 21 M.J. at 254.
[31] 21 M.J. 251.
[32] 483 U.S. 435 (1987).
[33] *Id.* at 437.
[34] 21 M.J. 512 (C.G.C.M.R. 1985).
[35] 21 M.J. 251 (C.M.A. 1986).
[36] 483 U.S. at 435.
[37] *Id.* at 441.
[38] *Id.*
[39] *Id.* at 439.
[40] *Id.* at 445.

recalling that just 2 years after O'Callahan, the Supreme Court felt it was necessary to expand on service connection in Relford, enumerating myriad factors to weigh in service connection. The Court went on to say that the O'Callahan v. Parker service connection test was confusing and caused an unwarranted expenditure of time and energy in litigating jurisdictional issues.[41]

The Court illustrated the confusion caused by O'Callahan by pointing to the military's own experience with drug offenses. Soon after O'Callahan in 1969, the Court of Military Appeals, in United States v. Beeker[42] held that all drug offenses were service connected and then changed its position at least twice in later cases, the last time in United States v. Trottier.[43]

The Supreme Court thus held that Congress has primary responsibility for balancing the rights of soldiers against the needs of the military and that Congress' implementation of that responsibility is entitled to judicial deference.

b. The dissent. Justice Marshall, joined by Justices Brennan and Blackmun, authored perhaps one of the strongest dissents in the entire history of the Supreme Court. The tone of dissent was established by the very first paragraph in which Justice Marshall proclaimed in overruling O'Callahan v. Parker, the"court disregards constitutional language and the principles of stare decisis in its single-minded determination to subject members of our armed forces to the unrestrained control of the military in the area of criminal justice."[44] The constitutional language he was referring to was the Bill of Rights, specifically, the fifth amendment right to grand jury indictment and the sixth amendment right to a trial by jury, which only except "cases arising in the land and naval forces" from their protections. Justice Marshall went on to explain that because Solorio's case did not arise in the land or naval forces, the military had no jurisdiction to try him.

Thus, Justice Marshall believed that O'Callahan v. Parker was constitutionally based on the Bill of Rights and that Justice Douglas' historical analysis was correct. He ended his dissent in a sentence that even Justices Brennan and Blackmun would not join, writing:"The Court's action today reflects contempt, both for the members of our Armed Forces and for the constitutional safeguards intended to protect us all."[45]

c. Unresolved issues. Despite the clarity of the holding in Solorio, some issues remain. First, can Solorio be applied retroactively? Second, what will congressional reaction be? Third, what is the future of the military's relationship with local civilian district attorneys and prosecutors?

(1) *Retroactivity of Solorio.* The issue of retroactivity was not addressed in the Solorio opinion, except by way of Solorio's argument that the Court of Military Appeals decision should be reversed because it applied a more expansive subject-matter jurisdiction test than had previously been announced.[46] The Supreme Court, however, refused to hear the issue because Solorio failed to raise this claim at the Court of Military Appeals and provided no explanation for his failure to do so.[47]

The Court of Military Appeals, in its first post- Solorio jurisdiction opinion, also failed to address the retroactivity issue. In United States v. Overton,[48] the court applied the O'Callahan service connection test to determine jurisdiction, but then, in a footnote, indicated "that the same result would be reached if … Solorio v. United States … is retroactive."[49] Later, in United States v. Huitt,[50] that court again indicated that it would continue to apply the service connection test until the retroactivity issue was properly framed before them.

The retroactivity issue was finally directly addressed in United States v. Avila.[51] In Avila, the Court of Military Appeals held that Solorio is completely retroactive.[52] In fact, the court held that it appeared that they had no option under existing Supreme Court precedent of Griffith v. Kentucky[53] but to hold Solorio retroactive.

The courts of military review have also held that Solorio is retroactive. In United States v. Starks,[54] the Army Court of Military Review, also citing the Supreme Court's decision in Griffith v. Kentucky,[55] found Solorio to be fully retroactive.

In Starks, the accused was tried by a general court-martial sitting at Fort Polk, Louisiana on 16 December 1986. At the time of the Solorio decision, Starks' case was on direct appeal to the Army Court of Military Review. Starks argued on appeal that the military lacked jurisdiction over several off-post offenses. The Army court disagreed.

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[41] *Id.* at 449.
[42] 40 C.M.R. 275 (C.M.A. 1969).
[43] 9 M.J. 337 (C.M.A. 1980).
[44] 483 U.S. at 452.
[45] *Id.* at 467.
[46] *Id.* at 451, n.18.
[47] *Id.*
[48] 24 M.J. 309 (C.M.A. 1987).
[49] *Id.*
[50] 25 M.J. 136 (C.M.A. 1987). This issue was addressed in oral argument at the Court of Military Appeals in United States v. Avila, Dkt. No. 57,512AF,*pet. granted* (C.M.A. 1988).
[51] 27 M.J. 62 (C.M.A. 1988).
[52] *Id.*
[53] 479 U.S. 314 (1987).
[54] 24 M.J. 857, 1859 (A.C.M.R. 1987); *accord* United States v. Ghiglieri, 25 M.J. 687, (A.C.M.R. 1987).
[55] 479 U.S. 314 (1987).

Addressing the retroactivity issue, the court noted that as a general rule, rules for criminal prosecutions will be fully retroactive with no exception for cases that constitute a clear break with the past and, moreover, there was no ex post facto application of the law in this case.[56] Thus, the service connection analysis is no longer needed.[57] Similarly, the Air Force and Navy Courts of Military Review have found Solorio to be retroactive in unpublished decisions.[58]

Department of Army policy in applying Solorio has been provided in a letter from The Judge Advocate General.[59] In general, Army policy provides that Solorio will be applied in all cases currently being tried or going through the appellate process. Cases, however, where the jurisdiction issue was raised and lost under O'Callahan, will not be revived as a matter of policy. Finally, the letter advises that Alef[60] factors need no longer be pleaded to establish jurisdiction.

(2) *Congressional reaction.* The Solorio decision gives control of military jurisdiction to Congress, specifically noting "[J]udicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules for their governance is challenged."[61] Congress has not reacted to this deferral of power. Moreover, in recent history the Congress has statutorily broadened the scope of military jurisdiction, most importantly, providing the doctrine of constructive enlistment in article 2, UCMJ[62] and most recently, providing expanded jurisdiction powers over members of the Reserve Components.[63] This trend, however, is subject to reversal if the expanded jurisdiction provided by Solorio is subjected to abuse.[64]

(3) *Relationships with civilian prosecutors.* Solorio's expanded jurisdiction provides the military with the authority to handle many crimes traditionally tried by civilian courts. Coordination with civilian law enforcement agencies is therefore mandated.[65]

Double jeopardy does not bar the prosecution of a soldier, tried previously in a state court, in a trial by court-martial.[66] Army regulations, however, establish guidelines. AR 27-10 provides: "A person subject to the UCMJ who has been tried in a civilian court may, but ordinarily will not be tried by court-martial or punished under Article 15, UCMJ, for the same act over which the civilian court has exercised jurisdiction."[67] That regulation further requires that the general court-martial convening authority personally determine that further punitive action is necessary.[68] Navy and Air Force regulations are in accord.[69] Moreover, the Air Force Court of Military Review, in United States v. Olsen,[70] barred a second prosecution of an Air Force member for drug offenses that had been the subject of a previous state court conviction, where Air Force regulations were not followed. Thus, dual prosecutions, while permitted, are clearly not favored.

11–4. Conclusion

Solorio creates a new age of military practice. Its future definition in large part depends on the perceived equities or inequities of the military justice system by the civilian population. If the status test of jurisdiction is abused, or more importantly perceived to be abused, the subject-matter jurisdiction of the court-martial will again be limited, not by the courts, but by the Congress.

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[56] 24 M.J. at 859.
[57] 24 M.J. at 858.
[58] United States v. Taylor, A.C.M. 25834 (30 June 1987, A.F.C.M.R.); United States v. McNamara, No. 86–3714 (13 July 1987 N.M.C.M.R.).
[59] Policy Memorandum 87–5, Office of The Judge Advocate General, U.S. Army, subject: Liaison with Civilian Officials After *Solorio,* 28 July 1987,*reprinted* in The Army Lawyer, Sept. 1987, at 3 [hereinafter TJAG Memorandum 87–5].
[60] United States v. Alef, 3 M.J. 414 (C.M.A. 1977). In *Alef,* the Court of Military Appeals mandated that the Government affirmatively demonstrate through sworn charges the jurisdictional basis for the trial of the accused and his offenses.
[61] 483 U.S. at 447.
[62] UCMJ art. 2.
[63] *See* UCMJ art. 2(a)(3), 2(d), and 3(d).
[64] *See* TJAG Policy Memorandum 87–5.
[65] *Id.*
[66] Benton v. Maryland, 395 U.S. 784 (1969).
[67] AR 27–10, para. 4–2.
[68] *Id.*at para. 4–3.
[69] Air Force Regulation 111–1, Military Justice Guide, para. 3–7b (30 Sept. 1988); Navy JAGINST 5800.7B, para. 0116d.
[70] 24 M.J. 669 (A.F.C.M.R. 1987).

Part Three
Pretrial Procedure

Chapter 12
Charges and Specifications

12–1. General

Charging or pleading is the essential first step in the court-martial process. Any person subject to the UCMJ may prefer charges,[1] but trial counsel should always draft or review charges before they are preferred. The drafter prepares the pleading by completing a DD Form 458 (Charge Sheet). The formal written accusation consists of the technical charge and the specification.[2]

12–2. The charge

The charge is a statement of the article of the UCMJ violated, and ordinarily will be written: "Violation of the Uniform Code of Military Justice, Article ___." Neither the misdesignation of an article nor the failure to designate any article is ordinarily material so long as the specification alleges an offense over which courts-martial have jurisdiction.[3]

12–3. The specification

The specification is a plain, concise, and definite statement of the essential facts constituting the offense charged.[4] No particular format is required,[5] but counsel and legal specialists should always follow the form specifications in the Manual. Drafting creative and novel specifications, particularly when a sufficient form specification already exists, often results in needless appellate litigation and may result in prejudicial error.

12–4. Additional charges

New and separate charges preferred after others have been preferred are called additional charges. Additional charges may not be incorporated after arraignment at the same trial without the consent of the accused.[6]

12–5. Legal sufficiency of pleadings

Every essential element of the offense sought to be charged must be alleged directly or by fair implication in the specification.[7] Specifications alleging a violation of the third clause of article 134, UCMJ, for example, must set forth the essential elements of the underlying statutes.[8] If a specification fails to allege an offense, a motion to dismiss should be granted as to the specification.[9] The burden is on the Government to show the legal sufficiency of the specification,[10] and the failure to do so may be attacked on appeal notwithstanding a guilty plea.[11]

A specification should allege every essential element of the offense charged,[12] demonstrate the criminal nature of the conduct,[13] and give sufficient notice to the accused to prepare a defense and protect the accused from re-prosecution for the same offense.[14] An incomplete specification may be sufficient where an offense is necessarily implied,[15] but it

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[1] R.C.M. 307(a). No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath, however. R.C.M. 307(a) discussion.

[2] R.C.M. 307(c)(1). This is also called a pleading.

[3] R.C.M. 307(c)(2);*see* United States v. Bluitt, 50 C.M.R. 675 (A.C.M.R. 1975). Particular subdivisions of the article violated should not be included. If there is only one charge it is not numbered. When there is more than one charge, each is numbered with a Roman numeral. R.C.M. 307(c)(2) discussion.

[4] R.C.M. 307(c)(3).

[5] *Id.* If there is only one specification it is not numbered. When there is more than one specification, they are numbered with Arabic numerals. R.C.M. 307(c)(3) discussion. MCM, 1984, Part IV contains sample specifications for most offenses under the Code.

[6] R.C.M. 601(e)(2). If there is more than one additional charge number them with Roman numerals, such as "Additional Charge I." The term "additional" is not added to specifications under an additional charge. R.C.M. 307(c)(2) and (3) discussion.

[7] R.C.M. 307(c)(3); United States v. Watkins, 21 M.J. 208 (C.M.A. 1986); United States v. Fout, 13 C.M.R. 121, 124 (C.M.A. 1953); *see also,* United States v. Flieg, 37 C.M.R. 64 (C.M.A. 1966); United States v. Jefferson, 14 M.J. 806 (A.F.C.M.R. 1982).

[8] United States v. Mayo, 12 M.J. 286 (C.M.A. 1982); United States v. Johnson, 48 C.M.R. 282 (A.C.M.R. 1974).

[9] R.C.M. 907(b)(1)(B). Specifications that allege some violation of the UCMJ are not subject to a motion to dismiss. *See* R.C.M. 307(d).

[10] United States v. Buswell, 45 C.M.R. 742 (A.C.M.R. 1972); United States v. Jefferson, 14 M.J. 806 (A.F.C.M.R. 1982).

[11] United States v. Morgan, 44 C.M.R. 898 (A.C.M.R. 1971). The Court of Military Appeals, however, has stated that a flawed specification, attacked first on appeal, will be viewed with greater tolerance. In United States v. Watkins, 21 M.J. 208 (C.M.A. 1986), the court did not reverse for a failure to allege"without authority" in an AWOL guilty plea case.

[12] R.C.M. 307(c)(3) and discussion (G)(i) (either expressly or by necessary implication); United States v. Yum, 10 M.J. 1 (C.M.A. 1980); United States v. Adams, 14 M.J. 647 (A.C.M.R. 1982).

[13] R.C.M. 307(c)(3) discussion (G)(ii); United States v. Jones, 42 C.M.R. 282 (C.M.A. 1970) (no averment of wrongfulness or unlawfulness in assault specification); United States v. Brice, 38 C.M.R. 134 (C.M.A. 1967) ("wrongfulness" omitted in attempted drug sale specification); United States v. Garcia, 18 M.J. 539 (A.C.M.R. 1984) ("wrongfulness" omitted in drug possession specification, fatally defective). *But see* United States v. Brecheen, 27 M.J. 67 (C.M.A. 1988) ("wrongful" omitted from conspiracy to distribute in guilty plea case; *Brice* distinguished); United States v. Watkins, 21 M.J. 208 (C.M.A. 1986) ("without authority" omitted in AWOL guilty plea, not reversed); United States v. Bryant, 28 M.J. 504 (A.C.M.R. 1989) ("wrongful" omitted from conspiracy to distribute in contested case; implied by separate distribution specification). United States v. LeProwse, 26 M.J. 652 (A.C.M.R. 1988) ("with intent to arouse sexual desire … " omitted; court found alleged by fair implication).

[14] R.C.M. 307(c)(3) discussion (G)(iii); United States v. Curtiss, 42 C.M.R. 4 (C.M.A. 1970); United States v. Weems, 13 M.J. 609 (A.F.C.M.R. 1982). *See*

must demonstrate the criminal nature of the accused's conduct either directly or by fair implication.[16] The specification should negate every reasonable hypothesis of innocence.[17] Thus, specifications alleging violations under article 92, UCMJ, must be premised upon the fact that the regulation itself is punitive in nature; that is, it is intended to regulate conduct of individual soldiers with a self-evident, direct application of sanctions for its violation.[18]

The accused must be able to prepare his or her defense. If the specification is ambiguous, it may not be sufficient to apprise the accused of what he or she must defend against at trial.[19] An ambiguous specification may fail because it does not sufficiently identify the nature of the res in a wrongful appropriation allegation;[20] however, information in an article 32 report of investigation[21] or brought out in a providence inquiry[22] may remedy an otherwise deficient specification.

In addition to informing the accused of the offense, a specification should preclude a second prosecution for the same offense.[23] The UCMJ provides protection against trial, without consent, for the same offense a second time.[24] Therefore, a properly pleaded specification resulting in an acquittal or conviction, together with the record of trial, should identify the offense so as to preclude the accused being placed in jeopardy twice for the same offense.

Ordinarily, use of the model specifications provided in the Manual for Courts-Martial[25] furnishes sufficient pleading, and conformity with the suggested forms is encouraged.[26] Nevertheless, the forms are not a guarantee of legal sufficiency in every case,[27] nor is a failure to follow them necessarily fatal to pleadings.[28] Therefore, specifications should be drafted with care to allege all the elements, the criminality of the conduct, and inform the accused of the nature of the offense and preclude a second prosecution for the same offense.

12–6. Multiplicity

Multiplicity is where a single offense is charged in more than one specification. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges.[29] A specification is multiplicious with another if it alleges the same offense, or if one offense is a lesser included offense of the other.[30]

a. Multiplicity before findings. The general prohibition against multiplicious pleading is subject to the exception where sufficient doubt exists as to the facts or law. If multiplicious specifications are necessary for the Government to meet exigencies of proof through trial, review, and appellate action, then they should not be dismissed before findings.[31] Put another way, multiplicious pleading to meet exigencies of proof is not an "unreasonable" multiplication

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R.C.M. 307(c)(3) discussion for more detailed guidance in drafting specifications.

[15] United States v. Brecheen, 27 M.J. 67; United States v. McCollum 13 M.J. 127 (C.M.A. 1982) (value fairly implied); United States v. Bryant, 28 M.J. 504; United States v. LeProwse, 26 M.J. 652 (A.C.M.R. 1988); United States v. Brown, 42 C.M.R. 656 (A.C.M.R. 1970) ("club" considered a building or structure for purposes of housebreaking, by fair implication).

[16] United States v. Brice, 38 C.M.R. 134 (fatal to omit "wrongfulness" in attempted drug sale specification). *But see* 27 M.J. 67; 28 M.J. 504; 26 M.J. 652.

[17] United States v. Jones, 42 C.M.R. 282 (C.M.A. 1970) (failure to allege assault wrongful or unlawful); United States v. Richardson, 22 C.M.R. 473 (A.B.R. 1956) (omission of "legal efficacy" in forgery specification).

[18] United States v. Scott, 46 C.M.R. 25 (C.M.A. 1972) (paragraph of regulation held nonpunitive); United States v. Stewart, 2 M.J. 423 (A.C.M.R. 1975) (weapons regulation held nonpunitive); United States v. Edell, 49 C.M.R. 65 (A.C.M.R. 1974); United States v. Wright, 48 C.M.R. 319 (A.C.M.R. 1974).

[19] United States v. Bolden, 40 C.M.R. 758 (A.C.M.R. 1969).

[20] United States v. Curtiss, 42 C.M.R. 4 (1970) (specification only alleged accused wrongfully appropriated "personal property" held insufficient).*But see* United States v. Durham, 21 M.J. 232 (C.M.A. 1986) (specification alleging theft of "items" was upheld where items were described in the record, providing adequate notice to the accused and double jeopardy protection).

[21] United States v. Suggs, 43 C.M.R. 36 (C.M.A. 1970).

[22] Watkins; United States v. Krebs, 43 C.M.R. 327 (C.M.A. 1971) (affirming larceny of "goods"); *see also* United States v. Swann, 44 C.M.R. 871 (A.C.M.R. 1971) affirming a conspiracy specification alleging unknown conspirators.

[23] United States v. Durham, 21 M.J. 232 (C.M.A. 1986); United States v. Sell, 11 C.M.R. 202 (C.M.A. 1953); United States v. Freeman, 23 M.J. 531 (A.C.M.R. 1986); United States v. Smith, 40 C.M.R. 432 (A.B.R. 1968).

[24] UCMJ art. 44.

[25] MCM, 1984, Part IV.

[26] United States v. Marshall, 40 C.M.R. 138 (C.M.A. 1969).

[27] United States v. McCollum, 13 M.J. 12 (C.M.A. 1982) (merely adopting form specification does not guarantee a legally sufficient pleading); United States v. Brice, 48 C.M.R. 368 (N.C.M.R. 1973) (sample specification in 1969 MCM did not adequately allege riot).

[28] United States v. Quarles, 50 C.M.R. 514 (N.C.M.R. 1975) (duty to obey order necessarily implied).

[29] R.C.M. 307(c)(4) discussion.

[30] R.C.M. 907(b)(3)(B) discussion

[31] *Id.*

of charges.

Lesser included offenses should never be separately charged.[32] This is because even where exigencies of proof exist, the court still has before it the charged offense and all lesser included offenses in issue.[33]

b. Multiplicity after findings. The exigencies of proof are most pronounced at the trial level. The exigencies of proof ordinarily dissipate once all the evidence is received and findings are made. As the courts of military review have fact-finding power, some exigencies may extend beyond the findings.

Given this uncertainty, the Manual concedes that it may be appropriate after findings to dismiss the less serious of any multiplicious specifications; consideration must nonetheless be given to possible post-trial or appellate action with regard to the remaining specification.[34] The Court of Appeals has hinted that a specification dismissed at trial as multiplicious might be retrievable later if the remaining specification were set aside on appeal.[35] If the military judge does not find dismissal of any specifications appropriate after findings, the general rule is that the maximum authorized punishment may be imposed for each separate offense.[36] The Manual then defines "separate" as those offenses that each require proof of at least one element not required to prove the other.[37] This is called the separate elements test.

Several exceptions to the separate elements test are recognized. Conspiracies[38] and cover-ups[39] are separately punishable from the underlying offense even though they may not strictly meet the separate elements test. Other crimes that do meet the separate elements test may not be separately punishable, depending upon all the circumstances, if they were committed as the result of a single impulse or intent, or were part of a continuous chain of events that share a unity of time.[40] In sum, "[a] single template by which to determine in all instances whether particular misconduct is punishable as a single offense or as separate and different offenses has not been successfully designed."[41]

The current case approach to multiplicity for findings first examines whether the offenses are part of the same act or transaction. If not, the offenses are separate.[42] Of course, congressional intent is critical because the double jeopardy clause of the fifth amendment only prohibits courts from prescribing greater punishment than Congress intended. If congressional intent is expressed, implied, or can be determined from a reasoned analysis of the statute or from authoritative interpretations of military law, then such intent is determinative. Generally, congressional intent is not clear and rules of construction are applied to determine such intent. The Blockburger separate elements test has been applied to determine separateness.[43] If the Blockburger test is met, the Baker case sets out four situations where offenses are nonetheless considered multiplicious, absent contrary statutory intent: (1) where offenses require inconsistent findings of fact; (2) where the offenses are part of an indivisible crime as a matter of law; (3) where both offenses are different aspects of a continuous course of conduct prohibited by one statutory provision; and (4) where offenses stand in the relation of greater and lesser offenses. Finally, consideration should also be given to whether there are any "aggravating circumstances" which will avoid a finding of multiplicity.[44]

When considering multiplicity for sentencing, legislative intent again governs. When such intent is not clear, the separate elements test of Blockburger and R.C.M. 1003 is applied. The courts have applied several tests to determine multiplicity for sentencing.[45] These tests include: (1) the single impulse test; (2) the unity of time, existence of

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[32] R.C.M. 307(c)(4) discussion. The Court of Military Appeals has expanded the concept of lesser included offenses in recent years. When both offenses arise out of one act or transaction, the wording of the specifications must be examined to determine if one is lesser included within the other. The court has stated that two specifications stand in a relationship of greater and lesser included in two situations:

> First, where one offense contains only elements of, but not all the elements of the other offense; second, where one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by the evidence at trial.

United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983).

A further extension of this "fairly embraced"concept was adopted by the court in United States v. Holliman, 16 M.J. 164, 167 (C.M.A. 1983) where the court would find a lesser included offense if it were "fairly embraced as an integral means of accomplishing"the greater offense. In *Holliman,* a threat specification was held to be multiplicious for findings with a rape specification where the evidence showed the threat was an integral means of accomplishing the rape. These innovative definitions from the court have contributed to what has been referred to as a morass, a Sargasso Sea, and a quagmire. The 1984 Manual purported to solve this problem of uncertainty by reverting to a form of the Supreme Court's simple and effective "separate elements" test announced in Blockburger v. United States, 284 U.S. 299 (1932). R.C.M. 1003 (c)(1)(c) discussion.

[33] R.C.M. 920(e)(2).

[34] R.C.M. 307(c)(4) discussion.

[35] United States v. Doss, 15 M.J. 409, 413 (C.M.A. 1983).

[36] R.C.M. 1003(c)(1)(C).

[37] *Id. See also* Blockburger v. United States, 284 U.S. 299 (1932).

[38] R.C.M. 1003 (c)(1)(c) discussion; United States v. Washington, 1 M.J. 473 (C.M.A. 1976).

[39] United States v. Harrison, 4 M.J. 332 (C.M.A. 1978); United States v. Meyer, 45 C.M.R. 84, 85 (C.M.A. 1972).

[40] United States v. Weaver, 42 C.M.R. 250 (C.M.A. 1970); United States v. Kleinhans, 34 C.M.R. 276 (C.M.A. 1964) (unlawfully opening mail matter and larceny of money therefrom held multiplicious for sentencing where both were generated by a single impulse).

[41] United States v. Meyer, 45 C.M.R. 84, 85 (C.M.A. 1972); *see also* United States v. Meace, 20 M.J. 972 (N.M.C.M.R. 1985) (the perfect analysis for multiplicity is no more possible than the search for perfect smoke); United States v. Baker, 14 M.J. 361 (C.M.A. 1983).

[42] United States v. Wells, 20 M.J. 513 (A.F.C.M.R. 1985).

[43] United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984) (if same conduct violates article 133 and another punitive article, the violation of the other punitive article is a lesser included offense of the article 133 offense); United States v. Zubko, 18 M.J. 378 (C.M.A. 1984) (simple possession is a lesser included offense of distribution of the same drug at the same time).

[44] United States v. DiBello, 17 M.J. 77 (C.M.A. 1983) (AWOL of 16 days and breach of restriction held not multiplicious due to the aggravating circumstance of the duration of the AWOL).

[45] *See* United States v. Chisolm, 10 M.J. 795 (A.F.C.M.R. 1981).

connected chain of events test; (3) the separate societal norms test; and (4) the separate duties test.[46]

12–7. Duplicity

One specification should not allege more than one offense; a specification containing more than one offense is duplicitous.[47] Further, one specification should not allege more than one offense conjunctively or in the alternative.[48] A specification is not necessarily duplicitous when it alleges an offense containing lesser included offenses.[49] Also, if two acts constitute a single offense[50] or if an offense is committed by more than one means, they may be alleged conjunctively. Another exception to the general prohibition against duplicitous pleading exists when several separate acts are part of a continuing course of conduct.[51]

If a specification is duplicitous, a motion to sever may be appropriate.[52] Of course, should the motion be granted, a separate punishment would be authorized for each offense.[53] In some cases, severing will reduce the total maximum authorized punishment.[54] When severing increases the punishment, the defense may not wish to raise the motion. Failure to object to the duplicitous specification results in waiver of the issue.[55] Duplicity alone is not a ground for reversing a conviction of that specification; it is only fatal when it materially prejudices the substantial rights of an accused.[56]

12–8. Joinder

Ordinarily, all known charges should be tried at a single court-martial.[57] The convening authority has discretion to refer separate and unrelated offenses to a single trial.[58] A significant change from the 1969 Manual is the provision that major offenses and minor offenses may be tried together at a single court-martial.[59]

The charges should be disposed of in a timely manner at the lowest appropriate level of disposition.[60] The saving up or accumulation of charges for an improper motive is prohibited.[61]

12–9. Joint offenses

A joint offense is one committed by two or more persons acting together in pursuance of a common intent.[62] Joint offenders may be charged separately or jointly;[63] however, members of different armed forces should ordinarily be charged separately.[64] If the participants are charged and tried jointly, it should be alleged that the named accused committed the offense "jointly and in pursuance of a common intent."[65] If the participants are charged separately, it should be alleged that the named accused committed the offense "in conjunction with" the joint offender.[66] A joint trial is subject to an appropriate motion to sever.[67]

12–10. Drafting problems

a. Pleading jurisdiction. The specification must allege the basis for jurisdiction over the accused.[68] Including the accused's rank or grade, armed force, and unit or organization is ordinarily sufficient to show jurisdiction over the

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[46] For a detailed treatment of one approach to multiplicity, *see* Uberman, *Multiplicity Under the New Manual for Courts-Martial,* The Army Lawyer, June 1985, at 31, and United States v. Ridgeway, 19 M.J. 681 (A.F.C.M.R. 1984).

[47] R.C.M. 307(c)(4);*see* United States v. Paulk, 32 C.M.R. 456 (C.M.A. 1963).

[48] R.C.M. 307(c)(3) discussion (G)(iv); United States v. Cook, 44 C.M.R. 788 (N.C.M.R. 1971); and United States v. Branford, 2 C.M.R. 489 (A.B.R. 1951) (specification included drunken driving and reckless driving).

[49] United States v. Parker, 13 C.M.R. 97 (C.M.A. 1953).

[50] R.C.M. 906(b)(5); United States v. Bull, 14 C.M.R. 53 (1954) (three acts of negligence in vehicular negligent homicide specification).

[51] R.C.M. 307(c)(3) discussion (G)(iv); United States v. Jones, 15 C.M.R. 664 (A.B.R. 1954) (sodomy at divers times and places alleged in one specification).

[52] R.C.M. 906(b)(5) discussion.

[53] *Id.*

[54] United States v. Davis, 36 C.M.R. 363 (C.M.A. 1966) (larcenies not permitted to be aggregated to increase maximum punishment); *see also* United States v. Poole, 24 M.J. 539 (A.C.M.R. 1987) (mega-specs for bad check offenses).

[55] United States v. Parker, 3 C.M.A. 541, 13 C.M.R. 97 (1953); Poole, 24 M.J. 539; United States v. Wakeman, 25 M.J. 644 (A.C.M.R. 1987).

[56] R.C.M. 906(b)(5) discussion; United States v. Branford, 2 C.M.R. 489 (A.B.R. 1951).

[57] R.C.M. 307(c)(4); R.C.M. 601(e)(2); R.C.M. 906(b)(10) discussion.

[58] R.C.M. 601(e)(2). This is contrary to Federal Rule of Criminal Procedure 8(a) which ordinarily allows an accused to receive separate trials for unrelated offenses.

[59] R.C.M. 601(e)(2).

[60] R.C.M. 306(b).

[61] R.C.M. 307(a) discussion. A convening authority may withhold charges for proper reasons, such as additional charges. United States v. Delano, 12 M.J. 948 (N.M.C.M.R. 1982). At some point, however, the accused's right to a speedy trial takes precedence over this delay to add charges. United States v. Ward, 50 C.M.R. 273 (C.M.A. 1975).

[62] R.C.M. 601(e)(3) discussion.

[63] R.C.M. 601(e)(3).

[64] R.C.M. 201(e). "Cases involving two or more accused who are members of different armed forces should not be referred to court-martial for a common trial." *Id.* discussion.

[65] R.C.M. 307(c)(3) discussion (H)(viii); see also United States v. Dolliole, 11 C.M.R. 101 (1953) (robbery).

[66] *Id.*

[67] R.C.M. 906(b)(9) (to be liberally granted if good cause shown).

[68] United States v. Alef, 3 M.J. 414 (C.M.A. 1977).

accused.[69] The drafter may wish to add the words"on active duty" after the description of the accused.[70]

b. Allegation of time or place of offense. Ordinarily, time and place should be pleaded with sufficient precision to give the accused notice. There are exceptions.[71] A larceny specification may be legally sufficient without an allegation of where the offense took place.[72] Similarly, when time is not of the essence, an erroneous statement of the date of the offense is a matter of form.[73] If time and place are of the essence, or when several similar offenses are involved, more specificity may be required.[74] A variance may also affect the maximum imposable sentence.[75]

c. Descriptions. Ordinarily, an erroneous description of the victim of an offense is not fatal,[76] subject to the condition that a specification must not mislead an accused in preparing the defense and must adequately protect the accused against a second prosecution of the same offense.

d. Statements concerning value. Exact value should be stated in the specification, if known.[77] If a specification, without specifying value, describes property which any reasonable person would necessarily conclude had some value, it is legally sufficient.[78] Of course, the consequence of failing to specify value is that the accused may only be convicted of the least degree of the offense.[79] If several different articles of various kinds are the subject of the offense, the value of each article should be stated, followed by a statement of the aggregate value.[80]

e. Allegation of course of conduct. If criminal acts extend over a considerable period of time, they may be alleged as having occurred during the period from _____ to _____.[81] Such pleading does not render the specification defective on the ground of duplicity.[82]

f. Amendments. Amendments are major and minor changes to pleadings. Major changes are defined as any change which adds a party, offense, or substantial matter not fairly included in the specification, or is likely to mislead the accused as to the offense charged.[83] Major changes cannot be made over the accused's objection unless the charge is preferred anew.[84] Minor changes are defined as all other changes which are not major changes.[85] Minor changes may be made before arraignment by any person who forwards, acts upon, or prosecutes the case, except the article 32 investigating officer.[86] Minor changes after arraignment may be permitted by the military judge if no substantial right of the accused is prejudiced.[87]

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[69] R.C.M. 307(c)(3) discussion (C)(ii).

[70] R.C.M. 307(c)(3) discussion (C)(iv)(a).

[71] R.C.M. 307(c)(3) discussion.

[72] United States v. McKinney, 40 C.M.R. 1013 (A.F.B.R. 1969) (where accused not misled and protected from further prosecution).

[73] United States v. Brown, 16 C.M.R. 257 (C.M.A. 1954).

[74] United States v. Henry, 7 C.M.R. 680 (A.F.B.R. 1952); United States v. Little, 5 C.M.R. 382 (A.F.B.R. 1952).

[75] United States v. Krutsinger, 35 C.M.R. 207 (C.M.A. 1965); United States v. Merritt, 18 M.J. 618 (A.F.C.M.R. 1984). Allegations and proof must correspond. Where there is a variance the issue has a dual standard: (1) has the accused been misled to the extent that he or she is unable to prepare for trial, and (2) is the accused fully protected against another prosecution for the same offense. *See* United States v. Leslie, 9 M.J. 646 (N.C.M.R. 1980) (citing United States v. Lee, 1 M.J. 15 (C.M.A. 1975)) (where accused charged with possession of "hashish" but evidence showed the accused only possessed "marijuana," no fatal variance existed).

[76] United States v. Craig, 24 C.M.R. 28 (C.M.A. 1957); United States v. Hopf, 5 C.M.R. 12 (C.M.A. 1952); United States v. Meadow, 14 M.J. 1002 (A.C.M.R. 1982); United States v. McGary, 9 C.M.R. 377 (A.B.R. 1953), *petition denied,* 10 C.M.R. 159 (C.M.A. 1957).

[77] R.C.M. 307(c)(3) discussion (H)(iv).

[78] *Id.*; United States v. McCollum, 13 M.J. 127 (C.M.A. 1982) (where reasonable person would conclude articles could have some value, failure to allege specific value is not fatal); United States v. May, 14 C.M.R. 121 (C.M.A. 1954) (property of "some value"alleged in wrongful appropriation specification).

[79] United States v. McCollum, 13 M.J. 127 (C.M.A. 1982) (where reasonable person would conclude articles could have some value, failure to allege specific value is not fatal); United States v. May, 14 C.M.R. 121 (C.M.A. 1954) (property of "some value" alleged in wrongful appropriation specification).

[80] R.C.M. 307(c)(3) discussion (H)(iv); *see also* United States v. Wakeman, 25 M.J. 644 (A.C.M.R. 1987).

[81] R.C.M. 307(c)(3) discussion (D)(iv); United States v. Schuwacker, 7 C.M.R. 10 (C.M.A. 1953) (from on or about June 15 to on or about August 1); United States v. DeJonge, 16 M.J. 974 (A.F.C.M.R. 1983) (rapes alleged at "divers times").

[82] United States v. Means, 30 C.M.R. 290 (C.M.A. 1961). However, the accused may be punished only once for each specification, regardless of how many offenses are alleged over the period of time. *See also* United States v. Wakeman, 25 M.J. 644 (A.C.M.R. 1987); United States v. Poole, 24 M.J. 539 (A.C.M.R. 1987).

[83] R.C.M. 603(a).

[84] R.C.M. 603(d).

[85] R.C.M. 603(a).

[86] R.C.M. 603(b). United States v. Brown, 21 M.J. 995 (A.C.M.R. 1986) (convening authority amended charge to lesser included offense; new preferral not required).

[87] R.C.M. 603(c).

Chapter 13
Initiation and Disposition of Charges

13–1. Initiation of charges in general

Charges may be initiated after the report of an offense. Any person may report an offense.[1] Ordinarily, military authorities who receive a report, or who have knowledge of an offense, forward the report and any accompanying information to the immediate commander of the suspect.[2]

13–2. Disposition of charges in general

Charges can be disposed of at four levels within the military justice system: (1) by the unit level commander who exercises immediate article 15 jurisdiction over the accused;[3] (2) by the summary court-martial convening authority;[4] (3) by the special court-martial convening authority;[5] and (4) by the general court-martial convening authority.[6] Each commander or convening authority within the military justice chain has a range of available options and each commander exercises his or her own discretion in selecting one of the available options or making a recommendation to a higher level commander. As charges progress up the military justice chain, the convening authority has more options available. Any higher level convening authority has all the powers and alternatives of any lower level convening authority or commander. Thus, a summary court-martial convening authority has available all the options of the immediate unit commander and additional alternatives as a convening authority. Similarly, a special court-martial convening authority is empowered to convene a summary court-martial as well as a special court-martial.

13–3. Reporting an offense and initiating charges

A person initiates the military justice process by reporting an offense to law enforcement authorities or the immediate commander of the suspect.[7] Any person, civilian or military, may report an offense. Any person subject to the Uniform Code of Military Justice may prefer charges.[8] Thus, a military policeman having knowledge of an offense could prefer charges against an accused and forward the charges to the unit commander. Customarily, the military policeman instead makes a report to the unit commander, who becomes the formal accuser, that is, the person who swears out charges and signs the charge sheet.[9]

13–4. Factors for consideration by commanders

Each commander has discretion to dispose of offenses committed by members of that command.[10] Ordinarily, the unit commander exercising immediate article 15 jurisdiction over the accused initially determines the disposition of charges.[11] Superior commanders may withhold the authority to dispose of offenses in individual cases, types of cases, or generally, but they may not limit the discretion of subordinate commanders over cases in which they have not withheld authority.[12]

Offenses should be disposed of in a timely manner at the lowest level that can adjudge an appropriate punishment for the offense and the accused.[13] A commander must consider several factors when determining an appropriate disposition. Among the factors to be considered are the nature of the offense, any injury to victims, evidence of premeditation, an accused's past record and rehabilitative potential, and an appropriate potential sentence.[14] To determine the possible sentences for various offenses, commanders must be aware of the jurisdictional limitations of each level of court-martial (for instance, a special court-martial may not adjudge more than 6 months' confinement) and should consider the maximum permissible punishment for the offense listed in Part IV of the Manual for Courts-Martial, 1984.

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[1] R.C.M. 301(a).
[2] R.C.M. 301(b).
[3] R.C.M. 402.
[4] R.C.M. 403.
[5] R.C.M. 404.
[6] R.C.M. 407.
[7] R.C.M. 301.
[8] R.C.M. 307(a).
[9] Although the immediate unit commander is normally the formal accuser, superior commanders may not direct that the unit commander or any other person prefer charges to which that person is unable to make the required oath. R.C.M. 307(a) discussion.
[10] R.C.M. 306(a).
[11] *Id.*
[12] *Id.*
[13] R.C.M. 306(b).
[14] *Id.* at discussion.

13–5. The unit commander with immediate article 15 jurisdiction over the accused

a. Preliminary inquiry. A commander who receives a report of an offense concerning a member of that command must conduct or cause to be conducted a preliminary inquiry into the matter.[15] The purpose of the inquiry is to determine whether charges should be preferred against the accused or whether another disposition is appropriate. A commander may conduct the investigation personally or by using members of the command, but a commander should ordinarily request assistance from law enforcement personnel in serious or complex cases.[16] The inquiry should gather all reasonably available evidence, including evidence in aggravation, extenuation, and mitigation.[17] A commander must exercise personal discretion in deciding whether to prefer charges. A commander may prefer charges based solely on secondary information.[18] A preliminary inquiry may consist of an examination of an investigative report or other summary of available evidence.[19]

If a commander, during the course of an inquiry, decides to interrogate a suspect, the commander must give article 31(b)[20] and Miranda[21] warnings and obtain a voluntary waiver of rights prior to any questioning.[22]

b. Commander's options. First, if charges have been preferred by some other person subject to the UCMJ, a commander may dismiss the charges.[23] A decision by a subordinate commander to dismiss charges does not bar other disposition of the offenses by a superior commander.[24]

Second, a commander may decide to take no action against the accused.[25] A preliminary inquiry might indicate that an accused is innocent of any crime, that the only evidence of guilt is inadmissible, or a commander may decide not to prosecute for other valid reasons. A subordinate commander's decision to take no action on an offense is not binding on superior commanders.[26]

Third, a commander may decide to take administrative action.[27] A commander might determine that an accused committed an offense, but that the best disposition for the offense and the offender is to take administrative rather than punitive action. Administrative actions include letters of reprimand, counseling, extra military instruction, adverse efficiency reports, and administrative separation from the Army.

Fourth, a unit commander could decide that an accused's violation is a minor offense and nonjudicial punishment under article 15 is appropriate.[28] A unit commander may use article 15 to impose punishments upon soldiers of the command for minor offenses.[29] Generally, a minor offense is one for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by a general court- martial.[30] If a commander properly imposes article 15 punishment for a minor offense, trial by court-martial for that offense is barred.[31] If a commander imposes an article 15, but the offense is not minor, later trial by court-martial is not barred. An accused may show at the subsequent trial that an article 15 was imposed. If the accused does so, the prior article 15 punishment must be considered in determining an appropriate sentence.[32] A commander who decides that an offense is serious enough to warrant trial by court-martial should exercise the fifth available option, preferring and forwarding charges.[33] A commander who reaches this decision must complete and forward DD Form 458, Charge Sheet, with allied papers to the summary court-martial convening authority.[34] Whenever charges are forwarded to a superior

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[15] R.C.M. 303.
[16] *Id.* at discussion.
[17] *Id.* at discussion.
[18] *Id.* at discussion.
[19] *Id.* at discussion.
[20] UCMJ art 31(b).
[21] Miranda v. Arizona, 384 U.S. 436 (1966). In United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967), the Court of Military Appeals held that the *Miranda*warning requirements applied to the military. Although article 31(b) contains independent warning requirements for interrogators who are questioning a person charged with or suspected of an offense, those warnings do not include advice concerning the right to counsel.*Miranda* requires counsel warnings to be given when custodial interrogation occurs. In United States v. Jordan, 44 C.M.R. 44 (C.M.A. 1971), the Court of Military Appeals held that a company commander was required to give *Miranda* warnings to a soldier whom he had ordered him to report to his office and questioned him about an offense. Although the commander had given article 31 warnings, the court held that *Miranda*warnings were also required because the setting and questioning constituted custodial interrogation. *See also* United States v. Dowell, 10 M.J. 36 (C.M.A. 1980) (commander required to give rights warnings when informing accused of additional charges). Mil. R. Evid. 305(d)(1)(B) also requires counsel warnings when questioning occurs after imposition of any pretrial restraint or after referral of charges.
[22] Mil. R. Evid. 305(g)(1).
[23] R.C.M. 402(1).
[24] R.C.M. 401(c)(1).
[25] R.C.M. 306(c)(1).
[26] *Id.* at discussion.
[27] R.C.M. 306(c)(2).
[28] R.C.M. 306(c)(3). *See also* MCM, 1984, Part V; AR 27–10, chap. 3.
[29] MCM, 1984, Part V, para. 1*d*(1).
[30] MCM, 1984, Part V, para 1*e*.
[31] MCM, 1984, Part V, para. 1*e*; R.C.M. 907(b)(2)(D)(iv).
[32] MCM, 1984, Part V, para. 1*e*. *See also* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (accused must be given complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe).
[33] R.C.M. 307; R.C.M. 402(2).
[34] R.C.M. 307; AR 27–10, para. 5–14. *See also* MCM, 1984, app. 4 (sample charge sheet).

commander for disposition, the subordinate commander must make a personal recommendation as to disposition, including what level of court that commander believes is appropriate.[35]

To prepare the charge sheet, a commander must complete the first three sections. In Section I, the commander records an accused's personal data, including name, social security number, organization, pay grade, and pay. A commander also lists any pretrial restraint and when the pretrial restraint was imposed. Pretrial restraint information is particularly important because the imposition of any restraint begins certain speedy trial time periods with which the Government must comply.[36] Accurate completion of the restraint portion of Section I notifies the trial counsel that the case must be processed expeditiously. Section II contains the charges and specifications. For help in drafting accurate charges and specifications, a commander should consult relevant paragraphs on offenses in Part IV of the Manual and the unit legal specialist or the trial counsel. In Section III, entitled "Preferral," the commander signs the charge sheet and swears that he or she has personal knowledge or has investigated the charges and they are true to the best of the commander's knowledge and belief. A commander must swear the charge sheet before a commissioned officer authorized to administer oaths.[37] An accused may not be tried on unsworn charges over his or her objection.[38] A commander also signs Section III indicating the date on which an accused was informed of the charges and the name of the accuser.[39] Normally, a commander should prepare an original and four signed copies of the charge sheet.[40]

A commander forwards the charge sheet with a transmittal letter and recommendation for disposition to the summary court-martial convening authority.[41] The letter should include as enclosures: a summary of available evidence for each offense; evidence of an accused's previous convictions and nonjudicial punishments; a statement concerning whether an accused has been offered nonjudicial punishment for these offenses; and other relevant matters, including appropriate information concerning an accused's background and character of military service.[42] If practicable, the letter should list expected Government witnesses and their availability for trial.

13–6. The summary court-martial convening authority

Article 24 lists those authorized to convene summary courts-martial.[43] Summary court-martial is the lowest level trial court in the military. It is ordinarily used for the trial of minor offenses.[44] In many commands, the summary court-martial is primarily used for the trial of soldiers who have refused nonjudicial punishment and demanded trial.

a. Notation of the date of receipt of the charges. The summary court-martial convening authority's receipt of charges tolls the running of the statute of limitations.[45] A summary court-martial convening authority should have the date and hour of receipt entered on the second page of the Charge Sheet, DD Form 458, as soon as the charges are received.

b. Correction of the charge sheet. Before deciding which disposition option to exercise, a summary court-martial convening authority must review the charges to ensure they are free from errors in substance and form. A convening authority may personally make minor changes and need not return the charge sheet to the original accuser. A convening authority enters and initials the correction but may not change the charges to add a party, offense, or change other substantial matters.[46] Such major corrections result in unsworn charges. If a major correction is necessary, charges must be redrafted and an accuser must sign and swear the charges. A convening authority has a duty to review and correct the charges. Correcting charges does not disqualify a convening authority from convening a court-martial on the charges because the correction is made in an official capacity rather than out of personal interest.

c. Options. The summary court-martial convening authority has the same options as the immediate unit commander. That is, the summary court-martial convening authority may dismiss charges, take no action, take administrative action, or take any other action a unit commander could take.[47] A summary court-martial convening authority can dispose of offenses by nonjudicial punishment under article 15. Although this is the same option that a unit commander has, a summary court-martial convening authority's punishment authority is usually greater because he or she is likely a field grade, rather than a company grade officer.[48]

A summary court-martial convening authority may decide to return the charges to a unit commander either for

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[35] R.C.M. 401(c)(2)(A).
[36] See R.C.M. 707. *See also infra* chap. 15.
[37] R.C.M. 307(b)(1). *See also* United States v. Gameroz, 3 C.M.R. 273 (A.B.R. 1952) (nonprejudicial error for warrant officer to administer oath to accuser).
[38] United States v. May, 2 C.M.R. 80 (C.M.A. 1952) (failure to swear to charges or swearing before an officer not authorized to administer oaths constitutes nonprejudicial error that is waived by lack of timely objection).
[39] R.C.M. 308.
[40] AR 27–10, para. 5–14.
[41] R.C.M.401(c)(2)(A).
[42] *Id.* at discussion.
[43] UCMJ art. 24.
[44] R.C.M. 1301(b). *See generally* MCM, 1984, Part II, chap. XIII.
[45] R.C.M. 403(a) discussion.
[46] R.C.M. 603.
[47] R.C.M. 306(c); R.C.M. 403(b).
[48] UCMJ art. 15; MCM, 1984, Part V, para. 5b(2)(B).

further investigation or for disposition at that level.[49] If a convening authority returns charges to a unit commander for disposition, the convening authority may not direct any particular disposition.[50]

A summary court-martial convening authority may also direct a pretrial investigation under article 32[51] and R.C.M. 405. This pretrial investigation, discussed in detail in chapter 16, is required before any charge can be referred to trial by general court-martial. Although a summary court-martial convening authority is empowered to direct this investigation, a special court-martial convening authority often directs the article 32 investigation.

The option available to a summary court-martial convening authority that was not available to the immediate unit commander is the summary court-martial. A summary court-martial consists of a single officer who acts as military judge, court, and counsel.[52] An accused has the option to hire civilian defense counsel at a summary court-martial, but is not entitled to detailed military counsel.[53] The summary court may not try capital offenses, may not try officers, and may not try any soldier over the soldier's objection.[54] That is, a soldier offered trial by summary court-martial may refuse trial at that level.

The maximum authorized punishment at a summary court-martial depends on the accused's pay grade. For enlisted accused in grades E-1 through E-4, the maximum punishment includes confinement for 1 month, reduction to E-1, and forfeiture of two-thirds pay for 1 month.[55] For those in grades E-5 through E-9, the maximum punishment includes reduction of one grade and forfeiture of two-thirds pay for 1 month.[56] A summary court-martial may not adjudge confinement for those above the grade of E-4.

A summary court-martial convening authority refers charges to trial by an indorsement on page two of the charge sheet.[57] Even if the case was previously referred to a higher court and then withdrawn, the summary court-martial convening authority must refer the case to a summary court-martial by indorsement on the charge sheet.

Trial by summary court-martial is conducted according to the procedure contained in R.C.M. 1304 and DA Pamphlet 27-7.[58] The pamphlet provides a detailed script for the summary court officer to use for the proceeding.

At the conclusion of a trial by summary court-martial, the record of trial is forwarded to the convening authority for review.[59] The accused may submit written matters to the convening authority for consideration prior to action on the case, in accordance with R.C.M. 1306.[60] Review by a judge advocate after the convening authority's action is in accordance with R.C.M. 1112.[61]

A summary court-martial convening authority's final option is to forward the charges to a superior convening authority.[62] A summary court-martial convening authority can forward charges by indorsing a unit commander's transmittal letter and including a personal recommendation for disposition, to include the level of court the summary court-martial convening authority believes appropriate. The recommendation must be signed by the summary court-martial convening authority.[63]

13–7. The special court-martial convening authority

The next officer in the military justice chain is the special court-martial convening authority. Article 23 lists those authorized to convene special courts- martial.[64] A special court-martial convening authority has the same options as the commander and summary court-martial convening authority; that is, he or she may dismiss charges, take no action, impose article 15, or convene a summary court-martial.[65]

A special court-martial convening authority is also authorized to convene the military's intermediate level trial court, the special court-martial.[66] This court cannot try capital offenses, but it can try both enlisted soldiers and officers.[67] It has more sentencing authority than the summary court-martial, but less than the general court-martial. A special court-martial may not confine an officer.[68] Otherwise, the maximum authorized punishment includes confinement for 6

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[49] R.C.M. 403(b)(2).
[50] R.C.M. 401(c)(2)(B).
[51] R.C.M. 403(b)(5).
[52] R.C.M. 1301(a).
[53] R.C.M. 1301(e). In Middendorf v. Henry, 425 U.S. 25 (1976), the Supreme Court held that the sixth amendment right to counsel did not apply to summary courts-martial, despite the possibility of incarceration. The Court said that the summary court was more a minor disciplinary proceeding than a trial. The Court was influenced by the fact that a soldier had the right to refuse trial at this level.
[54] R.C.M. 1301c); R.C.M. 1303.
[55] R.C.M. 1301(d)(1).
[56] R.C.M. 1301(d)(2).
[57] R.C.M. 601(e)(1); R.C.M. 1302(c).
[58] DA Pam 27–7 (15 Apr. 1985).
[59] R.C.M. 1305(e)(2); R.C.M. 1306. *See also* MCM, 1984, appendix 15 (sample record of trial by summary court-martial).
[60] R.C.M. 1306(a). *See also*R.C.M. 1105.
[61] RCM 1306(c); RCM 1112(a)(3).
[62] R.C.M. 403(b)(3).
[63] R.C.M. 401(c)(2)(A).
[64] UCMJ art. 23.
[65] R.C.M. 306(c); R.C.M. 404.
[66] R.C.M. 404(d).
[67] R.C.M. 201(f)(2)(A), (C).
[68] R.C.M. 1003(c)(2)(A)(ii).

months, forfeiture of two-thirds pay per month for 6 months, and reduction to E-1.[69]

The membership of a special court-martial may take any one of three different forms. It may consist of: (1) at least three members; (2) a military judge and at least three members; or (3) a military judge alone if the accused requests.[70] Army special courts- martial are not presently tried without military judges, so the first option is never used.[71] If the accused requests orally or in writing that the court have enlisted membership, at least one-third of the court members must be enlisted soldiers.[72]

The military judge of a special court-martial is detailed by the chief trial judge or a designee, normally the general court-martial judge.[73]

Trial and defense counsel are detailed for each special court-martial. The trial counsel need not be a lawyer, but an accused has the right to be represented at trial by counsel who is a lawyer and a member of the Judge Advocate General's Corps.[74] As with all levels of court, an accused has the option to retain civilian defense counsel at no expense to the United States. As a matter of practice, both trial counsel and defense counsel at special courts-martial are qualified lawyers. The administrative task of making counsel available is normally handled through the offices of the responsible staff judge advocate and the Trial Defense Service.

A special court-martial may try anyone subject to the UCMJ. The jurisdiction of a special court-martial extends to any offense made punishable under the Uniform Code of Military Justice for which the maximum punishment is less than death.[75]

A special court-martial convening authority refers charges to trial by special court-martial through an indorsement on the charge sheet, similar to the summary courts-martial referral described in paragraph 13- 6c.[76] The record of trial at a special court-martial consists of a summarized transcript of the proceedings.[77] Court reporters are usually not detailed to these courts.[78]

A special court-martial convening authority is ordinarily the commander who directs a pretrial investigation under article 32 and R.C.M. 405. This investigation is directed when the charges are serious enough that they may be referred to a general court-martial. If, after reviewing the circumstances of a case and any report of investigation, a special court-martial convening authority believes that disposition at a higher level is warranted, a special court-martial convening authority endorses the transmittal letter and forwards the charges to the general court-martial convening authority. A forwarding indorsement must include special court-martial convening authority's personal recommendation concerning disposition of the charges, including a recommendation on what level of court should try the charges.[79]

13–8. The general court-martial convening authority

Article 22 lists those authorized to convene general courts-martial.[80] A general court-martial convening authority has all the disposition options available to subordinate commanders and has two additional options by virtue of the position.

The first additional option is to convene a special court-martial empowered to adjudge a bad conduct discharge (BCD), informally known as a "BCD special court-martial." The BCD special court-martial is basically the same type forum as the special court-martial discussed above (often referred to informally as a "regular" special court-martial) except the BCD special court-martial has the additional authority to adjudge a BCD as punishment. Before a BCD can be imposed at a special court-martial, certain requirements must be met. A verbatim record must be made; qualified defense counsel and a military judge must be detailed; and the court must have been convened by a general court-martial convening authority.[81]

The BCD special court-martial provides a forum for those cases in which a convening authority deems a punitive discharge warranted, but does not believe that the charges are serious enough to deserve confinement in excess of 6 months. Use of BCD special courts saves time and resources. In cases in which a punitive discharge may be warranted and the case is referred at this level rather than to a general court-martial, the time and effort that would have been expended at an article 32 investigation are saved. Additionally, a BCD special court-martial does not require a written pretrial advice as does a general court-martial.[82] Because commissioned and warrant officers cannot receive bad conduct discharges, a BCD special court-martial is not appropriate for cases involving officer accused.

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[69] R.C.M. 201(f)(2)(B).
[70] R.C.M. 501(a)(2).
[71] AR 27–10, para. 5–3*a* provides that military judges will be detailed to special courts-martial whenever possible.
[72] R.C.M. 503(a)(2).
[73] AR 27–10, para. 5–3*a.*
[74] AR 27–10, para. 5–5*a.*
[75] R.C.M. 201(f)(2).
[76] R.C.M. 601(e)(1).
[77] R.C.M. 1103(c)(2); AR 27–10, para. 5–31.
[78] AR 27–10, para. 5–11*a.*
[79] R.C.M. 401(c)(2)(A).
[80] UCMJ art. 22.
[81] R.C.M. 201(f)(2)(B)(ii); AR 27–10, para. 5–24.
[82] AR 27–10 at 5–24*d.*

The final option available to a general court-martial convening authority is the military's highest level trial court, the general court-martial. This court tries military personnel for the most serious crimes. The punishment authority of the general court-martial is limited by the maximum authorized punishment for each offense found in Part IV of the Manual and compiled in Appendix 12 of the Manual.[83] The death penalty may be adjudged at a general court-martial for certain offenses provided proper procedures for capital cases are followed.[84]

Before any charge is referred to trial by general court-martial, an article 32 investigation must be conducted.[85] The purpose of the investigation is to inquire into the truth of the matters set forth in the charges, to determine the correctness of the form of the charges, and to secure information upon which to determine a proper disposition of the case.[86] The article 32 investigating officer's recommendation, however, is not binding on any convening authority. In addition, before a general court-martial convening authority refers a case to general court-martial, a staff judge advocate must provide a formal written pretrial advice. These two prerequisites to a general court-martial are discussed in detail in chapter 16.

A general court-martial may take either of two forms. It may consist of a military judge and not less than five members, or solely of a military judge if, before the court is assembled, an accused requests trial by military judge alone.[87] An accused may elect trial by judge alone in all cases except those referred as capital.[88] In all cases a military judge must be detailed to the court.[89] In a trial by a court with members, a minimum of five members must be present.[90] An enlisted accused is entitled to at least one-third enlisted membership upon request.[91]

Trial and defense counsel are also detailed for each general court-martial. Both the detailed trial counsel and defense counsel must be lawyers certified by The Judge Advocate General.[92]

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[83] R.C.M. 201(f)(1)(A)(ii).
[84] R.C.M. 201(f)(1)(A)(ii); R.C.M. 1004.
[85] UCMJ, art. 32 R.C.M. 405 R.C.M. 601(d)(2)(A).
[86] R.C.M. 405(a) discussion. *See also infra*chap. 16.
[87] R.C.M. 501(a)(1).
[88] R.C.M. 201(f)(1)(C).
[89] R.C.M. 501(a).
[90] R.C.M. 501(a)(1)(A).
[91] R.C.M. 503(a)(2).
[92] R.C.M. 502(d)(1).

Chapter 14
Pretrial Restraint

14–1. Pretrial restraint, in general

a. Introduction. Upon receiving a report of an offense, the commander must decide what to do with the soldier pending trial or other disposition of charges. Should the soldier continue to perform regular military duties with no change in status? Should there be some limits placed on the soldier's freedom? Should the soldier be totally removed from the unit and placed in pretrial confinement pending trial? The answers to these questions depend on the offense and the soldier involved and are governed by specific rules on pretrial restraint. Because of the inherently restrictive nature of military life and because the military has no system of bail, the procedures and rules governing pretrial restraint are carefully delineated in the Manual and case law.

Restraint is particularly significant because pretrial restraint implicates speedy trial rules.[1] Because there is no bail system, the courts and the President, through the Manual, have fashioned strict speedy trial rules that require soldiers accused of crimes to be brought to trial quickly.[2] Certain forms of pretrial restraint also are taken into consideration on sentence, including day-for-day sentence credit for pretrial confinement and additional credit for the Government's failure to abide by the rules concerning when and how to impose restraint before trial.[3]

b. Pretrial restraint generally. Pretrial restraint is defined as "moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses."[4] Pretrial restraint includes pretrial confinement, the most severe form of restraint, and the general rules pertaining to restraint apply equally to pretrial confinement.

c. Types of pretrial restraint. Rule for Courts- Martial 304 lists four types of restraint: conditions on liberty; restriction in lieu of arrest; arrest; and confinement.

(1) *Conditions on liberty.* "Conditions on liberty" is a type of restraint listed and defined for the first time in the 1984 Manual. This restraint is defined as "orders directing a person to do or refrain from doing specified acts," and includes orders to report periodically to a specified person; orders not to go to a certain place (such as the scene of the crime); or orders to stay away from certain persons (such as the victim, potential witnesses, or co- accused).[5] As originally promulgated, any of these orders was a form of pretrial restraint that started the running of the speedy trial period. Effective 1 March 1986, however, the Manual was amended to eliminate conditions on liberty as a trigger for speedy trial provisions for "conditions" imposed after that date.[6] Unlike other forms of restraint, these orders are often not perceived to be a restriction on the pretrial liberty of an accused.

(2) *Restriction.* Restriction in lieu of arrest, commonly called restriction, is the restraint of a soldier by oral or written orders directing the soldier to remain within certain specified limits which are set by the person ordering the restriction.[7] Soldiers placed on restriction usually continue to perform full military duties. This limiting of a soldier's freedom of movement to a particular area or areas is frequently expressed in terms such as"restriction to barracks, dining hall, chapel, and place of duty." The withdrawal of pass privileges, while it may limit the soldier's movement to the confines of a military installation, has not normally been considered restriction.[8]

Restriction may also be imposed as punishment by a court-martial or under article 15. It may not be imposed as a form of unofficial punishment pending the disposition of offenses. Only a violation of a legally imposed restriction may be punished under article 134 as the offense of breach of restriction.[9]

(3) *Arrest.* Arrest is defined in the military justice system as restraint by oral or written orders directing a soldier to remain within specified limits.[10] This should not be confused with taking a person into custody, which is referred to as"apprehension" in the military.[11] Arrest is similar to restriction except that arrest is a more severe deprivation of

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[1] R.C.M. 707 states that *all* accused must be brought to trial within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)–(4) or entry on active duty under R.C.M. 204, whichever is earlier.

[2] In addition to R.C.M. 707 promulgated by the President in the Manual for Courts-Martial, the Court of Military Appeals devised specific rules concerning soldiers in pretrial confinement in United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971). The court has also held that the Supreme Court's enunciated rules for speedy trial under the sixth amendment in Barker v. Wingo, 407 U.S. 514 (1972) apply to the military. United States v. Johnson, 17 M.J. 255 (C.M.A. 1984). The *Barker* analysis includes evaluating prejudice to the defendant caused by excessive pretrial incarceration. The three rules operate together to protect the speedy trial rights of the accused soldier. United States v. McCallister, 27 M.J. 138 (C.M.A. 1988).

[3] *See infra* para. 14–3, sentence credit.

[4] R.C.M. 304(a).

[5] R.C.M. 304(a)(1) and discussion.

[6] Exec. Order No. 12,550, 3 C.F.R. 191 (1986 compilation), *reprinted in* 1986 U.S. Code Cong. & Admin. News B15. Conditions on liberty, however, continue as a defined type of restraint. Commanders and counsel should be alert, however, that a court might construe restraint intended as a "condition on liberty"as "restriction" thus triggering the 120-day speedy trial time of R.C.M. 707.

[7] R.C.M. 304(a)(2).

[8] The lack of pass privileges will usually have no impact on the speedy trial rules. United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), *petition denied*, 28 M.J. 230 (C.M.A. 1989). *But see* United States v. Camacho, 30 M.J. 644 (N.M.C.M.R. 1990) (restriction to limits of base triggered 120-day speedy trial rule; no analysis provided). United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (revocation of pass privileges considered the equivalent of restriction when all other members of the unit were granted pass as a matter of course).

[9] United States v. Haynes, 35 C.M.R. 94 (C.M.A. 1964).

[10] R.C.M. 304(a)(3).

[11] R.C.M. 302.

liberty in that a person in arrest is normally suspended from the performance of full military duties and the limits of arrest are usually narrower than those of restriction. Individuals in arrest may not exercise command, bear arms, exceed the limits of their arrest, perform guard duty, or perform other duties inconsistent with the status of arrest.[12] The status automatically ends when the person who ordered the arrest or a superior authority places the arrestee on duty inconsistent with the status of arrest.[13] Thus, if an officer is placed in arrest but is then permitted to exercise command by the officer who ordered the arrest, the status of arrest is terminated. Persons in arrest may do ordinary cleaning and policing and may take part in routine training and duties.[14]

(4) *Pretrial confinement.* Pretrial confinement is physical restraint depriving a person of freedom pending disposition of offenses.[15] Confinement is normally served in an authorized confinement facility and is governed by specific rules that are discussed in detail below.

d. Administrative restraint. R.C.M. 304(h) defines"administrative restraint" as "limitations … imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons." This subsection makes it clear that R.C.M. 304 does not limit a commander's ability to impose "administrative restraint." If restraint is "administrative", as opposed to the types of restraint listed in R.C.M. 304(a), it does not implicate the speedy trial rules.[16] The Court of Military Appeals has applied a "primary purpose" test to its analysis of the types of restraint.[17] If the commander's primary purpose for imposing restraint is related to an upcoming court-martial, the restraint is not administrative and the speedy trial rules of R.C.M. 707 apply. If the commander's primary purpose for imposing restraint is administrative or operational, the restraint is "administrative" under R.C.M. 304(h) and the speedy trial rules are not implicated. Judge advocates should note that the court's determination of the issue focuses on the commander's primary purpose, not the commander's sole purpose. This issue is a factual one that cannot be resolved by the label that the commander gives to the restraint.[18]

e. Who may order pretrial restraint. Commissioned officers and warrant officers may be ordered restrained only by their commanding officers.[19] Likewise, only commanding officers may order pretrial restraint for civilians who are subject to court-martial.[20] The authority to restrain civilians and officers may not be delegated.[21] Any commissioned officer may order the restraint of an enlisted person, and the authority to order restraint of enlisted persons of a command may be delegated by the commanding officer to warrant officers and noncommissioned officers.[22] As with the authority to dispose of charges, superior competent authority may withhold from subordinates the power to order pretrial restraint.[23] For example, a battalion commander could withhold from company commanders the authority to order restraint of any person. In many commands, the authority to order restraint of officers is withheld by the general court-martial convening authority.

f. When pretrial restraint may be imposed. The decision to impose pretrial restraint, and what type to impose, must be made on a case-by-case basis. Pretrial restraint is never required by law and the type of restraint selected, if any, should be only that sufficient to ensure the presence of the accused at trial or to prevent future serious misconduct.[24] In addition to determining that the specific restraint imposed is required by the circumstances, the person ordering restraint must have a reasonable belief that the person to be restrained has committed an offense triable by court-martial.[25] As AR 27-10 states,"An accused pending charges should ordinarily continue the performance of normal duties within the accused's organization while awaiting trial."[26]

g. Procedures for ordering pretrial restraint. Except for pretrial confinement, pretrial restraint is imposed by notifying the soldier of the restraint, including its terms or limits. The notification can be oral or written and may be delivered to enlisted soldiers by the person who ordered restraint or another person subject to the UCMJ.[27] An officer or civilian must be personally notified of restraint by the officer who ordered it or by another commissioned officer.[28] Pretrial confinement is imposed by written orders (typically, a confinement order) and delivery of the soldier to a proper confinement facility.[29] A soldier who is placed under restraint must be informed of the offense that is the basis

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[12] R.C.M. 304(a)(3) and discussion.
[13] R.C.M. 304(a)(3).
[14] *Id.*
[15] R.C.M. 304(a)(4).
[16] *See infra* chap. 15, Speedy Trial.
[17] United States v. Bradford, 25 M.J. 181 (C.M.A. 1987).
[18] *Compare* United States v. Bradford, *supra* note 17 (liberty risk program held administrative restraint) with United States v. Wilkes, 27 M.J. 571 (N.M.C.M.R. 1988) (liberty risk program held not administrative restraint).
[19] UCMJ art. 9(c); R.C.M. 304(b)(1).
[20] *Id.*
[21] *Id.*; R.C.M. 304(b)(3).
[22] UCMJ art. 9(b); R.C.M. 304(b)(2),(3).
[23] R.C.M. 304(b)(4).
[24] UCMJ arts. 9(d), 10, 13; R.C.M. 304(c) and discussion. *See also* United States v. Haynes, 35 C.M.R. 94 (C.M.A. 1964).
[25] R.C.M. 304(c).
[26] AR 27–10, para. 5–13*a.*
[27] R.C.M. 304(d).
[28] *Id.*
[29] *Id. See also*AR 27–10, para. 5–13*c.*

for the restraint.[30] Except for pretrial confinement, pretrial restraint does not require notice to the soldier of the right to civilian counsel or assignment of military counsel.[31]

h. Punishment prohibited. Article 13 states that persons being held for trial may not be punished before trial.[32] Pretrial restraint must serve a legitimate purpose such as ensuring the prisoner's presence at trial or preventing foreseeable future serious misconduct. Pretrial restraint is not punishment and persons in pretrial restraint may not be punished for the offense which is the basis of their restraint. They may not be forced to undergo punitive duty hours or training, punitive labor, or to wear special uniforms prescribed for post-trial prisoners.[33] When pretrial restraint is imposed as punishment in violation of article 13, the soldier will receive credit toward any subsequent court-martial sentence.[34]

i. Termination of pretrial restraint. Soldiers may be released from pretrial restraint by officials authorized to impose the restraint.[35] Special rules regarding release from pretrial confinement are discussed below. Otherwise, pretrial restraint ends when a sentence is adjudged, the accused is acquitted, or charges are dismissed.[36]

14–2. Pretrial confinement

a. Pretrial confinement generally. As the most severe form of pretrial restraint, pretrial confinement is controlled by a specific set of rules and procedures. Pretrial confinement implicates specific speedy trial rules, requires credit against the adjudged sentence for both legal and illegal confinement, and implicates constitutional considerations because of the deprivation of liberty involved.

The Court of Military Appeals has decided several cases dealing with procedures for imposing pretrial confinement and when such restraint is appropriate. In addition, the 1984 Manual for Courts-Martial has formalized the procedures and summarized the requirements in R.C.M. 305, which also makes several significant changes in the law concerning pretrial confinement.

Commanders make the initial decision to confine, but they should obtain all essential facts in cases in which pretrial confinement is being considered and consult with a judge advocate prior to ordering a soldier into pretrial confinement since the decision to confine will be reviewed to determine if confinement is legally supported.[37] Whenever a soldier is confined, the staff judge advocate or the designee must be notified.[38]

In certain circumstances, pretrial confinement is not appropriate. For example, pretrial confinement is not ordinarily authorized when disposition of the charges by summary court-martial is contemplated.[39] Pretrial confinement also is not authorized for individuals pending administrative discharge when no charges are awaiting disposition.[40]

The regulatory requirement that pretrial confinement in excess of 30 days be personally approved by the general court-martial convening authority has been rescinded.[41]

b. Decision and standard for confinement. The initial confinement decision is normally made by the accused's unit commander. The person ordering confinement must have a reasonable belief that the accused has committed an offense punishable by court-martial; that lesser forms of restraint would be inadequate; and that confinement is necessary because: (1) the accused is a flight risk; or (2) it is foreseeable that the accused will engage in serious criminal misconduct.[42]

The commander must consider lesser forms of restraint and conclude that conditions on liberty, restriction, or arrest would be inadequate.[43] There is no requirement, however, to actually try a lesser form of restraint and have it prove inadequate.[44]

"Serious criminal misconduct" includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other acts 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.[45] The definition and

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[30] R.C.M. 304(e). Other notification requirements for soldiers placed in pretrial confinement are found in R.C.M. 305(e). *See infra* para. 14–2c.*See also* UCMJ art. 10, requiring that an accused placed in arrest or confinement prior to trial be immediately informed of the "specific wrong of which he is accused." Failure to give the required notice does not generally entitle the accused to relief, absent a showing of prejudice. R.C.M. 304(e) analysis.

[31] R.C.M. 304(e) discussion; R.C.M. 305(e).

[32] UCMJ art. 13.

[33] R.C.M. 304(f). *See also*United States v. Davidson, 14 M.J. 81 (C.M.A. 1982).

[34] *See infra* para. 14–3c.

[35] R.C.M. 304(g).

[36] *Id.*

[37] R.C.M. 305(h)(2)(A) and analysis.

[38] AR 27–10, para. 5–13*a.*

[39] UCMJ art. 10.

[40] This follows from the provisions of UCMJ art. 10 that state that a prisoner placed into pretrial confinement must be informed of the specific wrong of which he is accused and immediate steps taken to try or release him. If the soldier is only pending an administrative discharge with no criminal charges pending, pretrial confinement would violate art. 10.

[41] Interim Change IO7, AR 190–47, para. 4–4c (15 Feb. 1987); rescission continued in Interim Change IO8, 15 Feb. 1988.

[42] R.C.M. 305(h)(2)(B).

[43] *Id.* at discussion. *See also* United States v. Otero, 5 M.J. 781 (A.C.M.R. 1978). United States v. Sharrock, 30 M.J. 1003 (A.F.C.M.R. 1990) (commander's failure to consider less severe forms of restraint was one factor that rendered pretrial confinement improper).

[44] R.C.M. 305(h)(2)(B) discussion and analysis.

[45] R.C.M. 305(h)(2)(B).

criteria of R.C.M. 305 are not intended to allow pretrial confinement for the "pain in the neck" soldier whose behavior is merely an irritant to the commander, but R.C.M. 305 does cover the "quitter" who seriously affects morale and discipline in the unit by disobeying orders or refusing to perform duties.[46] The rule slightly expands the bases for confinement found by the Court of Military Appeals in United States v. Heard,[47] but essentially follows the ideas set down in Heard that pretrial confinement is proper only to ensure the presence of the accused at trial or to protect the safety of the community. Other considerations for placing soldiers in pretrial confinement, including concern for the safety of the accused, are by themselves improper.[48]

The prevention of future serious misconduct as a basis for pretrial confinement in R.C.M. 305 clearly incorporates the concept of preventive detention as a basis for pretrial confinement. In United States v. Salerno the Supreme Court held that under the procedures of the Bail Reform Act of 1984, preventive detention does not violate due process or the excessive bail clause of the Constitution.[49]

The commander who is considering pretrial confinement should take several factors into account. These include the nature and circumstances of the offenses; any extenuating circumstances; the weight of evidence against the accused; the accused's ties to the local community, including family, other employment, and local residence; the character and mental condition of the accused; any past misconduct; the accused's past record of appearance at or flight from other similar proceedings; and the likelihood of the accused's committing serious criminal acts if allowed to remain free or if only lesser restraint is imposed.[50] As the commander is in a unique position to assess the predictive aspects of the initial confinement decision, including the accused's likely behavior and the impact of release or confinement on mission performance, the initial decision is left to the commander.[51] In addition, the commander's written assessment of these factors serves as a partial basis for later review of the propriety of confinement by a neutral and detached official.

c. Confinement procedure. An accused who is to be confined must be advised of the nature of the offenses for which confined, the review procedures for confinement, the right to remain silent and that any statements made may be used against him or her, and the right to counsel.[52] The right to counsel includes the right to retain civilian counsel at no expense to the Government and the right to request assignment of military counsel.[53] There is no right to individually requested military counsel at this pretrial stage. This right to counsel pertains solely to counsel for the pretrial confinement stage of the proceedings, that is, to protect the accused's interest in the pretrial confinement determination and review by the neutral and detached official.[54] Counsel appointed at this stage is not required by law to represent the accused through trial.[55] Continuing representation, however, is the usual practice in many jurisdictions. Whenever a soldier is to be ordered into pretrial confinement, the staff judge advocate requests an appointed counsel from the Trial Defense Service.[56] Army Regulation 27-10 expresses a preference for consultation between the accused and counsel prior to incarceration. However, if a Trial Defense Service counsel is not available within 72 hours of the accused's entry into pretrial confinement, the staff judge advocate must appoint other legally qualified counsel.[57] The

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[46] *Id.* at analysis. United States v. Rosato, 29 M.J. 1052 (A.F.C.M.R. 1990), *rev'd in part*, 32 M.J. 93 (C.M.A. 1991) (Disobedient and disrespectful airman properly placed in pretrial confinement to protect student squadron's morale and discipline.).

[47] 3 M.J. 14 (C.M.A. 1977). In *Heard,*the court addressed at length the question of the propriety of pretrial confinement. Much of the Manual rule is based on the court's decision and subsequent interpretations of it. The court said that the seriousness of the offense does not per se justify confining an accused and that the only considerations justifying confinement were assuring presence at trial and protecting the safety of the community. The drafters of the 1984 Manual have expanded this language slightly by defining more broadly what is included in "safety of the community." R.C.M. 305(h)(2)(B) analysis.

[48] Berta v. United States, 9 M.J. 390 (C.M.A. 1980).

[49] 481 U.S. 739 (1987)."In our society liberty is the norm, and detention prior to trial… is the carefully limited exception." *Id.* at 755."The Bail Reform Act of 1984 allows a federal court to detain an arrestee pending trial if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions ' will reasonably assure… the safety of any other person and the community. ' " *Id.* at 741. Held: The Act is not facially invalid under due process or the excessive bail clause.

See also United States v. Lavalla, 24 M.J. 593 (A.F.C.M.R. 1987), *petition denied*, 26 M.J. 39 (C.M.A. 1988) (The standard for pretrial confinement was met when the pretrial confinement reviewing officer found the accused had the potential for harming others or engaging in further serious misconduct if released (though concern the accused might harm himself was also in evidence)); United States v. Rios, 24 M.J. 809 (A.F.C.M.R. 1987) (magistrate did not abuse his discretion in approving pretrial confinement considering these factors—Rios fled and hid for two nights and missed a half-day's duty before turning himself in; the robbery was planned ahead; the victim was viciously attacked, and Rios' lies to the police indicated his unreliability, though his commander also stated the incident was out of character for Rios;"seriousness of the offense alone is not sufficient justification for pretrial confinement," but the"circumstances surrounding" a serious offense may support confinement); United States v. Moore, 32 M.J. 56 (C.M.A. 1991) (Accused who violated order not to communicate with his wife and daughter was properly placed in pretrial confinement. Obstruction of justice by suborning perjury of a witness is serious criminal misconduct that warrants pretrial confinement to protect the truth-seeking of a trial. Foreseeable that accused would again attempt to influence his daughter's testimony.). United States v. Williams, 29 M.J. 570 (A.F.C.M.R. 1989), *petition denied,* 30 M.J. 106 (C.M.A. 1990) (Continued commission of crimes, along with other factors, justified pretrial confinement.). Useful evidence of the potential for future misconduct also includes threats of future acts by the confinee and psychiatric testimony.

[50] R.C.M. 305(h)(2)(B) discussion.

[51] R.C.M. 305(h) analysis.

[52] R.C.M. 305(e).

[53] R.C.M. 305(f).

[54] *Id.*

[55] *Id.* at analysis. The rule is designed to recognize that counsel appointed at the pretrial confinement stage cannot always continue to represent the accused because of the location of some confinement facilities and the limits on legal resources, although continued representation may be desirable in many circumstances.

[56] AR 27–10, para. 5–13*b*.

[57] *Id.*

Manual rule is intentionally silent concerning who informs the accused of these rights prior to pretrial confinement to allow flexibility.[58]

Failure to comply with the requirement for advising a confinee does not automatically trigger a sentence credit remedy, but violations of the requirement are tested for specific prejudice.[59] Failure to provide appointed counsel after a request by the accused, however, does require administrative credit as discussed below.[60]

The accused's commander must decide on the validity of pretrial confinement within 72 hours after it is imposed.[61] Because the commander normally makes the initial confinement decision, this review ordinarily is done at the time pretrial confinement is ordered. If the commander who orders confinement takes the proper steps at the time of confinement, there is no requirement for a review by the same commander"[n]ot later than seventy-two hours" later. The Manual rule does not intend to include a "cooling off period" after which the commander must reevaluate the confinement decision. The 72-hour requirement applies to confinement ordered by someone other than the immediate commander. In that circumstance, the immediate commander must decide on the validity of the confinement within the prescribed time. This allows for a reasonably prompt determination while taking into consideration times in which the commander may not be immediately available.

In deciding whether confinement ordered by someone else will continue, the commander makes the same determination required for any type of pretrial restraint: that less severe restraint would be inadequate and that the accused is either a flight risk or will foreseeably engage in serious criminal misconduct.[62] The accused's commander must prepare and forward to the magistrate a written memorandum, DA Form 5112-R (Checklist for Pretrial Confinement), detailing the reasons for the conclusion that the requirements for pretrial confinement are met.[63] The memorandum must be prepared by the seventh day of pretrial confinement so that it is available for the military magistrate's review.[64]

d. Review by the neutral and detached officer. R.C.M. 305(i) provides specific procedures for review of confinement. The review of the legality of confinement must be completed within 7 days by a neutral and detached official.[65] In counting the 7 days, confinement of a soldier en route to his or her home station must be counted.[66] A probable cause review of a warrantless arrest may also be required within 48 hours if not previously conducted.[67] Although the Supreme Court has held that reviewing officials in similar circumstances need not be legally trained,[68] the Army requires that the pretrial confinement review be done by a military magistrate who is a qualified judge advocate.[69] The time period for review can be extended to 10 days by the magistrate, for good cause.[70] The Government, however, must request the extension before the 7 day period has expired, and must justify the extension.[71]

The pretrial confinement review is designed to be similar to what the Supreme Court required for parole revocation hearings,[72] with the additional feature that the accused is always provided the opportunity to obtain counsel. The magistrate reviews the commander's memorandum and any additional matters, including any submitted by the ac-

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[58] R.C.M. 305(e) analysis.

[59] *Id. See also*R.C.M. 305(k).

[60] R.C.M. 305(k). Violation of this provision requires administrative credit because the assignment of counsel is important to insuring the fairness of the pretrial confinement process. *See* United States v. Chapman, 26 M.J. 515 (A.C.M.R. 1988), *petition denied*, 27 M.J. 404 (C.M.A. 1988).

[61] R.C.M. 305(h)(2)(A).

[62] R.C.M. 305(h)(2)(B).

[63] R.C.M. 305(h)(2)(C); AR 27–10, para. 5–13*c*, 9–5*b*(2).

[64] United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988). *But see* United States v. Williams, 29 M.J. 570 (A.F.C.M.R. 1989), *petition denied,* 30 M.J. 106 (C.M.A. 1990) (R.C.M. 305(h) read to require memorandum within 72 hours).

[65] R.C.M. 305(i)(1).*See also* United States v. Lynch, 13 M.J. 394 (C.M.A. 1982).

[66] United States v. DeLoatch, 25 M.J. 718 (A.C.M.R. 1987) (an AWOL soldier was confined for 1 day in the D-cell at Fort Di x, transferred for 6 days to the Philadelphia Navy Brig, and then returned to his unit and confined at Hunter AAF, Georgia, with magistrate review coming on the second day of confinement at Hunter AAF, the ninth day of confinement counting from day one at Fort Dix; held: magistrate's review was not timely; 2 days of R.C.M. 305 credit given in addition to *Allen* credit). *Accord* United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989).

[67] The seven day requirement for a neutral and detached review was not based on specific guidance or caselaw. It was, instead, an attempt to comply with the Supreme Court's decision in *Gertstein v. Pugh*, 420 U.S. 103 (1975), and accommodate other circumstances unique to R.C.M. 305. (See R.C.M. 305(i) analysis) In*Pugh*, the Court held that the IV Amendment required a"prompt" judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. The Court did not, however, define what constituted "prompt" until*Riverside County v. McLaughlin*, 111 S.Ct. 1661 (1991). In *Riverside County,* the Court stated, "Taking into account the competing interests articulated in*Gerstein,* we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."*Id.* at 1670.*Riverside County* imposes an additional requirement on the military to conduct a probable cause review of any arrest, absent warrant or other similar authorization, within 48 hours. Review of the probable cause for a warrantless arrest by a neutral and detached officer during a commander's review under R.C.M. 305(h) or a pretrial confinement review under R.C.M. 305(i) should satisfy that requirement if conducted within 48 hours. Commanders should insure compliance with *Riverside County* pending changes to R.C.M. 305.

[68] Shadwick v. City of Tampa, 407 U.S. 345 (1972) (magistrate who reviews probable cause determinations need not be a lawyer).

[69] AR 27–10, para. 9–1*d.* This requirement is peculiar to the Army. Prior to the 1984 Manual, the Air Force used nonlawyers to review pretrial confinement. Following the adoption of the new Manual, the Navy and Marine Corps changed to the Air Force system of using nonlawyer line officers as magistrates.

[70] R.C.M. 305(i)(4).

[71] United States v. Dent, 26 M.J. 968 (A.C.M.R. 1988); *accord* United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988).

[72] R.C.M. 305(i) analysis. The review procedure is patterned after the procedures described in Morrissey v. Brewer, 408 U.S. 471 (1972).

cused.[73] During the review process, both the accused and counsel are permitted to appear before the magistrate and make statements. In addition, a representative of the command is also permitted to appear and make a statement.[74] Except for Military Rules of Evidence, Section V (Privileges) and Military Rules of Evidence 302 and 305, the Military Rules of Evidence do not apply at the review hearing[75] and there is no right to call or cross-examine witnesses. The command must show that the requirements for pretrial confinement are met by a preponderance of the evidence.[76] After completing the review, the magistrate either approves continued confinement or orders immediate release. The magistrate cannot impose conditions on release, but may suggest appropriate conditions to the unit commander.[77] The magistrate is required to make a written record of decision, including factual findings and conclusions.[78] This memorandum is available to either party upon request.

The magistrate's authority and responsibility over pretrial confinement does not end at the initial review hearing. After receiving significant additional information, the magistrate may notify the parties and reconsider the decision to confine.[79] This provision of the Manual rule makes clear the continuing authority of the magistrate over pretrial confinement, an authority that diminishes but does not end when the case is referred to trial.[80]

e. Who may order release. Once the accused has been confined, only certain persons may order release. In addition to the magistrate who reviews confinement, any commander of the accused can order release,[81] although this is probably limited in the same way in which any commander may confine; superior commanders may withhold from subordinates the authority to confine or order release. After charges are referred to trial, the detailed military judge can order release in some circumstances.[82]

f. Role of the military judge. The military judge has review authority for pretrial confinement once the case is referred to trial. Upon defense motion, the judge can review the propriety of pretrial confinement. This could be done at a pretrial conference or at an article 39(a) session.

The judge's release powers are limited, and he may order release only if:

(1) The magistrate's decision was an abuse of discretion and insufficient information is presented to the judge that justifies continued confinement;

(2) Information that was not presented to the magistrate shows that the accused should be released; or

(3) There has been no review by a magistrate and the judge determines that the requirements for confinement have not been met.[83]

This limitation of the judge's release powers is new in the 1984 Manual and changes past case law in which the Navy and the Army Courts of Military Review had held that the military judge reviewed the confinement decision de novo and could simply overrule the decision of the magistrate.[84] This change indicates the importance the Manual rules place on the magistrate's role in the pretrial confinement process. Recently, however, the Army Court again encouraged military judges to conduct de novo hearings when determining whether a magistrate abused her discretion when reviewing pretrial confinement.[85]

In addition to reviewing the decision to confine, the military judge also orders administrative credit for any pretrial confinement served as a result of abuse of discretion; failure to provide military counsel, if requested, before review; failure by the commander to comply with the procedures for action within 72 hours; failure by the commander to properly consider the reasons for confinement; or failure to comply with review procedures.[86] When the 1984 Manual was originally drafted, the administrative credit for failure to follow the rules was at a rate of 1 1/2 days' credit for

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[73] R.C.M. 305(i)(3)(A).

[74] *Id.* The specific language, stating that the accused and counsel "shall be allowed" to appear, while a representative of the command "may appear" seems to leave the decision of whether to hear the command's representative to the magistrate's discretion, while appearance of the accused is mandatory, unless impracticable. Because violation of the review provisions makes the confinement "illegal," requiring administrative credit (R.C.M. 305(k)), the magistrate should be cautious in deciding that appearance would be impracticable. *See generally* United States v. Butler, 23 M.J. 702 (A.F.C.M.R. 1986), *petition denied*, 24 M.J. 56 (C.M.A. 1987) (held: at the magistrate's review"where counsel has been appointed, counsel [for the prisoner] should be present unless his or her presence has been waived"; if not present or waived, R.C.M. 305 credit is appropriate); *accord* United States v. Duke, 23 M.J. 710 (A.F.C.M.R. 1986).

While *ex parte* discussions with the magistrate, are not per se prohibited, they should be avoided as the prisoner has a right to know all information presented to the reviewing officer. United States v. Bell, 25 M.J. 676 (A.C.M.R. 1987), *petition denied*, 27 M.J. 161 (C.M.A. 1988) (*ex parte* discussion by magistrate with prisoner's commander and trial counsel held not prohibited, at least when defense counsel was given access to all the information and an opportunity to respond).

[75] R.C.M. 305(i)(3)(B).

[76] R.C.M. 305(i)(3)(C).

[77] AR 27–10 para. 9–5*b*(3).

[78] R.C.M. 305(i)(6); AR 27–10, para. 9–5*b*(6).

[79] R.C.M. 305(i)(7).

[80] *Id.* analysis. *See also* R.C.M. 305(j) analysis.

[81] R.C.M. 305(g). *See* United States v. Shelton 27 M.J. 540 (A.C.M.R. 1988) (court lists four different commanders with release authority).

[82] *Id.*; R.C.M. 305(j).

[83] R.C.M. 305(j).*See also* Porter v. Rochardson, 50 C.M.R. 910 (C.M.A. 1975) (upholding authority of military judge to order release from confinement).

[84] United States v. Montford, 13 M.J. 829 (A.C.M.R. 1982), *petition denied* 15 M.J. 183 (C.M.A. 1983); United States v. Dick, 9 M.J. 869 (N.M.C.M.R. 1980).

[85] United States v. Hitchman, 29 M.J. 951 (A.C.M.R. 1990).

[86] R.C.M. 305(j)(2); R.C.M. 305(k). The requirement for administrative credit is based on the Court of Military Appeals decision in United States v. Larner, 1 M.J. 371 (C.M.A. 1976), although the violation in that case concerned art. 13's prohibition against punishment before trial. *See infra* para. 14–3.

each day of illegal confinement.[87] After the Court of Military Appeals decided United States v. Allen,[88] discussed in detail below, the Manual provision was revised to require a one-for-one credit against the adjudged sentence for illegal confinement.

g. Confinement after release. After a competent authority has ordered release from confinement, the accused cannot be placed back into pretrial confinement before the trial is over except upon discovery of new evidence or misconduct which justifies confinement, either alone or in conjunction with other evidence.[89] This means that a commander cannot"overrule" a magistrate's decision by ordering an accused back into confinement after the magistrate has ordered release.[90] If an additional offense occurs or newly discovered evidence justifies reconfinement and the commander orders the soldier back into pretrial confinement, the magistrate must be notified immediately.[91] The magistrate then conducts an additional review of the propriety of confinement, considering the new evidence or misconduct and any previously available information.[92]

The prohibitions against reconfinement also preclude the Government from seeking immediate reversal of the magistrate's decision by appealing to a military judge if the charges have been referred to trial. Because reconfinement is only authorized upon newly discovered evidence or misconduct, the military judge may be precluded from overruling the magistrate and ordering the accused back into confinement.[93]

h. Exceptions. The Manual rule concerning pretrial confinement and required review procedures contains limited exceptions that recognize the difficulty of compliance under certain circumstances. Some procedural requirements are suspended for vessels at sea.[94] In addition, when operational requirements dictate, the Secretary of Defense may suspend some provisions of the rules for specific units or specified areas.[95] The purpose of the exception is not limited to units in combat, but also applies to units deployed in a remote area or on a sensitive mission.[96] In these circumstances, the Secretary of Defense may suspend requirements to advise the accused upon confinement of the right to remain silent and the right to counsel; to provide requested military counsel; for the commander to review confinement within 72 hours and to prepare a written memorandum; and for review of confinement by a neutral and detached officer.[97] The standard for confinement remains the same; the pretrial confinement is still subject to judicial review; and the commander must still evaluate the confinement to determine that less severe restraint would be inadequate and that the accused is either a flight risk or will foreseeably engage in serious criminal misconduct.[98] The time provisions and the review provisions are suspended, however, due to overriding operational concerns.

14–3. Sentence credit

What credit, if any, should an accused receive for time spent under pretrial restraint? Court decisions and the 1984 Manual have supplied some answers: specific credit must be given even for legal pretrial confinement. Credit is also required for restriction which is tantamount to confinement; for confinement imposed in violation of R.C.M. 305 as an abuse of discretion or in violation of certain procedural requirements of R.C.M. 305; and for pretrial restraint which amounts to punishment in violation of article 13's prohibition against punishment prior to trial.

a. Allen credit. In United States v. Allen,[99] the Court of Military Appeals held that all accused are entitled to day-for-day credit against their sentence for each day spent in pretrial confinement. Prior to Allen, the court had discussed the issue of credit for illegal pretrial confinement and fashioned rules for determining and awarding credit.[100] Allen, however, provides for credit for legal pretrial confinement.

In Allen, the court relied on a Department of Defense (DOD) Instruction requiring military sentence computation procedures to conform with those used by the Department of Justice.[101] Because the Department of Justice granted administrative credit following a statutory mandate, the court held the military must also give credit, despite an exemption in the underlying statute for courts-martial.[102] The court reasoned that, while Congress had exempted the

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[87] Proposed Revision of the Manual for Courts-Martial, January 1984 Draft, Proposed Rule for Courts-Martial 305(k).
[88] 17 M.J. 126 (C.M.A. 1984).
[89] R.C.M. 305(1). United States v. Rolfe, 24 M.J. 756 (A.F.C.M.R. 1987), *petition denied,* 25 M.J. 238 (C.M.A. 1988) (held 2–1: an absentee who is released from pretrial confinement by a magistrate at the location of apprehension may be reconfined at the home installation based on information available at the home installation).
[90] *See also* United States v. Malia, 6 M.J. 65 (C.M.A. 1978). A commander is not precluded, however, from imposing a lesser form of restraint, such as restriction, on an accused released from pretrial confinement. AR 27–10, para. 9–5*b*(4).
[91] AR 27–10 para. 9–5*b*(4).
[92] AR 27–10 para. 9–5*b*(5).
[93] R.C.M. 305(l).
[94] R.C.M. 305(m)(2). The exceptions for vessels at sea are somewhat more limited than those allowed for operational necessity on the decision of the Secretary of Defense.
[95] R.C.M. 305(m)(1).
[96] *Id.* at analysis.
[97] R.C.M. 305(m)(1).
[98] *Id.* at discussion.
[99] 17 M.J. 126 (C.M.A. 1984).
[100] *See, e.g.*, United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983), *after remand*, 20 M.J. 248 (C.M.A. 1985); United States v. Larner, 1 M.J. 371 (C.M.A. 1976).
[101] DOD Instr. 1325.4 (Oct. 7, 1986).
[102] 18 U.S.C. § 3568.

military from the statute's provisions, the DOD Instruction had voluntarily adopted a policy of conforming sentence computation procedures for the military to those of the Department of Justice.[103] The court also noted that this credit policy was in accord with the recommendation of the American Bar Association.[104]

In a concurring opinion in Allen, Chief Judge Everett listed several policy benefits he saw resulting from the court's decision. First, the rule requiring credit would place the military person in the same position as a person tried in a Federal district court, thus providing greater uniformity of treatment.[105] Secondly, the credit rule would avoid the problem noted 2 years before by Judge Everett in United States v. Davidson,[106] that is, the potential that the total of pretrial and post-trial confinement might exceed the maximum authorized punishment.[107] Lastly, Judge Everett approved of the certainty of the new rule, finding it better than simply having the sentencing authority attempt to give undetermined weight to pretrial confinement on a case by case basis.[108]

Army judges instruct court members that, in determining an appropriate sentence, they should consider the fact that the accused has spent time in pretrial confinement and also that the accused will receive day-for-day credit at the confinement facility against the adjudged sentence for any pretrial confinement.[109] Convening authority actions approving sentences to confinement should direct that Allen credit be given by the confinement facility.[110]

b. When Allen credit applies.

(1) *Credit for restriction tantamount to confinement.* In United States v. Mason, the Court of Military Appeals extended the Allen rule to require credit for "pretrial restriction equivalent to confinement."[111]

In United States v. Smith[112] the Army Court of Military Review applied Mason and set out useful guidance in a comprehensive opinion. The Smith court stated that the test to determine whether restriction is "tantamount to confinement," such that Allen credit must be given, is determined on the "totality of the conditions imposed."[113] Relevant factors to consider include "the nature of the restraint (physical or moral); the area or scope of the restraint…, the types of duties, if any, performed during the restraint…, and the degree of privacy enjoyed within the area of

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[103] *Allen,* 17 M.J. at 128.

[104] *Id.* (citing ABA Standards,*Sentencing Alternatives and Procedures*, § 18–4.7(a) (1979)).

[105] *Id.* at 129.

[106] 14 M.J. 81 (C.M.A. 1982). In*Davidson,* Judge Everett disagreed with Judges Fletcher and Cook who reasoned that as pretrial confinement was not"punishment," the total of pretrial and post-trial confinement could properly exceed the maximum authorized punishment.

[107] *Allen,* 17 M.J. at 129. On the other hand, pretrial confinement is not punishment. It must serve independent purposes such as ensuring the accused's presence at trial or preventing foreseeable future serious misconduct.

[108] *Id.*

[109] DA Pam 27–9, para. 2–43 (C3, 15 Feb. 1989). *See also* United States v. Stark, 19 M.J. 519, 527 n.3 (A.C.M.R. 1984), *aff'd,* 24 M.J. 381 (C.M.A.), *cert. denied,* 484 U.S. 1026 (1987); R.C.M. 1005(e)(4) discussion. Judge Everett in *Allen* stated that the members should be instructed specifically on how pretrial confinement would be treated. 17 M.J. at 130. Does this create a danger that court members might increase a sentence to compensate for the credit? United States v. Balboa, 33 M.J. 304 (C.M.A. 1991) (members instructed, without objection, accused would be credited with 68 days *Allen* credit. No error when panel sentenced accused to 68 days plus 12 months confinement) *See generally Davidson*, 14 M.J. at 87 (Everett, C.J., concurring in the result). *Cf.* United States v. Noonan, 21 M.J. 763 (A.F.C.M.R. 1986),*petition denied,* 22 M.J. 356 (C.M.A. 1986) (members should be instructed on *Allen* and also art. 13, UCMJ credit).

[110] Message, HQDA DAJA–CL, 181400Z Jan. 84, subject: Credit for Pretrial Confinement, U.S. v. Allen. *See* MCM, 1984, p. A16–1 for a "form for action" for illegal pretrial confinement credit which could also be used for *Allen* credit for legal pretrial confinement. Credits must be applied at the confinement facility, and not through a reduction by the convening authority of the approved sentence, because of the graduated system of good time credits. *See generally* United States v. Larner, 1 M.J. 371 (C.M.A. 1976).

[111] 19 M.J. 274 (C.M.A. 1985) (summary disposition). In a footnote, the court stated that the "principle set out in United States v. Schilf, 1 M.J. 251 (C.M.A. 1976), is applicable in determining the amount of credit to be given for pretrial confinement." 19 M.J. at 274. *Schilf* equated "severe restriction"with pretrial confinement for purposes of applying the*Burton* speedy trial rule. 1 M.J. at 252. The Army Court of Military Review had earlier held that *Allen*did not require credit for forms of pretrial restraint other than "incarceration." United States v. Fair, 17 M.J. 1036, 1037 (A.C.M.R. 1984), *petition denied*, 19 M.J. 121 (C.M.A. 1984).

[112] 20 M.J. 528 (A.C.M.R.), *petition denied*, 21 M.J. 169 (C.M.A. 1985).

[113] *Id.* at 530.

restraint."[114] The issue of restriction tantamount to confinement has been the subject of much litigation.[115] Commanders and their supporting judge advocates should avoid imposing conditions of restriction which raise the issue. On procedural matters, the Smith court interpreted Mason and Allen to permit the issue of eligibility for Allen credit to be raised for the first time on appeal.[116] More recently, however, with credit for restriction tantamount to confinement well established law, a broad waiver rule has been established: the issue is waived if not raised at trial.[117] The court also called for the Government, in future cases, to disclose any form of pretrial restraint to the trial judge on the record, and for the trial judge to determine the relevant facts and rule whether the restraint is tantamount to confinement.[118] This ruling will be subject to review for abuse of discretion.[119] As a matter of policy, when an issue of tantamount to confinement is raised prior to referral of charges, part-time Army magistrates are precluded from reviewing the issue. A military judge is to make the review, acting in his or her capacity as magistrate.[120] As with the usual Allen credit,

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[114] *Id.* at 531.

[115] United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1986) (dicta, n.12: "We believe that staff judge advocates following the factual distinctions apparent in United States v. Smith, Wiggins v. Greenwald and Washington v. Greenwald will be able to provide meaningful guidance to commanders concerning types of restrictions that are tantamount to confinement…."The issue is raised when "an individual is to be restricted to a relatively small area (such as a room or one floor of a barracks); when the individual has sign-in requirements of an hour or less; when the individual is to be escorted with an armed guard; or when the individual is, during any part of his restriction, locked in a room or otherwise physically restrained"), *aff'd,* 23 M.J. 246 (C.M.A. 1986) (summary disposition); Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985) (88 days' pretrial restriction found not tantamount to confinement; credit denied; Washington restricted to company area, place of duty, dining facility, and chaplain's office; performed normal duties; restricted to room after 2200 hours; signed in every hour at CQ's office when not at work; could travel to any place on post he needed to go during duty hours without an escort if he obtained permission and during non-duty hours with an escort),*writ appeal denied*, 20 M.J. 324 (C.M.A. 1985).*Washington* may demonstrate the greatest restriction which would not be found tantamount to confinement.*See also* Wiggins v. Greenwald, 20 M.J. 823 (A.C.M.R. 1985) (13 days' pretrial restriction found not tantamount to confinement; credit denied, case less useful for analysis as Wiggins was outprocessing during the period and therefore did not perform normal duties), *writ appeal denied*, 20 M.J. 196 (C.M.A. 1985); United States v. McElyea, 22 M.J. 863 (A.C.M.R. 1986) (restriction not tantamount to confinement; performed normal duties; restricted to battery area, place of duty, chapel, and dining facility; hourly sign-in after duty; escort required for some purposes; but not for others); United States v. Cahill, 23 M.J. 544 (A.C.M.R. 1986) (restriction was tantamount to confinement; did not perform normal duties; remained in orderly room all during duty hours; escorted even to latrine; sign-in every half hour after duty hours; remained with CQ during non-duty days); United States v. Keck, 22 M.J. 755 (N.M.C.M.R. 1986) (per curiam) (pretrial restriction to limits of U.S.S. Long Beach found not equivalent to confinement; accused performed regular shifts and was free to move about the ship, but was required to attend restricted men's muster "at various intervals throughout the day"); United States v. Berumen, 24 M.J. 737 (A.C.M.R. 1987), *petition denied,*26 M.J. 67 (C.M.A. 1988) (accused charged with rape and forcible sodomy; held: 4-day period of restriction at issue not tantamount to confinement; while the restriction was "relatively oppressive," and while"[r]estricting a servicemember to a one room area… may in and of itself create a condition tantamount to confinement," *id.* at 743, other factors lessened the impact of the restriction; the accused could go anywhere on post with an escort and was not denied any reasonable request for escort including to return to his room to shower and watch television. "Among the issues which may evolve from restraint tantamount to confinement are illegal pretrial punishment, speedy trial, and the preferral of charges against individuals who impose severe conditions of restraint…. Hopefully, if each staff just advocate initiates a continuing legal education program for key military personnel, the issue of restraint tantamount to confinement will seldom come before this court in the future" *id.* at 743 n.6); United States v. Loman, 25 M.J. 709 (A.C.M.R. 1987); *petition granted,* 26 M.J. 279 (C.M.A. 1988) ("*Gregory* appears to stand for the proposition that restriction tantamount to confinement is an authorized form of pretrial restraint… However, we do not believe [the issue has been] directly addressed…." "We would make an additional observation in passing, however. Improvised confinement outside of a confinement facility creates an unregulated environment wherein the risk of maltreatment or cruelty is not only greater, but can be more easily shielded from the law should it occur). United States v. Van Metre, 29 M.J. 765 (A.C.M.R. 1989) (Restriction tantamount to confinement where accused was required to: wear BDU at all times; live in barracks normally occupied by transients; possess only uniforms, personal hygiene items, and an alarm clock; remain in barracks room except from 1900-2100 each day; maintain a log of all his activities; and had 24 hour escort.); United States v. Russell, 30 M.J. 977 (A.C.M.R. 1990) (Restriction tantamount to confinement based on totality of the circumstances even though accused continued to perform normal military duties and could visit PX and commissary with escort where: accused restricted to small area of the military compound and barracks; radios, stereos, and books taken; doors removed from accused's room; civilian clothing taken; and visitors prohibited.); United States v. Villamil-Perez, 29 M.J. 524 (A.C.M.R. 1989), *aff'd,* 32 M.J. 341 (C.M.A. 1991) (PTR not tantamount to confinement when accused apprehended on Saturday night and restricted to barracks until 1800 Monday. Accused was escorted in barracks, to latrine, and to dining facility and missed duties on Monday. Accused was not, however, shackled, escort was unarmed, and restriction was relatively brief.); United States v. Guerrero, 28 M.J. 223 (C.M.A. 1989) (Accused "restricted to his room, the latrine, the chapel, mess hall and other places deemed to be his place of duty as long as he was escorted" by a NCO, could go any other place while off-duty so long as escorted by NCO, and was required to sign in every 30 minutes until lights out was not entitled to *Mason* credit for restriction tantamount to confinement. Accused asserted for the first time on appeal that his restriction was tantamount to confinement and defense counsel stated at trial "we do not claim it is tantamount to confinement.").

[116] *Smith,* 20 M.J. at 532. The issue of illegal pretrial confinement is ordinarily waived if not raised at trial. United States v. Huelskamp, 21 M.J. 509 (A.C.M.R. 1985); United States v. Martinez, 19 M.J. 744 (A.C.M.R. 1984), *petition denied,* 21 M.J. 27 (C.M.A. 1985).

[117] United States v. Ecoffey, 23 M.J. 629 (A.C.M.R. 1986) ("[I]n cases tried ninety days or more from the date of the decision [decided October 23, 1986], failure by defense counsel to raise the issue of administrative credit for restriction tantamount to confinement by timely and specific objection to the presentation of data at trial [R.C.M. 1001(b)(1)]… will waive consideration of the issue on appeal."Concurring opinion: "After reviewing or being informed of the pertinent data on the charge sheet, the military judge should not only ask the defense counsel whether the information is correct, but whether the defense is satisfied that the pretrial restraint was not tantamount to confinement."). *See also* R.C.M. 001(b)(1): "Trial counsel shall inform the court-martial of the data on the charge sheet relating to… the duration and nature of any pretrial restraint…. If the defense objects to the data as being materially inaccurate or incomplete… the military judge shall determine the issue. Objections not asserted are waived."

Concerning ineffective assistance of counsel for failing to raise the issue of restriction tantamount to confinement,*see* United States v. Guerrero, 25 M.J. 829 (A.C.M.R. 1988) *Ecoffey* applied to waive issue on appeal of restriction tantamount to confinement when civilian defense counsel explicitly waived the issue at trial. "A counsel who fails to raise a legitimate issue at trial will often be inadequate as to that particular issue. However such a failure is not *per se* inadequate representation…. An appellant must show that the representation considered as a whole was so seriously deficient as to deny him effective counsel…." The Court of Military Appeals denied Guerrero's claim for credit for the time he spent in pretrial restriction allegedly tantamount to confinement. 28 M.J. 223 (C.M.A. 1989). Although the court denied the claim because of civilian defense counsel's assertion at trial that the restriction was not tantamount to confinement, it nonetheless considered the claim which was raised the first time on appeal.

[118] *Smith*, 20 M.J. at 533.*See also* AR 27–10, para. 5–22.1. *But see* United States v. Diaz, 30 M.J. 957 (C.G.C.M.R. 1990), *petition denied,* 32 M.J. 13 (C.M.A. 1990) (judge has no obligation to inquire into the conditions of pretrial restriction to determine whether it was tantamount to confinement. Defense counsel must raise the issue or it is waived).

[119] *Smith,* 20 M.J. at 533.

[120] U.S. Army Trial Judiciary Standing Operating Procedure, February 16, 1989, p. 15-3, para. 4a:"[A]ll military judges may review pretrial confinement prior to referral based [on an allegation of restriction tantamount to confinement] upon request by the government, defense counsel or the soldier involved;" p. 15–3, para. 4d: "Part-time military magistrates will not review pretrial confinement based on an allegation of restriction tantamount to confinement."

court members may be instructed to consider the pretrial restraint on sentencing and that credit will be applied at the confinement facility.[121]

(2) *No Allen credit for confinement at the request of a foreign government.* In United States v. Murphy,[122] the Court of Military Appeals decided the issue of administrative credit for time spent in pretrial confinement at the request of a foreign government. Murphy was a Marine stationed in Japan, awaiting trial by Japanese authorities for violation of Japanese drug laws. Because he had previously gone AWOL and was considered a flight risk, he was placed in pretrial confinement, pursuant to the request of Japanese authorities that he be present for trial. In an opinion in which two judges concurred, the court stated that, because the authority for confinement was not found in the UCMJ and because the service member was not confined based on a suspected violation of the UCMJ, the time spent in pretrial confinement afforded no basis for credit on the sentence to confinement adjudged by a subsequent court-martial on related charges.[123] The court noted that the period of pretrial confinement was a permissible factor for the sentencing authority to consider when determining an appropriate sentence, but held that it did not qualify the accused for day-for-day administrative credit under Allen.[124]

(3) *Allen credit for confinement by civilian authorities.* In United States v. Huelskamp,[125] the Army Court of Military Review held that an accused was entitled to Allen credit for time spent in pretrial confinement in a civilian jail at the direction of military authorities pending return to his unit from AWOL status. In United States v. Ballesteros,[126] the Army Court of Military Review also held that Allen credit must be given for time spent in pretrial confinement in a civilian confinement facility at the insistence of civilian authorities, when the confinement is served in connection with misconduct ultimately resulting in a sentence to confinement at a court-martial.

c. Credit for violations of article 13 or R.C.M. 305.

(1) *General.* Prior to Allen, which provides for credit for legal pretrial confinement, the Court of Military Appeals had addressed the issue of credit for illegal pretrial confinement in several cases. The court's primary concern was whether conditions of pretrial confinement violated article 13's prohibition against punishment before trial. In United States v. Larner,[127] the court determined that the "only legal and fully adequate remedy" was "to adjudge and to affirm an otherwise appropriate sentence, but to judicially order administrative 'credit' thereon for the number of days served illegally in pretrial confinement."

(2) *Article 13 credit.* For egregious cases of illegal pretrial restraint which violate article 13, the military judge can order more than day-for-day credit against the sentence. In United States v. Suzuki,[128] the accused lived, and worked with sentenced prisoners. In addition, for a period of about 10 days, the accused was put in administrative segregation in a sparsely furnished, dimly lit 6 by 8- foot cell. On one occasion, he was released from the cell only after he was coerced to sign a waiver to work with sentenced prisoners. The trial judge ordered 3 days' credit for each day of this illegal confinement.[129] The convening authority granted only day-for-day credit. The Court of Military Appeals, however, upheld the trial judge, finding that the military judge had authority to order more than day-for-day credit when the harsh conditions of the illegal confinement warranted additional credit.[130] As Suzuki had completed his confinement, the court reassessed his sentence, invalidating all forfeitures.[131]

The military judge is not necessarily limited in the types of sentence credit he can order when illegal pretrial restraint violates Article 13. Credit may include sentence reassessment of forfeitures and punitive discharges.[132]

While article 13 credit may be applied to any conditions of pretrial restraint which amount to punishment, commingling of pretrial confinees with sentenced prisoners has been a recurring issue. Historically, the Court of Military Appeals has held that if a pretrial confinee is commingled with sentenced prisoners, performs the same work, and is treated the same as a sentenced prisoner, the article 13 bar against pretrial punishment is violated.[133] The court

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[121] *Smith,* 20 M.J. at 533 n.3.

[122] 18 M.J. 220 (C.M.A. 1984).

[123] *Id.* at 237 (Fletcher, J., concurring).

[124] *Id.*

[125] 21 M.J. 509 (A.C.M.R. 1985). *See also*United States v. Davis, 22 M.J. 557 (A.C.M.R. 1986) (27 days'*Allen* credit given for pretrial confinement in a civilian jail at the instance of Federal civilian authorities as confinee would have received credit had he been tried in Federal district court); United States v. Aldridge, 22 M.J. 870 (A.C.M.R. 1986) (*Davis*distinguished; *Allen* credit denied where soldier initially confined at the instance of State authorities on State charges).

[126] 25 M.J. 891 (A.C.M.R.), *aff'd,* 29 M.J. 16 (C.M.A. 1989).

[127] 1 M.J. 371 (C.M.A. 1976).

[128] 14 M.J. 491 (C.M.A. 1983), *after remand*, 20 M.J. 248 (C.M.A. 1985).

[129] *Id.* at 492.

[130] *Id.* at 491.

[131] 20 M.J. at 250.

[132] *United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987), *petition denied*, 25 M.J. 437 (C.M.A. 1987) After damaging his barracks room, Hoover was required to sleep in a pup tent for 3 weeks between 2200 and 0400 hours; he performed normal duties, was not required to sign in, could go to the barracks, dayroom, chapel, dining facility and gym, but was escorted whenever outside the company area; held: restriction was tantamount to confinement and Art. 13 was violated;"corrective or extra training" must be "directly related to the deficiency" and "oriented to improve … performance in the problem area." Sentence reassessed to return forfeitures rather than determining specific credits. *See United States v. Fitzsimmons*, 33 M.J. 710 (A.C.M.R. 1991) Having an accused sleep in a pup tent outside his unit's barracks was punishment. The court set aside bad conduct discharge and total forfeitures.

[133] United States v. Pringle, 41 C.M.R. 324 (C.M.A. 1970); United States v. Nelson, 39 C.M.R. 177 (C.M.A. 1969) (art. 13 violated, even in a combat zone facility, where pretrial and sentenced prisoners were treated the same, except for wearing different arm bands); United States v. Bayhand, 21 C.M.R. 84 (C.M.A. 1956).

had also held that a confinee could not waive the protection of article 13 and agree to accept the conditions of a sentenced prisoner, even to gain access to recreational facilities available to sentenced prisoners.[134] In United States v. Palmiter,[135] however, the court took a fresh look at the issues of commingling and waiver. The two sitting judges on the case disagreed both in principle and in semantics. Judge Cox found the earlier decisions of the court "applied the test of commingling in an inflexible manner."[136] For him, "the question to be resolved is not solely whether a pretrial confinee was commingled with sentenced prisoners, but, instead, whether any condition of his confinement was intended to be punishment."[137] Judge Cox also reasoned that while a prisoner could not waive the protection of article 13, it was appropriate for confinement authorities to use a "Work Program Request" form to "inform the pretrial detainee of what is available to him in pretrial confinement and to document his understanding and agreement."[138] Chief Judge Everett, on the other hand, reasoned that involuntary commingling was "stigma-by-association" and"usually should be considered … in contravention of Article 13."[139] He further reasoned, however, that a confinee could "waive" article 13 and agree to commingling to gain the benefits which might result.[140] The judges agreed that a pretrial confinee should apply to the military magistrate for relief from alleged illegal conditions of confinement.[141] United States v. James[142] provides the latest guidance from the Court of Military Appeals. There the court stated that "pretrial confinement in a civilian jail is subject to the same scrutiny as confinement in a detention facility operated by the military."[143] The court set forth a test that resolved those issues left unresolved by Palmiter: conditions imposed on pretrial prisoners, to include commingling with sentenced prisoners, must be"reasonably related to an important governmental objection."[144] "One significant factor, but not the only one, in determining whether the conditions of confinement violate article 13 is the intent of the detention officials."[145] Although James was confined with sentenced prisoners, was not allowed to wear his uniform or rank but instead wore an orange jumpsuit, had access to limited recreational facilities, and was subjected to a stringent visitation policy, there was no violation of article 13. The court reasoned that there was no intent to punish James because each condition imposed on the prisoner furthered a legitimate governmental objective and was no more stringent than required to hold the accused for trial. Again, as in Palmiter, the court stressed that the accused's failure to complain about his confinement conditions until he appeared at trial provided additional " 'strong evidence that' he 'was not illegally punished.' "[146] The message to defense counsel is clear: when pretrial confinement conditions violate article 13, seek relief from those conditions as soon as it is discovered. This provides dual benefits to the accused: (1) it should cause the illegal conditions to be removed; and (2) it establishes a record that supports the award of article 13 credit.

Procedurally, the convening authority, in an action, approves a sentence, and then orders credit for the number of days determined by the judge.[147] The issue of illegal pretrial confinement is normally waived if not raised at trial.[148]

(3) *Credit under R.C.M. 305.* In addition to the credit for illegal conditions of confinement developed by case law, the 1984 Manual in R.C.M. 305(j)(2) and 305(k) provides for administrative credit for certain violations of R.C.M. 305. This "R.C.M. 305 credit" results when confinement is served "as a result of an abuse of discretion"[149] or for

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[134] United States v. Bruce, 14 M.J. 254 (C.M.A. 1982).

[135] 20 M.J. 90 (C.M.A. 1985).

[136] *Id.* at 95.

[137] *Id.*

[138] *Id.* at 96.

[139] *Id.* at 98. *See also* United States v. Austin, 25 M.J. 639 (A.C.M.R. 1987), *petition denied*, 26 M.J. 279 (C.M.A. 1988) (*Palmiter* applied; art. 13 not violated when prisoner came into casual contact with sentenced prisoners while performing legitimate work details; there was no "intent to punish" and no "stigma-by- association"); United States v. Hoover, 24 M.J. 874 (A.C.M.R.), *petition denied,* 25 M.J. 437 (C.M.A. 1987) (after damaging his barracks room, Hoover was required to sleep in a pup tent for 3 weeks between 2200 and 0400 hours; he performed normal duties, was not required to sign in, could go to the barracks, dayroom, chapel, dining facility, and gym, but was escorted whenever outside the company area; held: restriction was tantamount to confinement and art. 13 was violated;"corrective or extra training" must be "directly related to the deficiency" and "oriented to improve… performance in the problem area."Sentence reassessed to return forfeitures rather than determining specific credits); United States v. Daniels, 23 M.J. 867 (A.C.M.R. 1987) (pretrial confinement in Cumberland County jail under contract with Fort Bragg did not violate art. 13 though conditions were more onerous than in military facilities); United States v. Walker, 27 M.J. 878 (A.C.M.R. 1989), *aff'd,* 28 M.J. 430 (C.M.A. 1989) (Cumberland County, N.C. jail did not violate art. 13; no intent to punish accused and conditions did not constitute punishment).

[140] *Palmiter*, 20 M.J. at 100.*See also* United States v. Walker, 27 M.J. 878, *aff'd,* 28 M.J. 430 (C.M.A. 1989) (A.C.M.R. 1989).

[141] *Id.* at 96, 97.

[142] 28 M.J. 214 (C.M.A. 1989).

[143] *Id.* at 215.

[144] *Id.* at 216.

[145] *Id.*

[146] *Id.*

[147] MCM, 1984, app. 16, at A16–1. *See generally*United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983),*after remand,* 20 M.J. 248 (C.M.A. 1985); United States v. McKinnon, 9 M.J. 769 (A.F.C.M.R. 1980).

[148] United States v. Huelskamp, 21 M.J. 509 (A.C.M.R. 1985); United States v. Martinez, 19 M.J. 744 (A.C.M.R. 1984), *petition denied*, 21 M.J. 27 (C.M.A. 1985); United States v. Walker, 27 M.J. 878, *aff'd* 28 M.J. 430 (C.M.A. 1989) (A.C.M.R. 1989). For an exceptional case in which waiver was not applied, however, see United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (Cruz and about 40 other soldiers suspected of drug offenses were called out of a mass formation of 1,200 Divarty soldiers, escorted before the Divarty commander who did not return their salute, called "criminals" by the commander, searched and handcuffed, billeted separately pending trial, and assembled into what became known as the "Peyote Platoon"; held: the "public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute[d] unlawful pretrial punishment prohibited by Article 13;""a new sentence hearing must be ordered so appellant can bring this prior punishment to the attention of his court-martial"; an issue of unlawful command influence was also raised; violation of art. 13 not waived when failure to raise at trial came "perilously close to inadequate representation.").

[149] R.C.M. 305(j)(2).

noncompliance with R.C.M. 305 subsections (f), (h), (i), or (j).[150] These subsections provide both substantive and procedural requirements for pretrial confinement including: in (f), providing counsel on request before review of pretrial confinement and informing the confinee if the assignment of counsel is for that limited purpose; in (h), reporting to the confinee's commander within 24 hours if someone other than the commander ordered the confinement, action by the commander within 72 hours deciding properly whether the substantive requirements for confinement are met, documenting the reasons in the commander's memorandum, and forwarding the memorandum to the reviewing magistrate; in (i), proper review by a neutral and detached officer within 7 days; and in (j), proper review by the military judge upon motion after referral. The R.C.M. 305 credit is day for day and is applied first against any adjudged confinement.[151] If less confinement is adjudged than is needed to apply the credit, the credit is applied (using the conversion formula of R.C.M. 1003(b)(6) and (7)) against hard labor without confinement, restriction, fine, and forfeiture of pay respectively.[152] One day of confinement offsets 1 day of total forfeiture or a like amount of fine.[153] The credit is not applied against a punitive discharge or reduction as these punishments are "so qualitatively different from confinement."[154]

It appears that R.C.M. 305 may be applied, however, for each violation of subsections (f), (h), (i), or (j). In United States v. Shelton,[155] the accused received 1 day of sentence credit for a late commander's review and additional credit for a late magistrate's review. In United States v. Chapman,[156] the accused received credit for a late magistrate's review and credit for the Government's failure to provide defense counsel when requested by the accused.

The R.C.M. 305 credit is the sole remedy for violations of the designated rule subsections.[157] The Supreme Court has held that dismissal of charges is not an appropriate remedy for illegal pretrial custody.[158] If the pretrial confinement is illegal, a prisoner who escapes cannot be convicted of escape from lawful confinement.[159]

Concerning restriction equivalent to confinement, in United States v. Gregory,[160] the Army Court of Military Review held that when restriction is tantamount to confinement, the procedures for confinement in R.C.M. 305 apply, and when they are not complied with, day-for-day credit under R.C.M. 305(k) is required, in addition to Allen-Mason credit.[161] Thus, a soldier placed under restriction tantamount to confinement will likely receive double credit, that is, 2 days' sentence credit for each day of restriction tantamount to confinement. (One day of credit is required by United States v. Mason, the second day of credit is required because the command failed to follow the procedures of R.C.M. 305(f),(h),(i) or (j)).[162]

When restriction tantamount to confinement lasts 6 or fewer days, Mason credit will be given for each day of the restriction, but normally there will not be double credit under R.C.M. 305(k)--Gregory for the same period of time.[163] This is because neither the magistrate's review nor the commander's written memorandum is required until the seventh day of pretrial confinement. There is normally no violation of R.C.M. 305 and, therefore, no requirement for R.C.M. 305(k) credit until the seventh day of pretrial confinement.[164]

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[150] *Id.*; R.C.M. 305(k).

[151] R.C.M. 305(k). *See* United States v. Davis, 29 M.J. 896 (A.F.C.M.R. 1989) (Error to give one-half day credit for each day magistrate's review was late; credit must be day-for-day.).

[152] *Id.*

[153] *Id.*

[154] R.C.M. 305(k) and analysis.*See also* United States v. Loman, 25 M.J. 709 (A.C.M.R. 1987), *petition denied*, 26 M.J. 279 (C.M.A. 1988) (R.C.M. 305(k) credit is not applied to set aside a punitive discharge); United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988) (R.C.M. 305(k) applied against approved forfeitures of accused who had already served the confinement portion of his sentence).

[155] 27 M.J. 540 (A.C.M.R. 1988).

[156] 26 M.J. 515 (A.C.M.R.), *petition denied*, 27 M.J. 404 (C.M.A. 1988). *But cf.* United States v. Freeman, 24 M.J. 547 (A.C.M.R. 1987) (commanders review presumed when he imposed restriction tantamount to confinement); United States v. Hill, 26 M.J. 836 (A.C.M.R. 1988) (no credit for commander's failure to prepare memorandum prior to a late magistrate's review held on day 11).

[157] R.C.M. 305(k) analysis.

[158] Gerstein v. Pugh, 420 U.S. 103 (1975).*See also* United States v. Nelson, 39 C.M.R. 177 (C.M.A. 1969).

[159] United States v. Green, 20 C.M.R. 331 (C.M.A. 1956); United States v. Brown, 15 M.J. 501 (A.F.C.M.R. 1982).

[160] 21 M.J. 952 (A.C.M.R. 1986),*aff'd* 23 M.J. 246 (C.M.A. 1986) (summary disposition).

[161] The view of another panel of the Army Court that R.C.M. 305 did not apply to restriction tantamount to confinement was reversed by the Court of Military Appeals. United States v. Amos, 22 M.J. 798 (A.C.M.R. 1986), *rev'd,* 23 M.J. 272–73 (C.M.A. 1986).

[162] *Id.*; United States v. Russell, 30 M.J. 977 (A.C.M.R. 1990) (R.C.M. 305(k) credit granted in addition to *Mason* credit when no magistrate's review held).

[163] *See* United States v. Freeman, 24 M.J. 547 (A.C.M.R. 1987) (Freeman under restriction tantamount to confinement for 6 days; *Mason* credit given; held: additional R.C.M. 305 credit under *Gregory* not required here as R.C.M. 305 was not violated: confinee did not request counsel, commander determined restraint was necessary, commander's memorandum not required until seventh day, and no requirement for magistrate's review as restraint ended within 7 days); United States v. Bell, 25 M.J. 676 (A.C.M.R. 1987), *petition denied*, 27 M.J. 161 (C.M.A. 1988) (*Freeman* applied to deny additional R.C.M. 305(k)-*Gregory* credit for 3 days' restriction tantamount to confinement). United States v. Demmer, 24 M.J. 731 (A.C.M.R. 1987) (*Freeman* applied to deny R.C.M. 305(k)-*Gregory* credit for 6 days' pretrial restriction tantamount to confinement; day-for-day credit und er *Mason* given.).

[164] Each situation should be individually reviewed to determine if a violation of R.C.M. 305 occurred. It is possible that a violation could occur within the first 6 days of pretrial confinement, thereby requiring credit under the rationale of *Gregory*. For example, the restriction tantamount to confinement may have been imposed by someone other than the commander and the commander never reviewed that decision as required by R.C.M. 305(h)(2)(A); credit may then be appropriate.

Credit under R.C.M. 305 has been given when a soldier was apprehended for being absent without leave and requested counsel en route to his or her home installation. The denial of this request for counsel was seen by the Army Court of Review as a violation of R.C.M. 305 even though counsel was provided prior to the magistrate's review of the pretrial confinement.[165]

When the magistrate's review occurred later than within the required 7 days, R.C.M. 305 credit has been given, and in determining the 7-day period, days of confinement en route to the confinee's home installation have been counted.[166] Credit under R.C.M. 305 has also been given when the magistrate's review was held without defense counsel present and defense counsel did not waive his or her appearance.[167]

In computing days of credit under R.C.M. 305 for late review by the magistrate, both the first day of confinement and the day of the magistrate's review are counted.[168] The soldier is then given additional credit from the seventh day until the day the soldier is either released from confinement or there is a magistrate's review that "regularizes" the confinement. Different counting methods are used for Allen credit and Mason credit.[169] Counsel are encouraged to stipulate to the amount of Allen credit and R.C.M. 305(k) credit due to an accused; such stipulations are binding absent plain error.[170]

Issues of R.C.M. 305 credit should usually be raised prior to sentencing. The credit is likely waived if not raised at trial.[171]

d. The interplay among the various administrative credits. What is the relationship among Allen credit, credit for illegal conditions of confinement in violation of article 13, and R.C.M. 305 credit? R.C.M. 305(k) states that 305 credit "is to be applied in addition to any other credit." The analysis to R.C.M. 305(k) specifically states that the credit is in addition to credit under Allen. The additional credit is intended to deter violations of the Manual rule and is provided as a matter of policy, not because cumulative credit is otherwise required.[172]

Several cases have dealt with the issue of multiple credit. United States v. Gregory[173] held that when restraint is found to be tantamount to confinement, the procedures for pretrial confinement in R.C.M. 305 apply, and when they are not followed, day- for-day credit under R.C.M. 305 is required in addition to day-for-day credit under the Allen and Mason cases. Gregory also implies that R.C.M. 305 credit and article 13 credit might both be appropriate in a given case.[174] United States v. Suzuki[175] teaches that a military judge can order more than day-for-day credit for egregious conditions of pretrial confinement which violate the article 13 prohibition against pretrial punishment.

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[165] United States v. Chapman, 26 M.J. 515 (A.C.M.R. 1988) Chapman was apprehended as a deserter on 20 May by Alabama civilian police, taken by the military to Fort Rucker on 26 May, then on 27 May to Fort Benning, and finally, on 5 June to Fort Polk where that day his commander reviewed the need for PTC. Magistrate's review occurred on 10 June at which time Chapman had counsel. On 29 May, Chapman had asked to speak to an attorney, but was denied. "While provision of counsel to appellant at Fort Polk prior to the R.C.M. 305(i) [magistrate's] review may have been technical compliance with R.C.M. 305(f) ['if requested… military counsel shall be provided… before the magistrate's review], denial of appellant's request on 29 May was, at least, noncompliance with the spirit and purpose of R.C.M. 305(f). We will, therefore, grant administrative credit against the sentence to confinement from 30 May through 9 June".

[166] United States v. DeLoatch, 25 M.J. 718 (A.C.M.R. 1987); *accord* United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989) (*Allen* credit given for time spent in civilian confinement "with notice and approval of military authorities," and R.C.M. 305 requirements also began then. Additional R.C.M. 305(k) credit given starting from 7th day in civilian confinement.).

[167] United States v. Butler, 23 M.J. 702 (A.F.C.M.R. 1986) (at the magistrate's review "where counsel has been appointed, counsel [for the prisoner] should be present unless his or her presence has been waived;" if not present or waived, R.C.M. 305 credit is appropriate); *accord* United States v. Duke, 23 M.J. 710 (A.F.C.M.R. 1986).

[168] United States v. DeLoatch, 25 M.J. 718 (1987) ("we decline to follow the method of computation for credit for restriction tantamount to confinement found in *New*"); United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989) (DeLoatch counting method followed for late magistrate's review); *accord* United States v. Dent, 26 M.J. 968 (A.C.M.R. 1988); United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988; United States v. Hill, 26 M.J. 863 (A.C.M.R. 1988); *compare* United States v. New, 23 M.J. 889 (A.C.M.R. 1987) (in counting the number of days' credit under R.C.M. 305 *Gregory* for restriction tantamount to confinement, the first day is not counted and the last day is, just like counting speedy trial days); United States v. Weddle, 28 M.J. 649 (A.C.M.R. 1989) (*New* formula applies except when calculating time to determine whether there was compliance with R.C.M. 305(f) (counsel), 305(h) (commander notification and action), and 305(i) (magistrate's review of pretrial confinement); in those cases the *DeLoatch* formula applies.)

[169] *See* United States v. Weddle, *supra* n.157; United States v. Hankton, 30 M.J. 1209 (A.C.M.R. 1989) (When computing day-for-day credit for ordinary pretrial confinement [*Allen* credit] don't count the first day, but count the last day. When computing R.C.M. 305(k) credit for a tardy magistrate's review, count the first day to determine the seventh day, then give credit from the seventh day to and including the day before the magistrate's review. Appendix shows computations.);*but cf* United States v. Spencer, 32 M.J. 841 (N.M.C.M.R. 1991) (Count each day or part of a day of pretrial confinement as an *Allen* day except where a day of pretrial confinement is also the day sentence is imposed.

[170] United States v. Jenkins, 28 M.J. 808 (A.C.M.R. 1989).

[171] The waiver rule of United States v. Ecoffey, 23 M.J. 629 (A.C.M.R. 1986) (*Mason* credit waived if not raised at trial) has been extended to R.C.M. 305 credit. United States v. Berry, 24 M.J. 555 (A.C.M.R. 1987), *petition denied*, 25 M.J. 193 (C.M.A. 1987) (dicta infers that *Ecoffey* also applies to R.C.M. 305 credit; waived if not raised at trial); United States v. Demmer, 24 M.J. 729 (A.C.M.R. 1987) (DeFord, S.J., concurring in part: while defense counsel raised issue of *Mason* credit at trial, the failure to raise the issue of R.C.M. 305 *Gregory* credit waived the issue, citing R.C.M. 1001(b)(1) and *Ecoffey*); United States v. Howard, 25 M.J. 533 (A.C.M.R. 1987) (if the issue of R.C.M. 305 *Gregory* credit is not raised at trial,"waiver may be considered appropriate," citing*Ecoffey*). In United States v. Hill, 26 M.J. 836 (A.C.M.R. 1988), waiver was not applied to 305(k) credit because the facts concerning pretrial confinement were in the case documents, as distinguished from *Howard. Hill* does not require the Government to affirmatively show compliance with R.C.M. 305; if defense counsel fails to raise the issue and the record contains no evidence of noncompliance, the issue is waived. United States v. Snoberger, 26 M.J. 818 (A.C.M.R. 1988), *petition denied*, 29 M.J. 289(C.M.A. 1989); United States v. Kuczaj, 29 M.J. 604 (A.C.M.R. 1989); United States v. Mathieu, 29 M.J. 823 (A.C.M.R. 1989); United States v. Taulbee, 29 M.J. 1014 (A.C.M.R. 1990).

[172] R.C.M. 305 analysis.

[173] 21 M.J. 952 (A.C.M.R.),*aff'd,* 23 M.J. 246 (C.M.A. 1986) (summary disposition).

[174] *Id.* at 958 n.14 ("Some would label R.C.M. 305(k) credit as additional credit for illegal pretrial confinement, but it is not broad enough in scope to cover all such situations" citing *Suzuki*).

[175] 14 M.J. 491 (C.M.A. 1983),*after remand,* 20 M.J. 248 (C.M.A. 1985).

In United States v. DiMatteo,[176] the Army Court of Military Review found the accused was entitled to Allen credit and that additional administrative credit for illegal conditions of confinement would have been warranted, had the defense requested it. Because defense counsel, however, presented evidence of the illegal conditions of confinement in extenuation and mitigation, and argued the matter on sentencing, the court reasoned the accused's relief was included in his adjudged sentence.[177]

What conclusions can be drawn concerning the interplay among the various administrative credits? While under the 1984 Manual an accused can clearly receive Allen credit plus R.C.M. 305 credit, an accused may arguably also receive day-for-day or more additional credit for illegal conditions of confinement violating article 13.[178] Each case should be decided to provide appropriate relief to the accused and a deterrent against violations of the law. Defense counsel must be sure to ask for all credit that is applicable. Otherwise a judge is only required to award that credit that was requested and unrequested, but appropriate credits will be waived.[179]

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[176] 19 M.J. 903 (A.C.M.R.), *petition denied*, 20 M.J. 305 (C.M.A. 1985).

[177] *Id.* at 905. This result seems inconsistent with the requirement of R.C.M. 1005(e)(4) that the judge instruct on all matters in mitigation, including "any pretrial restraint." R.C.M. 1001(c)(1)(B) permits the defense to present matters in mitigation and the defense certainly should do so since the judge is required to instruct the members on these matters. A consistent result with the approach under *Allen* would be to permit the defense to present matters in mitigation and have the judge instruct the members to consider the matter in determining an appropriate sentence and to consider also that the accused will get the credit which the judge has ordered. Whether this approach under *Allen* is sound policy remains open to debate.

[178] *Suzuki*, 14 M.J. 491 (C.M.A. 1983) *after remand*, 20 M.J. 248 (C.M.A. 1985).

[179] United States v. Bryant, 27 M.J. 811 (A.C.M.R. 1988) (Counsel requested and was granted *Mason* credit, but failed to request additional R.C.M. 305(k) credit; 305(k) credit held waived.).

Chapter 15
Speedy Trial

15–1. Introduction

a. The effect of Change 5 to the 1984 Manual for Courts-Martial. The 1984 Manual created new speedy trial standards for all courts-martial and attempted to alter case law pertaining to speedy trial in certain areas.[1] The drafters of the Manual attempted to set definite standards, but these were subjected to various court interpretations. Change 5 sought to correct some problems associated with the original R.C.M. 707. The change provided guidance for granting pretrial delays and eliminated after-the-fact determinations as to whether certain periods of delay are excludable.[2] Change 5 essentially rewrote the original R.C.M. 707. Several important changes included: clarifying when Government accountability begins and ends; deleting the statutory 90-day rule of section (d); eliminating specific exclusion provisions, requiring an independent determination beforehand to approve all pretrial delays; creating the additional remedy of dismissal with prejudice.[3] Most speedy trial litigation has focused on the 1984 Manual speedy trial rules of R.C.M. 707.[4] Other speedy trial rules, however, have not been completely supplanted.[5] While there are other speedy trial rules of lesser importance, the three rules of primary importance are: (1) The 120-day rule of R.C.M. 707; (2) The Burton 90-day rule; and (3) The constitutional protection of the sixth amendment.

b. Sources of the right to speedy trial. A military accused's right to a speedy trial is based on several sources.[6] One source is the sixth amendment to the United States Constitution which states that in all criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial."[7] A military accused also has additional speedy trial rights based on the Uniform Code of Military Justice (UCMJ). Article 10 of the UCMJ provides that, when an accused is placed in arrest or confinement before trial, "immediate steps shall be taken to inform him of the [charges] and to try him or to dismiss the charges and release him."[8] Article 33, UCMJ, states that when an accused is pending general court-martial, charges and documents shall be forwarded to the general court-martial convening authority within 8 days of the accused being ordered into arrest or confinement.[9] If that is not practicable, reasons for the delay must be reported in writing to the general court-martial convening authority. Article 98 of the UCMJ makes it a criminal offense to knowingly and intentionally fail to enforce or comply with any article of the UCMJ that regulates proceedings before trial or to cause unnecessary delay in the disposition of any criminal case.[10] In addition to these constitutional and statutory sources of the right to a speedy trial, the Court of Military Appeals created specific speedy trial rules in United States v. Burton.[11] The final source of speedy trial rights is the newest one: R.C.M. 707, which sets a 120-day rule for all courts-martial.[12]

c. Some basic principles. Preindictment delay does not normally count against the Government. The sixth amendment does not protect a prospective accused against Government delay in bringing an indictment.[13] This is true even when the accused's defense may have been "somewhat prejudiced" by the lapse of time before indictment.[14]

The time between dismissal of charges and indictment by another jurisdiction may not result in a violation of the sixth amendment right to a speedy trial. In United States v. MacDonald,[15] the accused, Dr. Jeffrey MacDonald, a captain and medical officer in the Green Berets, was charged by the military with murdering his wife and two daughters. After the article 32 investigation, the military charges were dismissed and MacDonald was released from the Army. More than 4 years later, he was indicted by a Federal grand jury for the same offenses. He contended that this 4-year delay violated his speedy trial right. The Supreme Court denied his appeal and held:

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[1] R.C.M. 707 created a 120-day rule for all trials. The accused must be brought to trial within 120 days of preferral of charges, imposition of restraint, or entry on active duty, whichever is earlier. The 90-day rule for arrest and confinement present in the original R.C.M. 707 was deleted by change 5. See R.C.M. 707, analysis (C5, 15 Nov. 1991).

[2] R.C.M. 707, analysis (C5, 15 Nov. 1991).

[3] R.C.M. 707 (C5, 15 Nov. 1991); *see* Gilligan,*Analysis of Change 5 to the Manual for Courts-Martial,* The Army Lawyer, Oct. 1991, at 68.

[4] *See* Wittmayer,*Rule for Courts-Martial 707: The 1984 Manual for Courts-Martial Speedy Trial Rule,* 116 Mil. L. Rev. 221 (1987).

[5] United States v. Harvey, 22 M.J. (N.M.C.M.R. 1986) (the demand rule prong of *Burton* is no longer the law in light of R.C.M. 707), *rev'd* 23 M.J. 280 (C.M.A. 1986) (memorandum opinion) (n.: "[W]e have not ascertained any Presidential intent to overrule *Burton,*[thus] we need not inquire as to his power to displace a judicial decision predicated on Article 10"). Following *Harvey* the Court of Military Appeals overruled the demand prong of *Burton* in United States v. McCallister, 27 M.J. 138 (C.M.A. 1988). The remainder of the *Burton* rule and its progeny continue in effect.

[6] For a historical perspective of the speedy trial right (as far back as the year 1166 in England), see Klopfer v. North Carolina, 386 U.S. 213 (1967). *See also* Tichenor, *The Accused's Right to a Speedy Trial in Military Law,* 52 Mil. L. Rev. 1 (1971).

[7] U.S. Const., amend. VI.

[8] UCMJ art. 10; United States v. Nelson, 5 M.J. 189 (C.M.A. 1978).

[9] UCMJ art. 33.

[10] UCMJ art. 98; *see* United States v. Maresca, 26 M.J. 910 (N.M.C.M.R. 1988) (warning counsel and others in the chain of command that delaying notice of preferral in order to manipulate the speedy trial clock is prosecutable under art. 98).

[11] 44 C.M.R. 166 C.M.A. 1971).

[12] R.C.M. 707, discussion, and analysis (C5, 15 Nov. 1991). The Manual rule is loosely based on principles in the Federal Speedy Trial Act, 18 U.S.C. § 3161-3174 (1982), but the act itself specifically excludes trials by court-martial. *See* R.C.M. 707 analysis (C5, 15 Nov. 1991),

[13] United States v. Marion, 404 U.S. 307 (171).

[14] United States v. Lavasco, 431 U.S. 783 (1977).

[15] 456 U.S. 1 (1982).

> The speedy trial guarantee is not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is primarily protected by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges… Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.[16]

In the military, substantial delay before charging, absent specific prejudice or a design to harass the accused, does not trigger the accused's speedy trial rights under either the sixth amendment or article 10. The test is whether the due process rights of the accused have been violated; for that the accused must show prejudice. The Court of Military Appeals held in United States v. Rachels[17] that a delay of over 2 years in charging an accused who was held beyond his normal ETS did not result in prejudice or a denial of due process.[18]

Interlocutory appeals by an accused from denials of motions to dismiss for lack of speedy trial are generally not permitted.[19] In the military, the Government may seek reversal of an adverse speedy trial ruling by petitioning for an extraordinary writ, but the chances for success are generally not good.[20] Under the 1984 Manual, dismissal of charges for lack of speedy trial is subject to appeal by the Government under R.C.M. 908.[21]

15–2. Articles 33 and 98, UCMJ

Articles 33 and 98, UCMJ, address speedy trial issues. In current practice, however, their utility is slight.

a. Article 33, UCMJ. Article 33 imposes an "8-day rule" for the forwarding of charges to the general court-martial convening authority for persons likely to be tried by general court-martial.[22]

The provision evinces a congressional expectation that the article 32 investigation and actions associated with it should normally be accomplished within 8 days, with an escape clause if the complicated nature of the investigation makes this impractical.[23] The escape clause requires that any delays beyond the 8-day period be accounted for in writing. Failure to explain the reason for not forwarding the charges within 8 days is not grounds, in itself, for reversal of a conviction.[24] Because article 33 is a procedural mandate that does not include any substantive rights or protections, deviations must be tested for specific prejudice to an accused.[25] An unjustified article 33 violation, when coupled with other unreasonable delay, may result in a violation of article 10,[26] and failure to comply with article 33's mandate will be weighed against the Government when determining whether due diligence has been exercised.[27]

No remedy for an article 33 violation is contained in either the UCMJ or the Manual, and the Court of Military Appeals has not prescribed one. The mandate has become almost an anachronism: it is the rare case in which charges are forwarded to the general court-martial convening authority within 8 days. The procedural requirements for article 32 investigations, and the administrative requirements attendant to processing and forwarding charges make this requirement difficult to meet. Any noncompliance is best handled by a thorough explanation of all delays in processing when the charges are forwarded to the convening authority.

b. Article 98, UCMJ. Article 98, which provides that any person who is responsible for unnecessary delay shall be punished by court-martial,[28] is an unused provision. The Court of Military Appeals has indicated an interest in the use of article 98 to speed disposition of charges in cases when they found diligence lacking on the part of persons involved

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[16] *Id.* at 4.

[17] 6 M.J. 232 (C.M.A. 1979).

[18] The court cited *Marion*and *Lavasco, supra* notes 13 and 14, to support the proposition. *See also* United States v. McGraner, 13 .J. 408 (C.M.A. 1982); R.C.M. 707(a) discussion (delay from time of offense to preferral of charges or imposition of restraint not considered for speedy trial purposes).

[19] United States v. MacDonald, 535 U.S. 850 (1978). This was the first of two reviews made by the Supreme Court of the case of Dr. Jeffrey MacDonald,*see supra* notes 15-16 and accompanying text. In this first instance, MacDonald tried to appeal before the trial on the merits commenced, alleging that preindictment delay had denied his right to a speedy trial.

[20] *See, e.g.,* Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979); United States v. Ramsey, 28 M.J. 370 (C.M.A. 1989).

[21] R.C.M. 908 allows interlocutory appeals by the Government of rulings of the military judge that terminate the proceedings as to a charge or specification. Because a ruling that speedy trial has been denied results in dismissal of charges, the Government could appeal.

[22] UCMJ art. 33."When a person is held for trial by general court-martial the commanding officer shall, within 8 days after the accused is ordered into arrest or confinement, if practicable, forward the charges ... to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for the delay."

[23] *Id. See also* United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973).

[24] United States v. Gatson, 48 C.M.R. 440 (N.C.M.R. 1974).

[25] United States v. Rogers, 7 M.J. 274, 275 n.1 (C.M.A. 1979) (no prejudice shown to result from art. 33 violation and delay was explained). *See also* United States v. Nelson, 5 M.J. 189, 190 n.1 (C.M.A. 1978) (art. 10 is the only substantive speedy trial protection under the UCMJ).

[26] United States v. Mason, 45 C.M.R. 163 (C.M.A. 1972).

[27] United States v. Fernandez, 48 C.M.R. 460 (N.C.M.R. 1974). *See also* United States v. Mladjen, 19 C.M.A. 159, 41 C.M.R. 159 (1969) (where accused was pending special court-martial, but additional charges made trial by general court-martial more appropriate, commander complied with the 8-day rule by forwarding a report to the general court-martial convening authority within 8 days of the art. 32 investigating officer's recommendation of trial by general court); United States v. Rogers, 7 M.J. 274 (C.M.A. 1979) (explanation of the delay in the commander's transmittal letter was a factor to be considered in determining if art. 33 had been violated).

[28] UCMJ art. 98.

in processing of charges. The court cautioned that an article 32 investigating officer who took 40 days to prepare a three-page report was "perilously close to an Article 98 violation"[29] and discussed the possible use of article 98's sanction against another investigating officer who took 55 days to conduct an investigation.[30] Similarly the Navy-Marine Corps Court of Military Review has cautioned that those who delay the notice to the accused of preferred charges in an attempt to manipulate the speedy trial clock may subject themselves to the penalties of article 98.[31] This court extended its warning beyond trial participants to those in the "chain of command who either condone or encourage the practice in a quest for prosecutorial efficiency."[32]

15–3. The Sixth Amendment

The Supreme Court addressed the sixth amendment right to a speedy trial in detail in Barker v. Wingo.[33] Barker had been tried in a Kentucky State court for a double murder. The Government had requested and received 16 continuances in Barker's trial while they attempted to convict a co-accused whom they wanted to testify against Barker.[34] The defense did not object to the Government's delays until the 15th continuance. As a result of the delays, Barker was not tried until more than 5 years after the murders. He spent about 10 months in pretrial confinement and the remaining 4 years on bail awaiting trial.[35]

The Court addressed Barker's claim that he had been denied a speedy trial and set forth some principles for deciding the constitutional issue. The Court noted that society, as well as the accused, has an interest in a speedy trial.[36] It was unlikely that the citizens of Kentucky enjoyed the thought of a possible murderer in their jurisdiction for several years awaiting trial. In addition, the accused may benefit from delay as witnesses become unavailable, forget facts, or become unwilling to testify. Because the right to a speedy trial is more vague than other procedural constitutional rights, the only adequate remedy for a violation is dismissal.[37] Finally, the Court said that the right cannot be quantified into a specific number of days or months; courts must employ a balancing test weighing the conduct of the Government and the conduct of the accused.[38]

The Court listed four specific factors to be considered when applying the balancing test to a sixth amendment speedy trial issue: the length of the delay, the reason for the delay, prejudice to the accused, and assertion of the right to speedy trial.[39] Although none of the factors has a "talismanic effect," the length of the delay is "to some extent a triggering mechanism."[40] One aspect of length of delay is the nature of any restraint imposed on the accused while awaiting trial. In this balancing test, the Government prevails when it successfully argues the second factor--reason for the delay. If the Government can show logical reasons for taking a long time to get to trial, it can usually overcome a motion to dismiss based on the sixth amendment alone. The accused prevails by arguing and showing the third and fourth factors--prejudice and assertion of the right. In Barker, the Court found that the 5-year period was certainly long enough to trigger the inquiry.[41] The Government argued that the reason for the delay was to try the co-accused first and showed the difficulty that trial presented. Barker could not show much prejudice, other than the 5-year waiting period. In addition, Barker asserted the right to a speedy trial only at the end of the 5-year period. Because he failed to assert the right, it seemed to the Court that he was willing to gamble that the Government might not successfully try him. Applying the balancing test, the Court concluded that the Government's explanation for the delay, coupled with the lack of prejudice and the failure to demand trial, showed that Barker's sixth amendment right had not been violated, despite the long delay in bringing him to trial.[42]

If other, possibly more restrictive, speedy trial rules do not apply, military courts will apply the Barker v. Wingo methodology to resolve claimed infringements of the right to a speedy trial.[43] With the 120-day rule under R.C.M. 707, however, the need to apply a sixth amendment analysis to evaluate speedy trial claims is less likely.[44]

The Court of Military Appeals applied the constitutional standard in United States v. Johnson,[45] in which 210 days

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[29] United States v. Powell, 2 M.J. 6 (C.M.A. 1976).
[30] United States v. Perry, 2 M.J. 113 (C.M.A. 1977) (Fletcher, C.J., concurring in result).
[31] United States v. Maresca, 26 M.J. 910 (N.M.C.M.R. 1988).
[32] *Id.*
[33] 407 U.S. 514 (1972).
[34] *Id.* at 516.
[35] *Id.* at 534.
[36] *Id.* at 519.
[37] *Id.* at 522.
[38] *Id.*at 530.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 533.
[42] *Id.* at 534–36. For a recent application of the Barker v. Wingo analysis *see* United States v. Loud Hawk, 474 U.S. 302 (1986) (when defendants' liberty was not restricted and defendants were not otherwise prejudiced, orderly appellate review of interlocutory appeals justified 7½ year delay).
[43] United States v. Nelson, 5 M.J. 189 (C.M.A. 1978).*See also* United States v. Wholley, 13 M.J. 574 (N.M.C.M.R. 1982); United States v. Shy, 10 M.J. 582 (A.C.M.R. 1980).
[44] If there was a lengthy exclusion under R.C.M. 707(c), and prejudice to an accused coupled with a demand for speedy trial, conceivably the *Barker v. Wingo* analysis would require dismissal when R.C.M. 707 would not.
[45] 17 M.J. 255 (C.M.A. 1984).

elapsed from preferral of charges to trial. The trial did not begin until 180 days after the accused had demanded immediate trial, but the accused was not under any pretrial restraint.[46] Applying the Barker factors, the court found that, although the accused had asserted the right, he could show no prejudice and the Government was able to adequately explain the delay in bringing the case to trial. The explanation included: the difficulty of securing an article 32 investigating officer while the unit was at a training site in Germany; scheduling difficulties of counsel; and problems in getting a trial date from the military judge. The court found that the sixth amendment had not been violated.[47] Recognizing that the general court-martial jurisdiction was a very busy one and that mission requirements had caused some of the delay, the court stated that, while the processing time was not a model to be emulated, it was the result of operational requirements that prevented more expeditious handling.[48] In the decision the judges recognized that it is not "the Army's primary mission to investigate and try court-martial charges" and that some delay may be tolerated as long as the Government was proceeding reasonably toward trial.[49]

The Court of Military Appeals most recently applied the Barker factors in United States v. Grom.[50] While Grom was decided after the effective date of the 1984 Manual, the processing and trial of the case occurred before the effective date, thus rendering R.C.M. 707 inapplicable. In Grom, the accused was arrested in January 1981 by civilian law enforcement officers after a search of his off-base residence revealed drugs. Probable cause was provided by information from an informant working with the Naval Investigative Service. In March 1981, civilian charges which had been brought were dismissed because the civilian authorities were unable to produce the evidence seized from the accused's apartment. In May 1981, military charges were preferred against Grom. He was ultimately tried and convicted in January of 1982.[51]

In considering the first Barker factor, length of delay, the court in Grom noted that delays of "as little as five or six months have caused the Federal courts to inquire into the remaining Barker factors."[52] Here, the court found the Government accountable for approximately 8 months, from preferral of charges in May 1981 until trial in January 1982.[53] On the second factor, reason for the delay, the court found nothing improper. As in Barker, the Government delayed prosecution hoping to try other persons first and to use their testimony against Grom. That this strategy failed did not make it illegitimate.[54] Concerning the third factor, the accused's assertion of the right, the court found Grom had timely demanded trial.[55] The final factor, prejudice to the accused, however, weighed the balance in favor of the Government. While the accused claimed specific prejudice from involuntary retention for 5 months beyond his expiration of service date, the court found that retention "does not establish prejudice per se, but it is a circumstance to be considered."[56] Here, however, any prejudice was slight as the accused continued to receive pay and allowances, was allowed leave, liberty, and the other privileges of military status, and performed normal duties.[57] The court concluded that the right to a speedy trial had not been denied as "the delay was for a legitimate purpose and any prejudice was minimal."[58]

15–4. Article 10, UCMJ

The requirements of article 10 are more rigorous than the sixth amendment.[59] Article 10 requires that immediate steps be taken to try or release a soldier who is in arrest or confinement.[60] Part of the emphasis on speedy trial in the military exists because a soldier does not have the opportunity for bail.[61] This is particularly significant when evaluating article 10 because it applies when there is pretrial restraint.

Article 10 is triggered by arrest or confinement of some significant duration.[62] Restriction can be sufficient to begin the accountability period, particularly when the restriction amounts to the legal equivalent of arrest.[63] Putting a soldier

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[46] *Id.* at 261.
[47] *Id.*at 261–62.
[48] *Id.*
[49] *Id.* at 261.
[50] 21 M.J. 53 (C.M.A. 1985).
[51] *Id.* at 55.
[52] *Id.* at 56.
[53] *Id.* Government accountability began with preferral in May; "new" charges later preferred against the accused "in essence" duplicated the May charges, with the addition of a conspiracy specification.*Id.* at 54, 56.
[54] *Id.* at 56–57.
[55] *Id.*at 57.
[56] *Id.*
[57] *Id.* at 58.
[58] *Id.*
[59] *United States v. King,*30 M.J. 59, 62 n.5 (C.M.A. 1990); United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (art. 10, as more protective than the sixth amendment, required dismissal for 161-day delay, 110 days of which were spent on restriction).
[60] UCMJ art. 10."When any person is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him."
[61] United States v. Mock, 49 C.M.R. 160 (A.C.M.R. 1974).
[62] United States v. Nelson, 5 M.J. 189 (C.M.A. 1978) (13 days' pretrial confinement is not confinement of significant duration).
[63] United States v. Williams, 37 C.M.R. 209 (C.M.A. 1967) (138-day restriction which amounted to "arrest"during which accused "languished" in his company area, coupled with other restriction, amounted to lack of speedy trial under art. 10); United States v. Smith, 39 C.M.R. 315 (A.B.R. 1967), *aff'd,* 38 C.M.R. 225 (C.M.A. 1968) (restriction to post which amounted to legal equivalent of "arrest" was sufficient to trigger art. 10 violation for 99-day restriction).

on"legal hold" status at the expiration of enlistment to prevent discharge is not restraint for article 10 purposes,[64] but revocation of pass privileges in some circumstances may be tantamount to restriction.[65] Government accountability for the delay extends only to the particular charges for which the accused is restrained.[66]

The test for compliance with article 10 is not constant motion but reasonable diligence in bringing the charges to trial.[67] Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive. Even when some of the delay is caused by the Government's error, courts may find reasonable action in moving toward trial by the Government if the prosecution was not indifferent to the delay.[68] In determining whether there has been a denial of speedy trial under article 10, courts will examine whether there has been a purposeful or oppressive design on the part of the Government.[69] Unreasonable delay is determined by the facts of each case.

Courts will consider several factors in determining the speedy trial issue, including demand for trial, defense-caused delay, reasonableness of the delay, nature of restraint, and arbitrariness of the delay. Unlike the Barker methodology, prejudice is not listed as a factor. Courts have found, however, that an otherwise satisfactory explanation for a particular delay "might be revealed as unreasonable in light of specific harm to the accused occasioned by the delay."[70] The loss of a defense witness can be prejudicial,[71] but administrative consequences of pending charges do not aggravate the delay.[72] Noncompliance with article 33's 8-day rule weighs against the Government in showing due diligence.[73]

When civilian authorities restrain the accused solely for military authorities, the Government is accountable for the delay.[74] If the accused is apprehended by civilian authorities for unauthorized absence from the military, the Government is entitled to a reasonable time to pick up the accused and return him or her to the place of trial.[75] The detention of the accused by civil authorities for civil offenses cannot be charged against the Government when measuring whether the prosecution has proceeded with reasonable dispatch.[76] This is true whether the initial detention was by civil authorities or by military authorities who turned the accused over to civil authorities.[77] Pending foreign civilian charges and application for an administrative discharge do not justify delay by the Government in disposing of military charges.[78]

The court-created Burton rules are a special application of article 10 and are discussed in detail below. Because of the attention paid to the Burton rules and R.C.M. 707, the independent article 10 claims are rarely litigated. Speedy trial violations are usually litigated under Burton and R.C.M. 707.

15–5. The Burton rules

a. Introduction. The Court of Military Appeals mandated speedy trial rules for military accuseds in pretrial confinement in United States v. Burton.[79] The court was concerned that the Armed Forces were not policing themselves on speedy trial issues and were allowing soldiers to remain in pretrial confinement for extended periods awaiting trial. The Burton court imposed two rules that apply to all accused in pretrial confinement: the "90-day" rule and the "demand rule." These rules are both special applications of article 10's mandate that immediate steps be taken to try or release soldiers in arrest or pretrial confinement. In the 90-day rule, the court created a judicial presumption that pretrial confinement in excess of 90 days violated article 10's"immediate steps" requirement. The demand rule

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[64] United States v. Rachels, 6 M.J. 232 (C.M.A. 1979); United States v. Amundson, 49 C.M.R. 598 (C.M.A. 1975).

[65] United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (all members of the accused's unit had pass privileges as a matter of course; privileges were withdrawn only for misconduct).

[66] United States v. Marell, 49 C.M.R. 373 (C.M.A. 1974); United States v. Mladjen, 41 C.M.R. 159 (C.M.A. 1969); United States v. Stubbs, 3 M.J. 630 (N.C.M.R. 1977).

[67] United States v. Tibbs, 35 C.M.R. 322 (C.M.A. 1965) (considering factors like seriousness of the charge, necessity for a complete investigation, time required to prepare formal charges, time for convening authority to act on the charges, time for the formal pretrial investigation, and time for the formal report, 55 days of pretrial confinement was reasonable).

[68] *See, e.g.,* United States v. Przybycien, 41 C.M.R. 120 (C.M.A. 1969) (56 days of the 117-day delay in bringing the accused to trial for desertion resulted from Government efforts to obtain the accused's personnel record; despite the fact that additional efforts could have expedited the situation, this conduct did not violate article 10; the court noted that the Government had not been indifferent to the delay, but had been actively attempting to move the case to trial).

[69] United States v. Parish, 38 C.M.R. 209 (C.M.A. 1968).

[70] United States v. Smith, 37 C.M.R. 319, 321 (C.M.A. 1967). *See also* United States v. Parish, 38 C.M.R. 209 (C.M.A. 1968) (inexperience of officers involved in processing the case explained the delay but defense loss of two key witnesses still made the delay unreasonable).

[71] United States v. Parish, 38 C.M.R. 209 (C.M.A. 1968). *See also* United States v. Dupree, 42 C.M.R. 681 (A.C.M.R. 1970) (137-day delay, which required defense to use depositions to present crucial alibi testimony, warranted dismissal of the charges).

[72] United States v. Amundson, 49 C.M.R. 598 (C.M.A. 1975) (loss of exchange and commissary privileges, denial of regular leave, and family separation not considered).

[73] United States v. Fernandez, 48 C.M.R. 460 (N.C.M.R. 1974). United States v. Fernandez, 48 C.M.R. 460 (N.C.M.R. 1974).

[74] United States v. Keaton, 40 C.M.R. 212 (C.M.A. 1969).

[75] *United States v. McCallister,* 24 M.J. 881 (A.C.M.R. 1987), *aff'd on other grounds,* 27 M.J. 138 (C.M.A. 1988) (Three days travel from West Virginia to North Carolina was reasonable, not 15 days); *United States v. Lilly,* 22 M.J. 620 (N.M.C.M.R. 1986) (Government is entitled to a reasonable time); United States v. Marin, 43 C.M.R. 272 (C.M.A. 1971) (57-day delay in returning accused to California from New York for trial was unreasonable, but warranted no additional relief because accused was not prejudiced in preparing defense and sentencing authority considered entire confinement period when adjudging sentence).

[76] United States v. Bragg, 30 M.J. 1147 (A.F.C.M.R. 1990), *petition denied,* 32 M.J. 313 (C.M.A. 1991).

[77] United States v. Reed, 2 M.J. 64 (C.M.A. 1977).

[78] United States v. Mclvane, 50 C.M.R. 732 (A.C.M.R. 1975).

[79] 44 C.M.R. 166 (C.M.A. 1971).

calls for the Government to respond immediately to a demand for trial from a soldier in pretrial confinement.

b. The "90-day" rule. For offenses occurring after 17 December 1971, whenever the accused's pretrial confinement exceeds 90 days,[80] in the absence of a defense request for a continuance, there is a presumption of a violation of article 10 and the Government has a heavy burden to show diligence in bringing the accused to trial. In the absence of such a showing, charges must be dismissed. This rule contemplates that, after 90 days of pretrial confinement, the focus shifts from the Barker methodology, which balances the conduct of the Government and the conduct of the accused, to an emphasis primarily on the Government's conduct.

(1) *Inception of the Burton period.* Government accountability normally begins with military confinement.[81] The Government is not accountable for civil pretrial confinement when the accused is held for civil charges even though the accused was apprehended by the military police and later turned over to civilian authorities.[82] The Government is authorized a reasonable time to pick up an accused held by civilian authorities before the Burton period of accountability begins.[83] Civilian restraint which effectively restricts military prosecution does not cause the presumption to arise.[84] Similarly, confinement at the request of a foreign country does not count toward determining Government accountability to bring the accused to trial for military charges also preferred.[85] The Government is charged with the period of time during which its agents unreasonably refuse to arrange for the return to military control of an accused in civilian confinement.[86] When an accused absents oneself from military jurisdiction, the Government is unable to process the charges against the accused until his or her return, and is not charged with responsibility for the delay.[87]

The Burton presumption is triggered by more than 90 days of pretrial confinement and normally does not apply to pretrial restraint other than confinement.[88] Severe arrest or restriction, however, can be "tantamount to confinement" for Burton purposes.[89] In United States v. Acireno,[90] the court held that arrest in excess of 90 days also activated the Burton presumption. The court found that the accused, who was restricted to two floors of the barracks; was not permitted to go outside the barracks without an NCO escort; had his civilian clothing taken away; was not permitted to attend formations, including PT; and was not permitted to perform normal military duties was in the status of "arrest" for 153 days.[91] If an entire unit is restricted in the same manner, however, the restriction may not be tantamount to confinement even when the restriction is more severe than it might be for sentenced prisoners.[92]

A rehearing, being a trial de novo, to redetermine either an accused's guilt or an appropriate sentence, or both, falls within the Burton 90-day mandate.[93] For rehearing purposes, the 90-day period begins on the day the convening authority actually receives the decision of the Court of Review.[94]

Each additional charge involves a separate determination of timeliness for speedy trial purposes.[95] Burton accountability for delay in trial of charges based on subsequently committed or discovered offenses begins when the Government possesses substantial information on which it intends to prefer additional charges.[96] For purposes of counting the Burton 90 days, the day of entry into confinement is excluded and the day of trial is included.[97]

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[80] *Id.* at 172. The *Burton* rule was originally announced to apply when pretrial confinement "exceeds three months." After trial and appellate courts experienced difficulty figuring the 3-month period, the Court of Military Appeals refined the period to "90 days" in United States v. Driver, 49 C.M.R. 376 (C.M.A. 1974).

[81] United States v. Lyons, 50 C.M.R. 804 (A.C.M.R. 1975); United States v. Halderman, 47 C.M.R. 871 (N.C.M.R. 1973).

[82] United States v. Reed, 2 M.J. 64 (C.M.A. 1976); United States v. Frostell, 13 M.J. 680 (N.M.C.M.R. 1982); United States v. Ward, 49 C.M.R. 110 (N.C.M.R. 1974); United States v. Emmons, 48 C.M.R. 373 (N.C.M.R. 1973); *but see* United States v. Swartz, 44 C.M.R. 403 (A.C.M.R. 1971).

[83] *See* United States v. McCallister 24 M.J. 881 (A.C.M.R. 1987), *aff'd on other grounds,* 27 M.J. 138 (C.M.A. 1988) (3 days travel from West Virginia to North Carolina was reasonable, not 15 days); United States v. Smith, 50 C.M.R. 237 (A.C.M.R. 1975) (6 days to return the accused 400 miles to the trial situs was reasonable); United States v. Halderman, 47 C.M.R. 871 (N.C.M.R. 1973) (12 days to return accused from Oregon to Camp Pendleton was reasonable).

[84] United States v. Harris, 50 C.M.R. 225 (A.C.M.R. 1975) (principally due to civilian confinement, trial could not be scheduled when both the accused and military judge could be present); United States v. Stevenson, 45 C.M.R. 649 (A.F.C.M.R. 1972).

[85] United States v. Murphy, 18 M.J. 220 (C.M.A. 1984).

[86] United States v. Keaton, 40 C.M.R. 212 (C.M.A. 1969) (accused held on State charges, but on behalf of Federal Government because of deserter status).

[87] United States v. Brooks, 48 C.M.R. 257 (C.M.A. 1974); United States v. O'Brien, 48 C.M.R. 42 (C.M.A. 1973); United States v. Bone, 11 M.J. 776 (A.F.C.M.R. 1981); United States v. Perkins, 1 M.J. 571 (A.C.M.R. 1975).

[88] United States v. Molina, 47 C.M.R. 752 (A.C.M.R. 1973) (55 days' pretrial confinement and 37 days' restriction did not trigger *Burton* rule).

[89] Art. 10 applies to cases when an accused is in the status of "arrest" or "confinement."To the extent*Burton* is based on art. 10, it should follow logically that both "arrest" and "confinement"trigger the *Burton* rules. The sentence credit cases on "restriction tantamount to confinement" such as United States v. Smith, 20 M.J. 528 (A.C.M.R.), *petition denied,* 21 M.J. 169 (C.M.A. 1985) could be applied by analogy to the speedy trial area. Note, however, that sentence credit is given for confinement or restriction tantamount to the highest level of restraint: *confinement.* Art. 10 addresses not only confinement, but also the lesser restraint of "arrest." Thus, arguably "restriction tantamount to *arrest,*" a significantly lesser level of restraint than confinement, could trigger art. 10 and*Burton.*

[90] 15 M.J. 570 (A.C.M.R. 1982). *See also* United States v. Schilf, 1 M.J. 251 (C.M.A. 1976) (restriction to "narrow confines of squadron area," combined with an hourly sign-in requirement, was tantamount to confinement and triggered *Burton*); United States v. Bowman, 13 M.J. 640 (N.M.C.M.R. 1982) (restriction to"restricted men's barracks" was tantamount to confinement).

[91] *Acireno,* 15 M.J. at 571–72.

[92] United States v. Buchecker, 13 M.J. 709 (N.M.C.M.R. 1982).

[93] United States v. Flint, 1 M.J. 428 (C.M.A. 1976).

[94] United States v. Cabatic, 7 M.J. 438 (C.M.A. 1979).

[95] United States v. Talavera, 8 M.J. 14 (C.M.A. 1979).

[96] United States v. Johnson, 1 M.J. 101 (C.M.A. 1975); United States v. Johnson, 48 C.M.R. 599 (C.M.A. 1974); United States v. Boden, 21 M.J. 916 (A.C.M.R. 1986); United States v. Shavers, 50 C.M.R. 298 (A.C.M.R. 1975).

[97] United States v. Manalo, 1 M.J. 452 (C.M.A. 1976).

(2) *Termination of the Burton period.* Release from confinement will terminate the period chargeable to the Government, although the Court of Military Appeals found in United States v. Rowsey[98] that release after 85 days' confinement and subsequent Government inaction denied the accused's right to a speedy trial.

Article 39(a) sessions can, under some circumstances, terminate the Burton period. An article 39(a) session which includes the acceptance of a guilty plea and the entering of findings of guilty is"tantamount to trial" and terminates Burton accountability.[99] The Court of Military Appeals has never ruled directly on the effect of some article 39(a) sessions, although some concurring and dissenting opinions have discussed the issue and concluded that delays occasioned by pretrial sessions dealing with pretrial motions should not be part of the Government's accountable period, and that arraignment at an article 39(a) session terminates the Burton period.[100]

(3) *The Burton methodology.* In determining whether the Government has violated the 90-day rule, the following methodology is suggested. First, determine the number of days from confinement to trial. If the number exceeds 90, determine whether any days are excludable from Government accountability. Exclusions are discussed below. If, after excludable days are subtracted from total days the accountable time is under 90 days, the presumption of a speedy trial violation does not arise. If the number exceeds 90 after subtracting exclusions, then the presumption of denial of speedy trial rights has been raised. The Government must then demonstrate "extraordinary circumstances" that justify the delay. What constitutes extraordinary circumstances is discussed below. The Government uses "extraordinary circumstances" to rebut the presumption of a violation of article 10 when accountable time exceeds 90 days.

(4) *Exclusions.* The Government is entitled to exclude certain periods of time from accountability. The major exclusions from the Burton 90-day period are times for defense-requested delay and times for psychiatric evaluation of the accused.

Continuances and delays because of defense request or convenience are excluded from the Burton 90-day period.[101] Parties can also stipulate that certain periods not be considered in determining whether the 90-day rule is applicable.[102] The question of what constitutes defense delay is often litigated in speedy trial motions. When the defense disputes responsibility for a particular delay, courts look to the real cause of the delay and to whether the Government was actually delayed. While defense- requested delays are generally attributable to the defense as the benefiting party, a showing that the Government could not have proceeded compels the conclusion that the Government was not actually delayed and the period will not be excluded. First, the court looks to the real cause of the request (that is, did the Government do anything to affirmatively necessitate the request?). Second, the court examines the result of the request (that is, did it really delay proceedings in any way?).[103]

If the responsibility for the delay is shared by the defense and the Government, the period may not be chargeable to the Government.[104] Concurrence by the defense in the trial date for defense convenience to accommodate the defense counsel's work schedule and leave will constitute defense delay.[105] Mere acquiescence in a new trial date already set is not, however, a defense delay.[106] The Government must carefully record each delay when it occurs and get defense requests for delay in writing to minimize potential issues of whether certain periods should be excluded.

Some cases have held that a defense counsel's temporary duty (TDY) was not a defense delay, at least in the absence of a showing that the TDY was for personal or other defense purposes.[107] In other cases, defense counsel's leave has been chargeable as defense delay, although not if the leave was taken in conjunction with TDY for a CLE course.[108]

Unavailability of the judge and failure of the defense to request another judge is not defense delay.[109] Some

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[98] 14 M.J. 151 (C.M.A. 1982).

[99] United States v. Cole, 3 M.J. 220, 225 n.4 (C.M.A. 1977) (art. 39(a) session must deal with accused's guilt to toll *Burton*); United States v. Marell, 49 C.M.R. 373 (C.M.A. 1974). An extension of the original art. 39(a) session after the court is assembled may justify delay beyond 90 days. United States v. Towery, 2 M.J. 468 (A.C.M.R. 1975). *But see* United States v. Beach, 50 C.M.R. 560 (C.M.A. 1975) (Cook, J., dissenting); United States v. Williams, 1 M.J. 1042 (N.M.C.M.R. 1976).

[100] *See, e.g.,*United States v. Cabatic, 7 M.J. 438 (C.M.A. 1979) (Cook, J., concurring in the result) (art. 39(a) session in which the accused is arraigned constitutes a trial for the purposes of speedy trial rule); United States v. Roman, 5 M.J. 385 (C.M.A. 1978) (litigation of speedy trial motion at art. 39(a) session tolled *Burton*); United States v. Beach, 1 M.J. 118 (C.M.A. 1975) (Cook, J., dissenting) (delay occasioned by time to deal with pretrial motions is not part of Government's accountable time).

[101] United States v. Roman, 5 M.J. 385 (C.M.A. 1978); United States v. Driver, 49 C.M.R. 178 (C.M.A. 1974); United States v. Herrington, 2 M.J. 807 (A.C.M.R. 1976) (oral request also deducted).

[102] United States v. Montague, 47 C.M.R. 796 (C.M.A. 1973).

[103] United States v. Cole, 3 M.J. 220, 225 n.5 (C.M.A. 1977). *See also* United States v. Anderson, 49 C.M.R. 37 (A.C.M.R. 1974) (defense delay should not be automatically subtracted; court should test to see if the request impaired the Government's ability to bring the case to trial within 90 days).

[104] United States v. Talavera, 8 M.J. 14 (C.M.A. 1979); United States v. Montague, 47 C.M.R. 796 (C.M.A. 1973).

[105] United States v. Neal, 48 C.M.R. 89 (A.C.M.R. 1973).

[106] United States v. Wolzok, 1 M.J. 125 (C.M.A. 1975); United States v. Reitz, 48 C.M.R. 178 (C.M.A. 1974) (trial counsel merely informed defense counsel of new date); United States v. Wactor, 30 M.J. 821 (A.C.M.R. 1990).

[107] United States v. Wactor, 30 M.J. 821 (A.C.M.R. 1990); United States v. Powell, 2 M.J. 849 (A.C.M.R. 1976); United States v. Lyons, 50 C.M.R. 804 (A.C.M.R. 1975).

[108] United States v. Lyons, 50 C.M.R. 804 (A.C.M.R. 1975) (defense counsel present at docketing and leave considered in setting trial date). In United States v. Powell, 2 M.J. 849 (A.C.M.R. 1976) (leave taken in conjunction with TDY for CLE course) and United States v. Perkins, 1 M.J. 571 (A.C.M.R. 1975), the defense leave was accountable time for the Government.

[109] United States v. McClain, 1 M.J. 60 (C.M.A. 1975).

docketing delays may, however, be excludable.[110] A submission of a request for discharge for the good of the service (chapter 10, AR 635-200) is not per se a request for delay. The time for processing the chapter 10 request will usually be considered a normal incident of processing.[111] If the request is submitted at such a late date that the trial must be delayed in order to give the request"meaningful consideration," however, the period will probably be excluded.[112] Assertion of the article 35, UCMJ, right to a 3- or 5-day period from service of charges until trial is not normally a defense-requested delay because this is an absolute right of the accused,[113] but, when the defense counsel affirmatively misleads the Government and then asserts the right to delay after service simply to take advantage of speedy trial rules, the defense may be held accountable for the time period.[114] Delay resulting from an attempt to negotiate a pretrial agreement may under some circumstances amount to a request for a continuance by the defense.[115] A defense request for joinder of all charges at one trial has been held not to be defense-requested delay.[116] In cases involving multiple accused, defense-requested delay for one accused does not extend to co-accused.[117]

The other major exclusion from Government accountability besides defense-requested delay is time for psychiatric evaluations of the accused. Reasonable time delays for these evaluations will not be counted under the 90-day rule, although the Court of Military Appeals has indicated that a "problem may exist when the Government's conduct delays" the examination.[118] The period of time for psychiatric evaluation is excluded whether the evaluation was requested by the defense,[119] by the article 32 investigating officer,[120] or ordered by the military judge.[121] In addition, the excludable period will encompass sufficient time for medical personnel to complete a thorough evaluation, provided there is no evidence of dilatory tactics on the part of the Government.[122] The exclusion encompasses the time from referral of the case to a sanity board until the board issues results. Time limitations which may interfere with the willingness of responsible officials to inquire fully into the sanity issue or which may interfere with the sanity inquiry will not be imposed.[123] Courts will examine the delay to determine if there was due diligence in bringing the accused to trial.[124]

(5) *Extraordinary circumstances.* When the Government is accountable for more than 90 days of pretrial confinement after subtracting exclusions, the presumption arises that article 10 and the accused's speedy trial rights have been violated. The Government may be able to rebut the presumption, however, by showing "extraordinary circumstances" that justify delay beyond 90 days. The Government may be able to show that the justifiable time exceeded 90 days in such cases as:

(a) Those involving problems in a war zone or foreign country; or

(b) Those involving complex offenses in which due care requires more than a normal time in marshaling the evidence; or

(c) Those in which, for reasons beyond the control of the Government, the processing was necessarily delayed.[125]

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[110] United States v. Talavera, 8 M.J. 14 (C.M.A. 1979) (delay caused by periodic change of court membership not charged to Government). *But see* United States v. Wolzok, 1 M.J. 125 (C.M.A. 1975) (mere docket problems do not excuse delay).

[111] *See, e.g.,*United States v. O'Brien, 48 C.M.R. 42 (C.M.A. 1973) (request did not delay Government because it was denied at same time case was referred); United States v. McElvane, 50 C.M.R. 732 (A.C.M.R. 1975); United States v. Parker, 48 C.M.R. 241 (A.C.M.R. 1973).

[112] United States v. Bush, 49 C.M.R. 97 (N.C.M.R. 1974) (request for delay was made 6 days before scheduled trial date). *Cf.* United States v. Abner, 48 C.M.R. 577 (A.C.M.R. 1974) (28-day docketing delay requested by defense for processing discharge request was not counted against the Government).*See also* United States v. Bowman, 13 M.J. 640 (N.M.C.M.R. 1982). The processing of a chapter 10 request will not normally be subtracted from Government accountable time, absent a specific defense request for delay. United States v. Parker, 48 C.M.R. 241 (A.C.M.R. 1973).

[113] United States v. Murrell, 50 C.M.R. 793 (A.C.M.R. 1975); United States v. Pergande, 49 C.M.R. 28 (A.C.M.R. 1974); United States v. Parker, 48 C.M.R. 241 (A.C.M.R. 1973).

[114] United States v. Cherok, 19 M.J. 559 (N.M.C.M.R. 1984), *aff'd,* 22 M.J. 438 (C.M.A. 1986).

[115] United States v. Perkins, 1 M.J. 571 (A.C.M.R. 1975); *but see* United States v. Harris, 20 M.J. 795 (N.M.C.M.R. 1985) (time for plea negotiations not excluded under R.C.M. 707(c)(3) concerning delay at request or with the consent of the defense).

[116] United States v. Ward, 1 M.J. 21 (C.M.A. 1975).

[117] United States v. Johnson, 1 M.J. 294 (C.M.A. 1976); United States v. O'Neal, 48 C.M.R. 89 (A.C.M.R. 1973).

[118] United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983). *See also* United States v. McClain, 1 M.J. 60 (C.M.A. 1975); United States v. McDowell, 19 M.J. 937 (A.C.M.R. 1985) (while the defense is generally responsible for delay from request for a sanity board, the Government has "some obligation to proceed with dispatch"); United States v. Bean, 13 M.J. 970 (A.C.M.R. 1982); United States v. Hill, 2 M.J. 950 (A.C.M.R. 1976).

[119] United States v. Rogers, 7 M.J. 274 (C.M.A. 1979); United States v. Hirsch, 26 M.J. 800 (A.C.M.R. 1988), *petition denied,* 27 M.J. 404 (C.M.A. 1988); United States v. Jones, 6 M.J. 770 (A.C.M.R. 1978).

[120] United States v. McClain, 1 M.J. 60 (C.M.A. 1975).

[121] United States v. Hill, 2 M.J. 950 (A.C.M.R. 1976).

[122] United States v. Badger, 7 M.J. 838 (A.C.M.R. 1979).

[123] *Id.* (no lack of due diligence when 35 days elapsed between referral to sanity board and issuance of board results).

[124] *See, e.g.,*United States v. Bone, 11 M.J. 776 (A.F.C.M.R. 1981); United States v. Farmer, 6 M.J. 897 (A.C.M.R. 1979). *Cf.* United States v. Leonard, 3 M.J. 214 (C.M.A. 1977) (*Dunlap* 90-day rule for post-trial processing not violated because time for defense requested psychiatric exam deducted).

[125] *Burton* raises a presumption of a lack of speedy trial after 90 days of pretrial confinement; extraordinary circumstances rebut that presumption. When the Government can show extraordinary circumstances, it demonstrates that due to the nature of this particular case, more than the normal time to bring the accused to trial was needed. The factors to be considered come from United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973), in which the court held: [W]hen a *Burton* violation has been raised by the defense, the Government must demonstrate that really extraordinary circumstances beyond such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave contributed to the delay." 47 C.M.R. at 413. This is a different method than used under R.C.M. 707, which sets a specific time period beyond which the Government can never prevail. R.C.M. 707 differs from the *Burton* method by taking what has been considered"extraordinary circumstances" in case law and making them excludable time periods under the 120-day rule.*See* R.C.M. 707 analysis. Once the Government exceeds the 120 days, however, it can no longer claim that it needed an even longer time to bring the accused to trial. *See infra* para. 15–6.

The Government must demonstrate a nexus between the claimed extraordinary circumstance and the delay.[126] Facts in the record must support a determination that because of extraordinary circumstances, more than the normal processing time was required.[127] The best way for the Government to make this showing is through the use of a detailed chronology of events which shows the processing of the case and demonstrates how extraordinary circumstances required more processing time than 90 days.[128]

The fact that an offense arose in a foreign country is not per se an extraordinary reason for delay,[129] nor is resolution of a foreign jurisdiction question or the absence of a judge for a court-martial conducted in a foreign country.[130] Again, the Government must show how these circumstances are extraordinary and how they cause slower than normal processing.

Complex cases may present extraordinary reasons for delay, although a serious offense is not per se an extraordinary circumstance.[131] Rather, the facts in the record must support a determination that because of the serious or complex nature of the charges, due care required more than a normal time to gather the evidence. A lengthy article 32 investigation and extensive laboratory testing are facts that help establish the serious and complex nature of a case,[132] although an article 32 investigation delay after the accused raises self-defense may not be an extraordinary circumstance.[133] Delay caused by the accused's repudiation of a waiver of the article 32 investigation, however, is chargeable to the defense.[134] A wide-ranging international search for witnesses plus the accused's successive requests for faraway military counsel, the accused's requests for extensive data and interrogatory proceedings at a far distant point, and accused's petition to the Court of Military Appeals for relief from pretrial confinement, were found to all amount to extraordinary circumstances by the Army Court of Military Review in United States v. Cabatic.[135]

Additional charges are not normally a reason for delay beyond 90 days for trial of the original charges.[136] Additional charges may, however, be extraordinary circumstances in some cases. In United States v. Groshong,[137] a case involving two sets of additional charges and other later offenses which were investigated but not referred to trial, the Court of Military Appeals found that the "repeated misconduct" by the accused constituted "reasons beyond the control of the Government" and held that the accused had not been denied a speedy trial despite 104 days of pretrial confinement.[138] Even when the accused expresses a desire to be tried on all charges at one trial, the Government is not excused from proceeding with due diligence. The policy of the 1969 Manual that all known offenses be tried at one court-martial was forced to yield when in conflict with article 10 and Burton.[139] The 1984 Manual eliminates this requirement, making it easier for the Government to comply with Burton.[140] The accused can be tried for the original charges before 90 days of pretrial confinement has elapsed to comply with Burton and the Government may still try the accused on other pending charges at a later time.[141]

Operational demands may be an extraordinary circumstance.[142] The unauthorized absence of an essential prosecution witness may be an extraordinary circumstance,[143] as may the diversion of investigative or legal personnel to investigate

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[126] United States v. Henderson, 1 M.J. 421 (C.M.A. 1976) (court dismissed murder charges in an egregious"murder for hire" case in which the accused was in pretrial confinement for 132 days; despite the fact that the crime occurred in Okinawa and there were multiple defendants, the court held that *Burton* had been violated because more than 90 days had elapsed and the Government could not demonstrate how "extraordinary circumstances" had caused the delay).

[127] *Id.* Among the factors that particularly seemed to disturb the court in *Henderson* was the excessive amount of time it took to complete the art. 32 investigation, the report of investigation, and the pretrial advice. The Government did not show on the record why extraordinary circumstances caused them to take extra time to complete these processing tasks.

[128] *See, e.g.,* United States v. Cole, 3 M.J. 220 (C.M.A. 1977) (no violation of *Burton* despite 100 days of pretrial confinement; Government was able to use chronology to show how it needed more than the normal time to process accused's case for trial). *See also*United States v. Miller, 12 M.J. 836 (A.C.M.R. 1982) (Government demonstrated extraordinary circumstances by showing foreign situs, victim's nationality, accused's nonduty status, Korean assumption of jurisdiction, and reversal of Korean conviction).

[129] United States v. Henderson, 1 M.J. 421 (C.M.A. 1976) (Government must show specific problems such as investigation by foreign police, difficulties in obtaining foreign witnesses, travel problems, or contested jurisdictional issues). *See also* United States v. Stevenson, 47 C.M.R. 495 (C.M.A. 1973); United States v. Young, 50 C.M.R. 490 (A.C.M.R. 1975).

[130] United States v. Young, 50 C.M.R. 490 (A.C.M.R. 1975); United States v. Eaton, 49 C.M.R. 426 (A.C.M.R. 1974).

[131] *See, e.g.,*United States v. Cole, 3 M.J. 220 (C.M.A. 1977); United States v. Henderson, 1 M.J. 421 (C.M.A. 1976). *See also* United States v. Rowel, 50 C.M.R. 752 (A.C.M.R. 1975) (extraordinary circumstances due to complexity of case: 6 days to transfer accused across international border, 8-day field exercise, and 18 days to complete art. 32 investigation due to uncooperative key Government witness).

[132] United States v. Cole, 3 M.J. 220 (C.M.A. 1977); United States v. Douglas, 2 M.J. 1091 (A.C.M.R. 1977).

[133] United States v. Perry, 2 M.J. 113 (C.M.A. 1977) (55 days to conclude art. 32 investigation with minimal involvement with self-defense).

[134] United States v. Herron, 4 M.J. 30 (C.M.A. 1977).

[135] 2 M.J. 985 (A.C.M.R. 1976).*See also* United States v. Cole, 3 M.J. 220 (C.M.A. 1977).

[136] United States v. Johnson, 1 M.J. 101 (C.M.A. 1975) (not an extraordinary circumstance when second offense was not complex and record did not indicate accused would have been tried within 90 days); United States v. First, 2 M.J. 1266 (A.C.M.R. 1976) (no extraordinary circumstances when accused had demanded speedy trial before committing second offense, intervening offense was not complex, and significant delay had already occurred before the intervening offense).

[137] 14 M.J. 186 (C.M.A. 1982).

[138] *Id.* at 187.*See also* United States v. Huddleston, 50 C.M.R. 99 (A.C.M.R. 1975) (extraordinary circumstances shown when Government could have tried the accused within 90 days absent the delay caused by additional charges).

[139] United States v. Ward, 1 M.J. 21 (C.M.A. 1975).

[140] R.C.M. 307(c)(4) and analysis.

[141] *See* United States v. Durr, 21 M.J. 576 (A.C.M.R. 1985) (additional charges found not to justify trial delay; R.C.M. 707(d) construed).

[142] United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973).

[143] United States v. Johnson, 48 C.M.R. 599 (C.M.A. 1974) (Government not responsible for repeated*unexcused* absences of witness).

sabotage of an important operational unit.[144] The Government's good faith efforts to obtain individual counsel belatedly requested by the accused may also be an extraordinary circumstance justifying delay.[145] Mere docket problems, however, do not excuse delay, nor do normal incidents of military practice. [146] Shortages of personnel; illness, injury, or absence of the convening authority, the staff judge advocate or deputy staff judge advocate; and backlogs resulting from shortage of personnel, inexperienced personnel, and heavy caseload of the office, defense counsel, or military judge do not constitute extraordinary circumstances justifying delay under Burton.[147] The failure of a Government witness to procure a passport to go to Germany to testify is not an extraordinary circumstance because this matter is a routine prosecution responsibility.[148] The Government's desire to complete the trial of another accused for the same murder with which the accused was charged and then use the accomplice's testimony against the accused was held to justify a 150-day delay in United States v. Johnson.[149]

c. The demand rule. The Court of Military Appeals also created a second speedy trial rule concerning soldiers in pretrial confinement in United States v. Burton, the "demand rule."[150] When a soldier in pretrial confinement requests speedy disposition of the charges, the Government must respond to the request and either proceed immediately or show adequate cause for any further delay. A failure to respond to a request for a prompt trial or to order a prompt trial may justify dismissal of the charges. A written response may not be necessary. For example, a Government"response" of immediately holding an article 39(a) session or immediately appointing an article 32 investigating officer may be adequate.[151]

The Burton demand rule, however, was eliminated by the Court of Military Appeals in United States v. McCallister.[152] The court held that "the part of Burton which sets out a distinct right to a speedy trial based simply on an accused's demand therefor is overruled, prospectively."[153]

15–6. R.C.M. 707: The 1984 Manual speedy trial standards

a. In general. The 1984 Manual for Courts-Martial adopted in R.C.M. 707 new speedy trial standards[154] for all courts-martial regardless of the level of court.[155] This was further modified with Change 5 in 1991.[156] The accused must be brought to trial within 120 days after preferral of charges, or the imposition of restraint, or entry on active duty under R.C.M. 204, whichever is earlier.[157]

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144 *Id.*

145 United States v. Rivera, 49 C.M.R. 259 (A.C.M.R. 1974), *rev'd on other grounds,* 1 M.J. 107 (1975).

146 United States v. Wolzok, 1 M.J. 125 (C.M.A. 1975). *But see* United States v. Talavera, 8 M.J. 14 (C.M.A. 1979) (convoluted opinion in which the Court of Military Appeals excused docket delays from Government accountability and completely muddied the distinction between exclusions and extraordinary circumstances).

147 United States v. Pyburn, 48 C.M.R. 795 (C.M.A. 1974) (heavy caseload); United States v. Holmes, 48 C.M.R. 316 (C.M.A. 1974) (personnel shortages); United States v. Stevenson, 47 C.M.R. 495 (C.M.A. 1973) (personnel shortages and inexperienced personnel); United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973) (illness, absence, or injury of convening authority, staff judge advocate, or deputy); United States v. Eaton, 49 C.M.R. 426 (A.C.M.R. 1974) (heavy caseload); United States v. O'Neal, 48 C.M.R. 89 (A.C.M.R. 1973) (backlogs due to personnel shortages); United States v. Sawyer, 47 C.M.R. 857 (N.C.M.R. 1973) (heavy caseload).

148 United States v. Dinkins, 1 M.J. 185 (C.M.A. 1975).

149 3 M.J. 143 (C.M.A. 1977). A joint trial is not per se an extraordinary circumstance, however. United States v. Johnson, 2 M.J. 827 (A.C.M.R. 1976) (Government must prove actual necessity for a joint trial for the delay to be an extraordinary circumstance).

150 44 C.M.R. 166 (C.M.A. 1971). The *Burton* demand rule is a separate rule, not dependent on the elapsing of more than 90 days of confinement. United States v. Johnson, 1 M.J. 101 (C.M.A. 1975).

151 United States v. Williams, 12 M.J. 894 (A.C.M.R. 1982); United States v. Onstad, 4 M.J. 661 (A.C.M.R. 1977). Although some cases had held that immediately releasing the accused from pretrial confinement was a sufficient response, *see, e.g.,* United States v. Mock, 49 C.M.R. 160 (A.C.M.R. 1974), the Court of Military Appeals found in United States v. Rowsey, 14 M.J. 151 (C.M.A. 1982), that merely releasing the accused from confinement was not a sufficient step, particularly when the accused had already spent 85 days in confinement, it took the Government 45 days from the demand to bring the accused to trial, and the offenses were uncomplicated.

152 27 M.J. 138 (C.M.A. 1988).

153 *Id.* at 141.

154 *See* Wittmayer,*Rule for Courts-Martial 707: The 1984 Manual for Courts-Martial Speedy Trial Rule,* 116 Mil. L. Rev. 221 (1987).

155 R.C.M. 707(a). This facet of the rule immediately distinguishes it from *Burton,* which applies only to accused in confinement.

156 R.C.M. 707 (C5, 15 Nov. 1991).

157 The ABA Standards for Speedy Trial set no specific time limits. ABA Standards, Speedy Trial (1978). The Federal Speedy Trial Act contains a basic period of 100 days from arrest or summons until trial. 18 U.S.C. § 3161 (1982) The drafters of the 1984 Manual chose a 120-day period as a "reasonable outside limit,"taking into account the variety of locations and conditions for courts-martial. R.C.M. 707(a) analysis. They relied on experience under *Burton* with a set time limit and considered the flexibility afforded in excluding time periods under R.C.M. 707(c) to arrive at the 120-day figure. Change 5 to R.C.M. 707 applied to cases arraigned on or after 6 July 1991. The original R.C.M. 707 applied to cases in which notice of preferral or imposition of restraint occurred on or after 1 Aug. 1984. United States v. Leonard, 21 M.J. 67 (C.M.A. 1985).

The drafters state that allowing 120 days to get to trial is not an onerous standard, and that should be true for most cases, particularly when the 120 days is counted from preferral until the trial date. Problems may occur when the initial date is from "restraint" rather than from preferral. Restriction, arrest, and pretrial confinement under R.C.M. 304 start the speedy trial clock.[158] Commanders must be aware of the rule and trial counsel must keep informed of any restraint imposed.[159]

The 120-day period includes the day of trial but does not include the initial date of restraint or preferral.[160] The clock stops running when the accused is arraigned.

b. Administrative restraint. Administrative restraint is not a type of restraint which triggers the running of the speedy trial clock under R.C.M. 707. R.C.M. 304(h) defines "administrative restraint" as restraint "imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons." Restraint is"administrative" if the commander's "primary purpose" in imposing the restraint is operational, administrative, or medical.[161] If, instead, the commander's "primary purpose" for imposing restraint relates to an upcoming courts-martial the restraint will trigger the 120-day clock of R.C.M. 707.

c. Restarting the clock at zero. R.C.M. 707(b)(3) gives the Government a possible escape valve for the situation when pretrial restraint starts the 120-day period, as well as for a case in which charges are dismissed[162] and then

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[158] "Conditions on liberty,"the least restrictive form of pretrial restraint, originally also triggered R.C.M. 707. In a change effective 1 Mar. 1986, conditions on liberty imposed after 1 Mar. do not trigger the rules of R.C.M. 707. Counsel must remain alert to "conditions on liberty", however, as a court might construe the "conditions"as "restriction." *Cf.*United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985)*petition denied,* 21 M.J. 169 (C.M.A. 1985) (factors rendering "restriction" "tantamount to confinement" discussed).

Restraint by civilian authorities does not start the speedy trial period until the soldier is held at the Army's request. United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987) (upon apprehension by civilian authorities "the government's accountability … commenced when [McCallister] … was held in a civilian jail at the Army's request"), *aff'd on other grounds,* 27 M.J. 138 (C.M.A. 1988). *See also* United States v. Cummings, 21 M.J. 987 (N.M.C.M.R. 1986),*petition denied,* 22 M.J. 242 (C.M.A. 1986) (when accused is initially apprehended and confined by civilian authorities on a civilian charge, military accountability under R.C.M. 707 does not begin until after notice to the military of the accused's availability and a reasonable time to arrange for transportation). *United States v. Bragg,* 30 M.J. 1147 (A.F.C.M.R. 1990), *petition denied,* 32 M.J. 313 (C.M.A. 1991). Time accused spent in civilian confinement as a result of civil offenses is excluded from Government accountability as delay "resulting from the absence or unavailability of the accused," even though accused was apprehended and confined on both civilian and military charges. Factors: (1) civilians were not acting at behest of the Air Force when they denied bail; (2) accused was not available for military prosecution while he remained in civilian jail; and (3) military authorities proceeded diligently once they were able to process the court-martial.

An involuntary extension of active duty has been held not to be restraint within the meaning of R.C.M. 707. United States v. Brunton, 24 M.J. 566 (N.M.C.M.R. 1987).

[159] A question not addressed in R.C.M. 707 is the effect of restraint imposed improperly. R.C.M. 304 states that any commissioned officer may impose restraint on any enlisted soldier. It is unclear what the law is when the first sergeant orders a soldier involved in a fracas at the Enlisted Club to remain in the company area for some period. The Government might argue that the first sergeant's restraint was not proper because he or she had no legal authority to restrict and thus the soldier was never restrained in a manner to trigger the speedy trial rule. Judges may not be sympathetic to that argument, however, particularly if the accused abided by the terms of the"restriction."

[160] R.C.M. 707(b)(1).

[161] United States v. Bradford, 23 M.J. 181 (C.M.A. 1987) (denial of sailor's port liberty while sailor a suspect of offense found to be "administrative restraint" under R.C.M. 304(h) which does not start the speedy trial clock; trial judge used an "erroneous legal premise" in finding R.C.M. 707 triggered when military justice purposes "in some measure" motivated the restraint; "[A]dministrative restriction under R.C.M. 304(h) must not become a subterfuge… . However, we believe the test is … the primary purpose… ."; "where the evidence supports a conclusion that the primary purpose of the command … is related to an upcoming court-martial, R.C.M. 707 applies"). Although the Court of Military Appeals adopted a "primary purpose" test, it is dangerous for the Government to call the restraint"administrative" whenever the soldier under restraint is a suspect, or is facing charges. A court may find the restraint was for military justice purposes and the speedy trial rule was triggered. United States v. Wilkes, 27 M.J. 571 (N.M.C.M.R. 1988) (restraint prior to trial held to start speedy trial clock despite commander's label of administrative restraint; court conducts its own factual analysis to determine primary purpose). *See also* United States v. Johnson, 24 M.J. 796 (A.C.M.R. 1987) (commander's cancellation of leave while Johnson was under police investigation, order not to leave Frankfurt area without permission—which was never denied—and order not to return to former place of duty as CID documents examiner were not restraint which started the speedy trial clock under R.C.M. 707 citing R.C.M. 304(h); conditions on liberty triggered R.C.M. 707 at the time); in United States v. Orback, 21 M.J. 610 (A.F.C.M.R. 1985), "administrative freeze"while under criminal investigation which required coordination of leave, transfer, or discharge with the investigating authority (Air Force Office of Special Investigation) was not "restraint" requiring application of R.C.M. 707.

The primary purpose test was not applied, but restraint was nonetheless found to be administrative in the following cases: United States v. Facey, 26 M.J. 421 (C.M.A. 1981) (restriction to "local area" which encompassed a 100-mile radius of Edwards Air Force Base was not "specified limits" that constituted restriction in lieu of arrest); United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988) (denial of off-post pass that gave accused free access to entire installation was at most a condition on liberty that had no effect on the speedy trial clock; lack of pass privileges will in the normal case, have no impact on rules relating to speedy trial); *but see* United States v. Camacho, 30 M.J. 644 (N.M.C.M.R. 1990) (restriction to limits of base triggered 120-day rule; no analysis provided); United States v. Miller, 26 M.J. 959 (A.C.M.R. 1988) (restriction to hospital following suicide attempt was for medical reasons and, therefore, qualified as administrative restraint). United States v. Callinan, 32 M.J. 701 (A.F.C.M.R. 1991). (Order to remain away from victim and victim's husband were "common sense preventive measures," not legally significant restriction.")

[162] The Court of Military Appeals held in United States v. Britton, 26 M.J. 24 (C.M.A. 1988) that restart provisions did not apply when the same charges were withdrawn and repreferred on the same day.

Since then the Courts of Military Review have further explained the steps that must be taken to"dismiss" charges. United States v. Hutchinson, 28 M.J. 1113 (N.M.C.M.R. 1989) (Speedy trial clock continued to run when convening authority "withdrew"preferred but unreferred charges, but never dismissed the charges and essentially the same charges were later preferred. "The only way charges can be 'unpreferred'is for the convening authority to dismiss them." Here there was "an attempt to create a 'limbo' status until such time as the prosecution was prepared to present its case-in-chief." Factors: (1) executive officer or legal officer, not convening authority, made decision to withdraw; (2) all witnesses testified to withdrawal, not dismissal; (3) withdrawal letter was never produced; and (4) specifications were not lined out.); United States v. Lorenc, 30 M.J. 619 (N.M.C.M.R. 1990) (*Mucthison* distinguished. Convening authority dismissed charges and stopped speedy trial clock despite "inartful use of the term 'withdrawal' and failure to line out charges because he fully intended to dismiss the charges. Factors establishing intent: (1) restraint removed and sailor returned to full duty; (2) sailor was informed by "withdrawal" letter that charges were dropped; (3) all personnel within the command were informed that accused was not on legal hold or under disciplinary restraint; (4) appellant suffered no prejudice; and (5) trial judge found convening authority acted in good faith.); United States v. Mickla, 29 M.J. 749 A.F.C.M.R. 1989) (Dismissal contemplates " 'that the accused no longer faces charges' and is 'returned to full-time duty with full rights as accorded to all other servicemembers.' " (quoting Britton). Charges are properly dismissed under R.C.M. 401 when they fail to state an offense, are unsupported by available evidence, or other sound reasons exist. Here convening authority always intended court-martial, newly-preferred charges were essentially the same as those purportedly dismissed, airman never returned to normal duties, and heavy caseload and manpower shortage were reasons for"dismissing," then reinitiating charges.)

reinstated or when a mistrial is granted. The rule states that, if the accused is released from pretrial restraint for a significant period, the accountable time will run only from the earlier of reinstitution of restraint or the preferral of charges.[163] This allows the Government to reset the speedy trial clock to the date of preferral even though charges were preferred prior to release from restraint.[164] The Government may restart the speedy trial clock at zero by lifting restraint for a "significant period"[165] before charges are preferred. The rule does not answer questions such as how long the accused may be initially restrained before the Government will be precluded from taking advantage of this provision or how long the Government has to lift the restraint to make it a"significant period." The rule has been interpreted to preclude the Government from holding a soldier under restraint in excess of 120 days and then attempting to take advantage of the restart provisions by releasing the accused for a "significant period."[166]

d. Multiple charges. For multiple or additional charges under R.C.M. 707(b)(2) a separate speedy trial period runs for each specification from the preferral of the specification or from restraint imposed on the basis of the offense. Different rules apply when an accused is placed in confinement rather than other forms of restraint.[167]

e. Exclusions from the Government's accountable time. The 120-day period, like the period of time under the Burton 90-day rule, means 120 days of Government accountable time. Change 5 consolidated the extensive list of exclusions under the previous R.C.M. 707(c) into a single procedural paragraph.[168] The new procedure requires all pretrial delays to be approved by an appropriate authority before the time period can be excluded from the 120-day speedy trial clock. The amendment was intended to follow ABA guidance and place responsibility on the military judge, convening authorities, or Article 32 investigating officers to grant reasonable pretrial delays.[169] It was also created to ensure speedy trial issues are fully developed before the conclusion of the trial.[170] Prior to referral, all requests for pretrial delay, together with supporting documents will be submitted to the convening authority for resolution. The discussion to the rule indicates that the decyision to grant or deny a delay should be based"on the facts and circumstances then and there existing."[171] Delays should not be granted ex parte, and decisions granting delays should be reduced to writing with supporting reasons and the dates covering the delay.[172] The discussion further provides that the convening authority may delegate authority to grant pretrial delays to an article 32 investigating officer.[173] After referral, all requests for pretrial delay should be submitted to the military judge.[174]

Several issues remain unanswered following publication of Change 5. There are normally several convening authorities during the processing of court-martial charges. Which convening authority has authority to approve pretrial delays under R.C.M. 707(c), and when? Also, does a summary court-martial convening authority lose the ability to grant pretrial delays once charges have been forwarded to the special court-martial convening authority? The analysis provides that approval authorities are required, "to make an independent determination as to whether there is in fact good cause (emphasis added) for a pretrial delay and to grant such delays for only so long as is necessary under the

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[163] R.C.M.707(b)(3)(B).

[164] R.C.M. 707(b)(3)(B) (C5, 15 Nov. 1991) (The analysis provides, "Where an accused is released from pretrial restraint for a significant period, he will be treated the same as an accused who was not restrained.").

[165] Cases construing a "significant period" of release for R.C.M. 707(b)(2): United States v. Hulsey, 21 M.J 717 (A.C.M.R. 1985) (5-day release from pretrial restraint held a "significant period" and not a"subterfuge designed to circumvent R.C.M. 707," clock restarted with reinstitution of restraint), *petition denied,* 22 M.J. 353 (C.M.A. 1986); United States v. Gray, 21 M.J. 1020 (N.M.C.M.R. 1986) (clock restarted with notice of preferral after "significant period" of release of 47 days), *aff'd,* 26 M.J. 16 (C.M.A. 1988) (three separate opinions; Cox (concurring in the result)—release from confinement for "a significant period" resets the clock at zero and it is restarted by notice of preferral; Everett (concurring in the result)—the clock was reset at zero, and trial timely whether counted from preferral or notice of preferral; Sullivan—"charges are pending ... when charges are preferred" and "only pretrial restraint when charges are pending is sufficient to start the clock under R.C.M. 707(a)." United States v. Miller, 26 M.J. 959 (A.C.M.R. 1988) *petition denied,* 28 M.J. 164 (C.M.A. 1989) (5-day period of "release" while accused was restricted to hospital held to be "significant period" that allowed speedy trial clock to restart); United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988),*petition denied* 28 M.J. 230 (C.M.A. 1989) ("release" of 50 days when accused had pass privileges pulled that prohibited him from leaving installation held to be a"significant period" that allowed the speedy trial clock to restart).

[166] Andrews v. Heupel, 29 M.J. 743 (A.F.C.M.R. 1989) (The restart provisions of 707(b)(2) apply only when a soldier is released *before* the 120 day rule is violated. The 120 day time limit of 707(a)(2) protects a soldier even though no charges are preferred against him or her during that time. Charges dismissed where airman held in pretrial restraint for 212 days with no charges preferred, then released for a significant period before charges were preferred.)

[167] United States v. Boden, 21 M.J. 916 (A.C.M.R. 1986) (94 days of Government accountable pretrial confinement; trial judge dismissed two charges preferred the day after confinement was imposed, but not a charge preferred a month and a half later; held: remaining charge dismissed; "government accountability ... begins on the date the government has in its possession substantial information on which to base preferral of that charge." Laboratory results were unnecessary for preferral and information known by the CID is information known to the "government"). In United States v. Robinson, 26 M.J. 954 (A.C.M.R. 1988),*aff'd,* 28 M.J. 481 (C.M.A. 1989), the Army Court created an exception to the *Boden* rule for cases involving pretrial restriction in lieu of arrest. In those situations the 120-day clock runs from the time restraint was imposed "in connection with" the particular charge; the clock does not begin when the Government has "substantial information" about a charge unless restriction is imposed in connection with the charge. Pretrial restraint imposed in connection with indecent assault did not start speedy trial clock for drug charges even though Government had substantial information about the drug charges for more than 120 days. Court distinguishes confinement from other forms of restraint. The Court of Military Appeals agreed. ("We hold that, in order to commence the speedy trial clock, the imposition of restraint ... must be 'in connection with' the specification being challenged."Furthermore, R.C.M. 707(a)(2) sometimes permits separate speedy trial clocks even though several charges were preferred at the *same* time.) See United States v. Honican, 27 M.J. 590 (A.C.M.R. 1988) (summarizes speedy trial rules for multiple specifications when confinement or other restraint is imposed).

[168] R.C.M. 77(c)(1) (C5, 15 Nov. 1991).

[169] R.C.M. 707(c) analysis (C5, 15 Nov. 1991).

[170] R.C.M. 707(c)(1) analysis and discussion (C5, 15 Nov. 1991).

[171] R.C.M. 707(c)(1) discussion (C5, 15 Nov. 1991).

[172] *Id.*

[173] *Id.*

[174] R.C.M. 707(c)(1).

circumstances." Prior exclusions for "good cause" under R.C.M. 707(c)(9) required a causal connection between the event and the delay sought to be excluded.[175] Should practitioners interpret the term "good cause" under R.C.M. 707(c) (C5, 15 Nov. 1991) similarly? Exclusion approval authorities are provided some guidance, however, concerning reasons to grant a delay. The discussion lists many examples as a guide to their independent determination.[176] They are essentially the same exclusions previously listed in R.C.M. 707(c). Decisions interpreting the previous extensive list of exclusions under R.C.M. 707(c) will continue to provide valuable precedent. They will be addressed later.

Approval authorities will have their decisions reviewed on two separate grounds. Their decisions will be "subject to review for both abuse of discretion and the reasonableness of the periody of delay granted.[177] It is a real possibility that a decision to grant a pretrial delay will not be an abuse of discretion, however, the period of delay could be determined unreasonable.[178]

The Government has to bring the accused to trial within 120 days, but may exclude certain periods from Government accountability. Unlike the Burton 90-day rule, there is not a presumption of a speedy trial violation that the Government can rebut; once the Government exceeds 120 days, after subtractions of exclusions, the accused's right to a speedy trial has been violated and the charges must be dismissed.[179]

f. Exclusions from the Government's accountable time under the original R.C.M. 707(c).

(1) *Delay from other proceedings.* Periods of delay from other proceedings were excluded.[180] These "other proceedings" included any examination or hearing into the mental capacity or responsibility of the accused,[181] pretrial motion sessions,[182] Government appeals under R.C.M. 908,[183] and petitions for extraordinary relief (including Government petitions).[184]

(2) *Delay from the unavailability of a judge from extraordinary circumstances.* Delays caused by the unavailability of the military judge due to exceptional circumstances were excluded.[185] This probably did not include the normal problems of a crowded docket-- that time was still charged to the Government. If the judge went on emergency leave 2 days before trial was to begin, however, the Government could probably exclude the time until the judge returned or a new judge could hear the case.

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[175] United States v. Longhofer, 29 M.J. 22, 27–29 (C.M.A. 1989).

[176] R.C.M. 707(c)(1) discussion (C5, 15 Nov. 1991) (The discussion provides: "Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the Reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.")

[177] R.C.M. 707(c)(1) analysis (C5, 15 Nov. 1991).

[178] United States v. McKnight, 30 M.J. 205 (C.M.A. 1990), *cert. denied,* 111 S.Ct. 350 (1990) (Defense counsel's letter requesting postponement of an Art. 32 hearing until a date between 6-14 Aug. relieved the Government of speedy trial accountability for the delay until 11 Aug. The delay until several weeks later, however, was unreasonable, and therefore attributable to the Government.

[179] R.C.M. 707(d) (C5, 15 Nov. 1991) ("failure to comply with the right to a speedy trial will result in dismissal of the affected charges.")

[180] R.C.M. 707(c) (C5, 15 Nov. 1991). The exclusions were taken generally from the ABA Standards, with modifications to conform to military practice. *Id.* at analysis.

[181] R.C.M. 707(c)(1)(A) excluded delay resulting from"Any examination into the mental capacity or responsibility of the accused." *See* United States v. Demmer, 24 M.J. 731 (A.C.M.R. 1987) (72 days excluded under (c)(1)(A) for psychiatric evaluation; "brief periods of inactivity in an otherwise active prosecution are generally not considered unreasonable or oppressive"); United States v. Palumbo, 24 M.J. 512 (A.F.C.M.R. 1987) (45 days excluded under R.C.M. 707(c)(1)(A) for command psychiatric examination; implied that the period need not be reasonable); United States v. Pettaway, 24 M.J. 589 (N.M.C.M.R. 1987) (45 days excluded under R.C.M. 707(c)(1)(A) for command psychiatric examination; implied that the period need not be reasonable); United States v. Jones, 21 M.J. 819 (N.M.C.M.R. 1985) (exclusion (c)(1)(A) is not limited to mental examinations under R.C.M. 706); United States v. Hirsch, 26 M.J. 800 (A.C.M.R.) *petition denied,* 27 M.J. 404 (C.M.A. 1988) (102-day delay for psychiatric examination reasonable because of case complexity); United States v. Mahoney, 28 M.J. 865 (A.F.C.M.R. 1989) (Standard for reviewing mental examination timeliness is not whether examination could have been done sooner, but whether the time it did take was reasonable. Sixty-eight day period to accomplish mental examination was reasonable despite psychiatrist's 11-day leave, failure to examine accused on consecutive days, and decision to convene a three member sanity board rather than a one person board.)

[182] R.C.M. 707((c)(1)(C) excluded delay resulting from "any session on pretrial motions." *See*United States v. Pettaway, 24 M.J. 589 (N.M.C.M.R. 1987)*petition denied,* 25 M.J. 483 (C.M.A. 1987). *In Pettaway* 12 days were excluded under (c)(1)(C) for time spent in between actual in-court sessions on motion practice: "R.C.M. 707(c)(1)(C) excludes all periods spent in motion practice without regard to the number of days actually spent in court or the reasonableness of the delay," citing Henderson v. United States, 106 S. Ct. 1877 (1986) (exclusion of delay under a similar provision of the Federal Speedy Trial Act, 18 U.S.C. § 3161 et seq. is "automatic" and need not be"reasonable.") The exclusion, however, is for "[a]ny periods of delay resulting from other proceedings in the case including ... (C) Any session on pretrial motions. *See also* United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987) (two pretrial motion sessions, the second on the day of trial, presented opportunity to exclude time in between sessions, but court deducted only the day of the first session), *aff'd on other grounds,* 27 M.J. 138 (C.M.A. 1988).

The position taken or implied in*Pettaway* and*Palumbo, supra* that the period need not be reasonable seems incorrect. Surely there is an outer limit of reasonableness. Also, each exclusion under R.C.M. 707(c) included the phrase "delay resulting from," or similar language. If a period of time is not reasonable for the circumstance which authorizes an exclusion, for instance, taking an unreasonably long time to complete a psychiatric evaluation of an accused, then the delay does not *result from* the circumstance which authorizes the exclusion, it results from other circumstances, possibly from unreasonable Government delay.

[183] Under the Military Justice Act of 1983, as implemented in the 1984 Manual, the Government may appeal certain rulings of the military judge. R.C.M. 908. Whether the time excluded under 707(c)(1)(D) includes time relating to appeals beyond the initial ruling by the Court of Military Review was left unresolved in United States v. Solorio, 29 M.J. 510 (C.G.C.M.R. 1990). Under R.C.M. 707(b)(3)(C) (C5, 15 Nov. 1991) Government appeal to the Court of Military Review, the Court of Military Appeals, or to the Supreme Court starts a new 120-day period on the date the parties are notified of the final appellate decision.

[184] United States v. Ramsey, 28 M.J. 370 (C.M.A. 1989) (time for Government petition for extraordinary relief and Government appeal not chargeable to Government even though accused remained in pretrial confinement and Government appeal denied).

[185] R.C.M. 707(c)(2).

(3) *Delay at the request or with the consent of the defense.* Delays requested by or consented to by the defense were excluded from Government accountability under R.C.M. 707(c)(3). What constituted a defense request for or consent to delay, however, proved to be an elusive concept and the subject of much of the litigation concerning the original R.C.M. 707 speedy trial rule. In United States v. Carlisle[186] , a defense counsel's suggestion that trial commence following a co-counsel's return from leave on the 136th day following notice of preferral was held not to be a defense request for delay. Likewise in United States v. Burris,[187] there was no defense requested delay when defense counsel returned the Government's "Docket Notification" after lining out the words "delay until" and requesting"a projected trial date of 25 March 85," the 131st day from initial restraint. Furthermore, defense counsel did not automatically request or consent to delay simply by failing to respond immediately to Government counsel's notification that the Government is ready to proceed[188] or by entering into pretrial agreement negotiations.[189] The Government's decision to delay scheduling a trial until after the defense counsel returns from temporary duty was also not defense delay, even though the defense counsel knew about the Government's action.[190] On the other hand, when defense counsel asked that a new convening authority assume jurisdiction over the case, he also"requested" a reasonable delay to allow the new convening authority to act on the case.[191]

Defense delays for article 32 investigations proved to be equally elusive. Thus, when a defense counsel requested that Government witnesses be produced for cross-examination at the hearing and the Government later produced those witnesses, the defense was not responsible for the delay.[192] Similarly, a defense request to abate the article 32 proceedings and depose unavailable witnesses was held not to be a defense requested delay.[193] An article 32 investigating officer's decision to delay the hearing until a time when he thought the civilian defense counsel would be available did not make the counsel responsible for the delay, despite the investigating officer's conversation with the defense counsel's secretary.[194] When the Government notifies the defense that it is ready to proceed with an article 32 investigation and asks the defense for a convenient date to meet to set a hearing date, the Government is responsible for the time between its notification and the defense-suggested meeting date.[195] When the defense does request a delay in the article 32 investigation, however, the Government may insist on some flexibility when it reschedules the hearing.[196]

Because of these and other problems,[197] the Court of Military Appeals announced its preference for formal

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[186] 25 M.J. 426 (C.M.A. 1988).*See also* United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987),*aff'd,* 27 M.J. 138 (C.M.A. 1988) (delay in scheduling art. 32 investigation for defense counsel's leave was not defense delay); United States v. Kohl, 26 M.J. 919 (N.M.C.M.R. 1988) (applies *Carlisle* to pretrial confinement and 90-day rule of R.C.M. 707(d); defense counsel and trial counsel agreed to trial on day 93; not defense delay).

[187] 21 M.J. 140 (C.M.A. 1985).

[188] United States v. Butterbaugh, 22 M.J. 759 (N.M.C.M.R. 1986), *aff'd,* 25 M.J. 159 (C.M.A. 1987) ("[D]efense counsel's failure to respond immediately to Government counsel's notification" that the Government is ready to proceed is not delay "at the request or with the consent of the defense."); *but cf.* United States v. King, 30 M.J. 59 (C.M.A. 1990) ("From March 1, when the Government submitted the docket notice, to March 8, the date the defense agreed to, also constituted a 'period of delay ... *with the consent* of the defense.' ")

[189] United States v. Harris, 20 M.J 795 (N.M.C.M.R. 1985) (122 days from notice of preferral to trial; Government appeal of dismissal denied; initiation of negotiations by the defense toward a pretrial agreement with no express request for or consent to delay, held not an "implied" request or consent to delay under (c)(3); pretrial agreement negotiations, like requests for administrative discharge in lieu of court-martial, are a " 'normal incident' of pretrial military justice"and are not defense delay, absent an "eleventh hour"submission designed to create an issue of lack of speedy trial).

[190] United States v. Wactor, 30 M.J. 821 (A.C.M.R. 1990) (Government's decision to docket case for date after defense counsel returned from temporary duty in Honduras rather than at earlier date when defense counsel was TDY did not render period of delay attributable to the defense, even though defense counsel was aware of Government's action and did not object. "Defense acquiescence [to delay] does not relieve the government of its burden. The record must at least show that the defense expressly agreed to the delay.").

[191] United States v. King, 30 M.J. 59 (C.M.A. 1990) ("When the defense requested that the Commander, Fort Huachuca recuse himself and that a new convening authority assume jurisdiction, the ensuing days occasioned by this request—subject to reasonableness of duration—constituted a 'period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted *at the request* or with the consent of the defense.' (citations omitted) [T]he right to speedy trial is a shield, not a sword. (citations omitted) An accused cannot be responsible for or agreeable to delay and then turn around and demand dismissal for the same delay. Like most rights, speedy trial can be waived; it was so here.")

[192] United States v. Cook, 27 M.J. 212 (C.M.A. 1988);*see also* United States v. Brodin, 25 M.J. 580 (A.C.M.R. 1987) (it was not delay "at the request or with the consent of the defense" when defense counsel objected to the art. 32 investigating officer considering an unauthenticated statement and the investigating officer delayed continuing the investigation and attempted to obtain the testimony; charges dismissed).

[193] United States v. Raichle, 28 M.J. 876 (A.F.C.M.R. 1989) (Time required to conduct defense requested depositions of witnesses found unavailable for an art. 32 investigation was chargeable to the Government. Defense counsel's request to abate the proceedings until depositions were taken found to be a statement that the proceedings were inadequate and should be ended unless witnesses were deposed, not a request for consent or delay. Generally all art. 32 time is chargeable to the Government unless it can establish an exception.).

[194] United States v. Haye, 25 M.J. 849 (A.F.C.M.R. 1988) *rev'd on other grounds,* 30 M.J. 213 (C.M.A. 1989) (art. 32 officer's phone conversation with civilian attorney's secretary concerning when attorney would be available held not defense-requested delay).

[195] United States v. White, 22 M.J. 631 (N.M.C.M.R. 1986) (per curiam) (189 days from notice of preferral to trial; defense appeal denied; Government is accountable for the time from the day when it contacts the defense, says it is ready to proceed with the art. 32 investigation, and asks the defense for a convenient date to meet to set a date for the investigation, until the day the defense agrees to meet; but it is defense delay under (c)(3) thereafter when the defense cancels the meeting and new civilian counsel is retained, until a new date to meet is agreed upon).

[196] United States v. McKnight, 30 M.J. 205 (C.M.A. 1990) (defense counsel's letter requesting postponement of an art. 32 hearing until a date between 6-14 Aug. relieved the Government of speedy trial accountability for the delayed until 11 Aug., the day the investigating officer was ready to proceed. "In our view, the defense is not entitled to ask that a pretrial hearing under Article 32 be delay until a certain date and then insist that the Government proceed on that very day."Although defense counsel has no duty to move a case to trial, "he does have some obligation to cooperate reasonably in rescheduling the proceeding" when the delay was granted for his convenience or needs. "The Government may insist on some flexibility in scheduling as a condition for granting a defense request for delay." Ambiguity in the request for delay should not be construed against the Government. "If the defense needed a continuance, it should have been requested on the record and not handled in off-the-record negotiations.").

[197] *E.g.,*United States v. Miniclier, 23 M.J. 843 (A.F.C.M.R. 1987) (neither officer accused's tender of resignation for the good of the service, nor senator's intervention to expedite decision on resignation was delay at the request or with the consent of the defense).

scheduling procedures. It repeatedly suggested that all requests for defense delay be "in writing or on the record" and that all requests be acted on by the convening authority or article 32 investigating officer prior to referral or by the military judge after referral.[198] The courts of review reiterated that suggestion.[199] Although it preferred a formal record documenting defense delay, the Court of Military Appeals made it clear that the defense could request or consent to delay in a less formal manner.[200]

(4) *Delay from defense noncompliance.* Delay resulting from "a failure of the defense to provide notice, make a request, or submit any matter in a timely manner" as required by the Manual was excluded from Government accountable time.[201]

(5) *Delay at the request of the prosecution.* Delays in the article 32 investigation or continuances at trial at the request of the Government could be excluded under R.C.M. 707(c)(5).[202] If the delay were requested because of unavailable evidence, despite the Government's due diligence,[203] or to give the trial counsel additional preparation time because of the exceptional circumstances of the case, the Government would not be held accountable for the time.[204]

(6) *Delay resulting from the absence or unavailability of the accused.* Delay was excluded from Government accountable time which resulted from the absence or unavailability of the accused.[205] The period of actual absence of the soldier, plus the time reasonably necessary to return the soldier to the appropriate military unit was excluded.[206] The time excluded could also include time when the accused was with his unit, if his unit was deployed at sea without

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198 United States v. Carlisle, 25 M.J. 426 (C.M.A. 1988) (United States v. Carlisle, 25 M.J. 426 (C.M.A. 1988) ("In our judgment, *each day that the accused is available for trial is chargeable to the Government, unless a delay has been approved by either the convening authority or the military judge, in writing or on the record*… "); United States v. Cook, 27 M.J. 212 (C.M.A. 1988) (defense counsel did not request delay when she asked that the Government produce its witnesses for cross-examination at the article 32 hearing; *Carlisle* language reiterated, "each day that an accused is available for trial is chargeable to the Government unless a delay has been approved by either the convening authority or the military judge, in writing or on the record"); United States v. Burris, 21 M.J. 140 (C.M.A. 1985) (136 days from restraint to trial; Government appeal of dismissal denied. The *Burris* court observed, "Docketing delays are generally attributable to the Government … We believe that many of the problems involved in attributing pretrial delays will be ameliorated if all such requests for delay together with the reasons therefor, were acted upon by the convening authority prior to referral of charges to a court-martial or by the trial judge after such referral, rather than for them to be the subject of negotiation and agreement between opposing counsel. This procedural requirement will establish as a matter or record who requested what delay and for what reason," quoting United States v. Schilf, 1 M.J. 251 (C.M.A. 1976)). The *Burris* court added, "If defense counsel elects to negotiate, *ex parte*, a trial date with a docketing clerk or with the trial judge, he has an ethical responsibility to insure that the clerk or judge is not misled or inadvertently deceived into setting a date which violates the speedy-trial rule. There is insufficient evidence in this record to support such a finding here. [Counsel should exercise caution. Clearly defense counsel must not mislead the court, but it is doubtful the defense has an affirmative obligation to see the Government brings the case to trial within the speedy trial period.] The*Burris* court further observed, "We would not hesitate to hold that a defendant is estopped from claiming he lacked a speedy trial if the delay is caused by defense misconduct." United States v. Maresca, 28 M.J. 328 (C.M.A. 1989) ("We believe that many of the problems involved in attributing pretrial delays will be ameliorated if all such requests for delay, together with the reasons therefor, were acted upon by the convening authority prior to referral of charges to a court-martial, or by the trial judge after such referral, rather than for them to be the subject of negotiation and agreement between opposing counsel. This procedural requirement will establish as a matter of record who requested what delay and for what reason. … Although we have urged that this prospective practice be followed, the services have not chosen to adopt this simple procedural rule." Citing *Carlisle.*); United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989) ("If the delay is occasioned by a specific request from an accused, in writing or on the record, and such a delay is granted by either the convening authority, the article 32 investigating officer, or a military judge, the Government shall be relieved of accountability.")

199 *See, e.g.,*United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987); United States v. Kohl, 26 M.J. 919 (N.M.C.M.R. 1988); United States v. Givens, 28 M.J. 888 (A.F.C.M.R. 1989) (listing of cases where informal exchanges did not amount to defense delay is given at page 890), *reversed and remanded,* 30 M.J. 294 (C.M.A. 1990).

200 United States v. Givens, 30 M.J. 294 (C.M.A. 1990) (Cox, J.: R.C.M. 707(c)(3) does not have "an exclusive requirement that either the convening authority or the military judge rule, contemporaneously with the event, on delay accountability. The language in United States v. Carlisle, *supra*, should likewise be read as precatory and not intended to establish a *per*se rule of law. However, the vagaries of the instant facts illustrate the need for the Government to document promptly and effectively any defense delays it seeks to rely on." Case remanded to determine whether defense counsel's conversation with staff judge advocate was a request for or consent to delay.)

201 R.C.M. 707(c)(4). *See* United States v. Arnold, 28 M.J. 963 (A.C.M.R. 1989) suggesting that Government make a "preemptive motion for appropriate relief in order to avoid needless expense and vexation"when defense does not provide a list of witnesses.

202 R.C.M. 707(c)(5).

203 United States v. Byard, 29 M.J. 803 (A.C.M.R. 1989) (opinion on reconsideration) (Exclusion under 707(c)(5)(A) is permitted "only if the Government has exercised due diligence to obtain the evidence." Government failure to use DOD IG subpoena or deposition subpoena to obtain essential bank records constituted lack of due diligence. Trial team's ignorance of IG subpoenas, even if honest and reasonable, constituted negligence, not due diligence. Exclusion under 707(c)(5)(B) requires exceptional circumstances which Government also failed to establish.)

204 *See* United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989) granting the art. 32 investigating officer the power to grant a Government request for delay, but making the decision subject to de novo review by the military judge.

205 R.C.M. 707(c)(6).

206 United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987) (" 'exclusion (6) … contemplates the period of actual absence plus the time it takes to return the accused' . . . to the appropriate unit … which reasonably … resulted from the accused's absence ... Time should not be excluded which … results from the government's failure to exercise due diligence in returning the accused to the appropriate unit." Three days' travel found reasonable, not 15 days), *aff'd on other grounds* 27 M.J. 138 (C.M.A. 1988). *See also* United States v. Lilly, 22 M.J. 620 (N.M.C.M.R. 1986) (accused went AWOL while charges were pending; Government appeal, trial judge reversed and case remanded, construing exclusion (c)(6), "We hold that exclusion (6) contemplates the period of actual absence plus the time it takes to return to the accused to his command, or the command to which reassigned, plus the time it takes to join or rejoin him to the command and process the original charges back to trial. The latter two factors are subject to the general limitations of government diligence and undue prejudice to the accused") [The time it takes to process the original charges back to trial should only be excluded to the extent any delay in the process results from the absence of the accused]; United States v. Turk, 22 M.J. 740 (N.M.C.M.R. 1986) ("We believe that the 24 day period involved in transporting the appellee from the place where he terminated his absence [Mayport, Florida] to his unit [ship then in Bahrain] is properly accountable to him under R.C.M. 707(c)(6). This is so because the commanding officer of his ship was the proper official to make the initial disposition of appellee's alleged offenses," citing *Lilly*;"This general rule must, of course, be limited to situations where the Government acts reasonably and without improper purpose"), *aff'd*, 24 M.J. 277 (C.M.A. 1987).

legal services.[207] Time spent in civilian jail on civilian charges was excluded from the military's speedy trial clock, even if the accused was apprehended because of both military and civilian charges.[208] Once the civilian charges were disposed of and the military was notified, the military had a reasonable time to transport the accused to a military facility.[209]

(7) *Reasonable delay for a joint trial.* A "reasonable period of delay when the accused is joined for trial with a co-accused as to whom the time for trial has not yet run and there is good cause for not granting a severance" was excluded from Government accountable time.[210]

(8) *Delay in ordering a Reserve member to active duty.* In March 1987 changes were made to the Manual for Courts-Martial to implement changes in UCMJ jurisdiction over Reserve component personnel.[211] The speedy trial period of R.C.M. 707 begins for Reserve members on the earlier of entry on active duty, preferral of charges, or imposition of restraint.[212] R.C.M. 707(c)(8) provided an exclusion from Government accountable time for a"period of delay, not exceeding 60 days, occasioned in processing and implementing a request … to order a member of a reserve component to active duty for disciplinary action."

(9) *The causation requirement for exclusions R.C.M. 707(c)(1) through (c)(8).* If delay fit into one of the exclusions found in R.C.M. 707(c)(1) through (c)(8), "the time [was] excludable without regard to whether the event proximately caused a delay in the trial itself."[213] The mere happening of events listed in c(1)-(8) did not, however, result in automatic exclusion of all time. The Government could be relieved of accountability, subject to a"reasonableness limitation."[214] Thus, if an event fit into exclusion (c)(1)-(8), the Government could exclude a reasonable amount of time from its speedy trial accountability whether or not the event caused a delay in trial; any time in excess of a reasonable amount could not be excluded.

(10) *Delay for "good cause."* In a residual or catchall exclusion, any "period of delay for good cause, including unusual operational requirements and military exigencies" was excluded from the time counted against the Government.[215] As stated earlier, Change 5 did not clarify whether "good cause" should be interpreted in the same manner under the new amendment.

In United States v. Kuelker,[216] the prosecution was delayed by the need to obtain U.S. Treasury checks allegedly forged by the accused that were in the hands of the Treasury Department. The Government argued that the time to obtain the checks was excludable under R.C.M. 707(c)(9), the exclusion for "good cause." The court, however, narrowly construed the exclusion, finding "delay for good cause" "well-defined by the illustrations" provided in R.C.M. 707(c)(9) of "unusual operational requirements and military exigencies."[217] The court concluded that "good cause" required "an extraordinary situation" rather than the normal difficulties of gathering the prosecution's evidence.[218] Finding 157 days of prosecution accountable time from the initial notice of preferral to trial, the court denied the Government's appeal.

In United States v. Harris,[219] the court considered possible exclusions in a 122-day period from notice of preferral to trial. The Government argued that time for negotiation of a pretrial agreement initially proposed by the defense was excludable as delay "at the request or with the consent of the defense" under R.C.M. 707(c)(3). The court disagreed, reasoning that plea negotiations, like requests for administrative discharge in lieu of court-martial, were a " 'normal incident' of pretrial military justice" and were not "defense generated delay."[220] The Government also contended that it was delayed for "good cause," R.C.M. 707(c)(9), because the convening authority was deployed aboard ship during

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[207] United States v. Brown, 30 M.J. 839 (N.M.C.M.R. 1990) (Two months that accused spent on small ship that had no legal counsel were excluded from Government speedy trial accountability as time reasonably resulting from the accused's absence without leave. Accused returned to military control after docketed charges were withdrawn and the day before his ship sailed. Accused's ship could not further process the charges until it made a port call where legal services were available.)

[208] United States v. Bragg, 30 M.J. 1147 (A.F.C.M.R. 1990) (Time accused spent in civilian confinement as a result of civil offenses is excluded from Government accountability as delay "resulting from the absence or unavailability of the accused," even though accused was apprehended and confined on both civilian and military charges. Factors: (1) civilians were not acting at behest of the Air Force when they denied bail; (2) accused was not available for military prosecution while he remained in civilian jail; and (3) military authorities proceeded diligently once they were able to process the court-martial.)

[209] United States v. Cummings, 21 M.J. 987 (N.M.C.M.R. 1986), *petition denied,* 22 M.J. 242 (C.M.A. 1986) (Accused was apprehended on civil charges, granted a signature bond at arraignment, but remained in jail because of "Navy hold" for desertion. Government's speedy trial accountability for confinement began after Navy was notified that accused was immediately available to military authorities. Government then has reasonable time to transport accused to military facility.) *Accord* United States v. Asbury, 28 M.J. 595 (N.M.C.M.R. 1989), *petition denied,*28 M.J. 356 (C.M.A. 1989).

[210] R.C.M. 707(c)(7).

[211] *See* R.C.M. 204.

[212] R.C.M. 707(a) (C5, 15 Nov. 1991). As is generally true, conditions on liberty do *not* start the speedy trial period.

[213] United States v. Longhofer, 29 M.J. 22, 27 (C.M.A. 1989). *Accord* United States v. King, 30 M.J. 59 (C.M.A. 1990) ("[A]ppellant contends that certain of the R.C.M. 707(c) exclusions should not have been charged to the defense because the prosecution was not in a position to proceed at that time. That argument as rejected in United States v. Longhofer.")

[214] *Id.*

[215] R.C.M. 707(c)(9); was (c)(8) prior to Mar. 1987 amendments.

[216] 20 M.J. 715 (N.M.C.M.R. 1985) (per curiam).

[217] 20 M.J. at 716. The "good cause" exclusion was originally in R.C.M. 707(c)(8). Amendments to the Manual in Mar. 1987 made it the (c)(9) exclusion.

[218] *Id.*

[219] 20 M.J. 795 (N.M.C.M.R. 1985).

[220] *Id.* at 797.

portions of the plea negotiations. The court rejected this argument as well, finding the deployment not "unusual" or exigent, citing Kuelker.[221] In United States v. Durr, the Army Court of Military Review took a broader view of the R.C.M. 707(c)(9) exclusion finding that "good cause is a less strict standard than … extraordinary circumstances" and that a balancing of the speedy trial interests with the ends of justice served by a delay was appropriate.[222] The Navy-Marine Court of Military Review subsequently adopted the Durr approach.[223]

(11) *"Good cause" and additional charges.* The issue of whether additional charges constitute "good cause" for a delay in trial was raised in several cases. The better view appeared to be that additional charges were not per se good cause for delaying trial on the original charges, but they could be good cause.[224] A balancing test weighing the speedy trial interests against the joinder interest would be applied and the judge would rule on the balance before the delay was taken.[225] If the judge ruled good cause for delay was not present, the Government could go ahead with trial on the original charges and then later try the additional charges separately.

(12) *Nexus between the event and delay.* Generally the exclusions under R.C.M. 707(c) from Government accountable time included the language"delay resulting from" the event or circumstance which authorized an exclusion. Early decisions of the Courts of Military Review required a nexus between the event which authorized an exclusion and a delay in trial.[226] In United States v. Longhofer[227] the Court of Military Appeals clarified the causation requirement and limited the "nexus requirement" previously used by the lower courts. In order to exclude time for "good cause" under R.C.M. 707(c)(9), unlike exclusions under R.C.M. 707(c)(1)-(8), there had to be a causal connection between the event and the delay sought to be excluded.[228] "The military judge has to find that the unusual event being relied upon caused a delay in the Government preparation of its case and that it was reasonable for the delay to result. Once the causal connection between the event and the delay is established, the time may be subtracted"[229] from the Government's speedy trial accountability. "The Government need not establish, however, that this delay 'proximately caused' the trial not to take place within the total time period."[230] The court decided it frequently would be impossible to show that unforeseen delays, especially those that occurred early in trial process, actually caused a delay in the trial itself. It was sufficient for the Government to show that the unusual event caused a delay in its case preparation.[231] As with all R.C.M. 707(c) exclusions, the Government had to show that the time it sought to exclude under R.C.M. 707(c)(9) was reasonable;[232] any time in excess of that could not be excluded.

g. The 90-day provision of R.C.M. 707(d). Change 5 eliminated the 90-day rule previously established in R.C.M. 707(d). The drafters extended the 120-day rule to apply to all cases, including pretrial confinement.[233] The drafters recognized, however, that current judicial decisions state an accused, held in pretrial confinement for more than 90

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221 *Id.*

222 21 M.J. 576, 578 (A.C.M.R. 1985).

223 United States v. Lilly, 22 M.J. 620 (N.M.C.M.R. 1986) (*Durr* "good cause" analysis adopted,*Kuelker* and*Harris* "confus[ed]"); United States v. Ruhling, 28 M.J. 586 (N.M.C.M.R. 1988) (both the balancing test and 2-part nexus tests of *Durr* adopted; 9-day deployment on readiness exercise following *USS Stark* incident in the Persian Gulf found "good cause"). *But see*United States v. Miniclier, 23 M.J. 843 (A.F.C.M.R. 1987) ("good cause" requires an "extraordinary situation," citing *Kuelker*).

224 United States v. Durr, 21 M.J. 576 (A.C.M.R 1985) ("While … the commission of additional offenses may justify a delay in trial, thus satisfying the first part of the good cause analysis, such events are not per se justifications… . The commission of the additional offenses must be the cause for trial delay)." Here the evidence did not show the additional charges caused the delay in trying the case.

225 United States v. Lilly, 22 M.J. 620 (N.M.C.M.R. 1986) (determination of "good cause for joining additional charges requires balancing of the joinder interest of the Government," citing R.C.M. 601(e)(2) and discussion, and the speedy trial interest, listing nine factors to consider; n.6: the Government may have the judge rule on the balance before the speedy trial period runs). *But see* United States v. Britton, 22 M.J. 501 (A.F.C.M.R. 1986) *aff'd on other grounds*, 26 M.J. 24 (C.M.A. 1988). (Government appeal taken on three of five charges; convening authority withdrew two unappealed charges and repreferred those two charges the same day, along with three additional charges; two unappealed charges dismissed as 143 days of Government accountable time elapsed from the original notice of preferral; "The speedy trial rule of R.C.M. 707 calls for some careful rethinking of old military justice practices such as ordinarily trying all known offenses at the same time. This is no longer suggested by the Manual and, as this case demonstrates, can be risky."[*But see* R.C.M. 601(e)(2) discussion ("Ordinarily all known charges should be referred to a single court-martial")"good cause" not mentioned].

226 United States v. Durr, 21 M.J. 576 (A.C.M.R. 1985) (construing the "good cause" exclusion, a nexus between the event and a delay in trial is required). United States v. Lilly, 22 M.J. 620 (N.M.C.M.R. 1986)(*Durr*nexus language cited). United States v. Ruhling, 28 M.J. 586 (N.M.C.M.R. 1988). The Court of Military Appeals explained and limited the "nexus" requirement in United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989).

227 29 M.J. 22 (C.M.A. 1989).

228 *Id.* at 27.

229 *Id.* at 28.

230 *Id.* at 29.

231 *Id.* at 27–29; United States v. Facey, 26 M.J. 429 (C.M.A. 1988) ("Generally, we believe that a military judge may properly subtract from the period of government accountability a delay incurred in order to await trial of a material government witness who is entitled to claim, and foreseeably will claim his privilege against self-incrimination." Government must offer evidence to demonstrate that there was "delay for good cause." Not all time before a co-accused's trial, however, can be deducted for "good cause." The judge must decide what portion of the time must be attributed to the Government's investigation and preparation for trial. That time is not excludable.); United States v. Camacho, 30 M.J. 644 (N.M.C.M.R. 1990) (Art. 32 Investigating Officer's 6-day emergency leave constituted "good cause" and was excluded from Government speedy trial accountability. Although report could have been completed earlier and other events contributed to the overall delay, there was a causal connection between the emergency leave and the delay. Furthermore, the duration of the leave was reasonable, and the accused was not prejudiced by the delay.)

232 *Id.*at 26–27 (only 21 of 36 days used to obtain attorney's security clearance was reasonable and excludable); Hall v. Thwing, 30 M.J. 583 (A.C.M.R. 1990) (Prosecution's failure to process case for 171 days while awaiting German government's release of jurisdiction was not reasonable, and time could not be excluded from Government's speedy trial accountability. Regulations require prompt case processing while jurisdictional issues are resolved and thereby establish standard of reasonableness. Delay is recognized under R.C.M. 707 "only if German consideration were actually pending when the 120th day arrived, or if American authorities could not receive German confirmation of waiver of jurisdiction, despite reasonable efforts.")

233 R.C.M. 707(c) analysis (C5, 15 Nov. 1991).

days, has been presumptively denied a speedy trial under article 10, UCMJ. The Government must then demonstrate due diligence in bringing the accused to trial.[234] The analysis to the new amendment invites the Court of Military Appeals to reexamine the Burton presumption.[235] The drafters recognize that compliance with R.C.M. 707 under Change 5 might not mean compliance with Burton.[236]

h. Remedies under Change 5 to R.C.M. 707. A major change to the previous speedy trial rules concerns the remedy available for violations of the 120-day rule of R.C.M. 707. Violation of the previous 120-day rule or 90-day rule of R.C.M. 707 resulted in dismissal with prejudice.[237] Failure to comply with the new 120- day rule will still result in dismissal, however, Change 5 permits the military judge to dismiss with or without prejudice.[238] The military judge must consider several factors before making a decision to include: "[T]he seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the adminyistration of justice; and any prejudice to the accused resulting from the denial of a speedy trial."[239] Dismissal without prejudice allows the Government to reinstitute court-martial charges against the accused for the same offense at a later date.[240] The drafters intended to follow the Federal Speedy Trial Act, 18 U.S.C. 3162, granting the military judge the additional discretion. This discretion is limited, however, and a military judge must dismiss with prejudice if an accused has been deniyed his or her constitutional right to a speedy trial.[241]

15–7. Rehearings.

R.C.M. 707 applies to rehearings, new trials, and"other trials."[242]

15–8. The exceptional case: referral to the U.S. Attorney.

When it appears a prosecution will fail because of a violation of R.C.M. 707, the Government may nonetheless be successful by dismissing court-martial charges and referring an important case to the U.S. Attorney for prosecution in Federal district court. There the more flexible speedy trial rules of the Federal Speedy Trial Act will control.[243]

15–9. Procedural aspects

A delay in trial does not automatically entitle an accused to dismissal of charges, because the accused must first raise the issue. When the accused raises a speedy trial issue, the Government is required to show the circumstances of the delay.[244] The accused raises a speedy trial issue by a motion to dismiss.[245] Failure to challenge delay prior to trial does not bar the motion at trial.[246] Absent a denial of military due process or manifest injustice, an accused who does not object to a presumptive violation of article 10 under the Burton rule at trial is precluded from raising the issue for the first time on appeal.[247] Under the 1984 Manual a speedy trial issue is waived if not raised before final adjournment,[248]

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234 *Id.*

235 *Id.*

236 *Id.*

237 United States v. Rowsey, 17 M.J. 151 (C.M.A. 1982); United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987) (98 days of Government accountable time for confinement and arrest; charge dismissed), *aff'd*, 27 M.J. 138 (C.M.A. 1988); United States v. Boden, 21 M.J. 916 (A.C.M.R. 1986) (94 days of pretrial confinement applied against Government; charge dismissed); United States v. Durr, 21 M.J. 576 (A.C.M.R. 1985) (114 days Government accountable time for restriction tantamount to confinement and for actual confinement; charges dismissed applying R.C.M. 707(d)).

238 R.C.M. 707(d).

239 *Id.*

240 *Id.*

241 R.C.M. 707(d) analysis (C5, 15 Nov. 1991).

242 R.C.M. 707(b)(3)(D);*see also,* United States v. McFarlin, 24 M.J. 631 (A.C.M.R. 1987) ("[W]e hold, for purposes of a rehearing under UCMJ art. 63 following appellate reversal of the conviction of a non-confined individual, the rehearing must be held within 120 days of the date the convening authority is notified of the final decision authorizing a rehearing."); United States v. Rivera-Berrios, 24 M.J. 679 (A.C.M.R. 1987) (120 day-rule applied to new trial under UCMJ art. 73; new trial must begin within 120 days after notification to convening authority of decision granting a new trial); United States v. Moreno, 24 M.J 752 (A.C.M.R. 1987) (120-day rule applied to "other trial" under R.C.M. 810(e); "other trial" must begin 120 days after notice to the convening authority); United States v. Spears, CM 444757 (A.C.M.R. 16 June 1986) (R.C.M. 707(d) applied to rehearing). *Compare* United States v. Giles, 20 M.J. 937 (N.M.C.M.R. 1985) (R.C.M. 707 does not apply to rehearing on sentence), *petition denied*, 21 M.J. 388 (C.M.A. 1985).

243 United States v. Talbot, 825 F.2d 991 (6th Cir. 1987) *cert. denied*, 108 S. Ct. 773 (1988) (court-martial charges against Army doctor at Fort Campbell withdrawn and allegations of child molesting referred to U.S. Attorney after defense filed speedy trial motion under R.C.M. 707; district court dismissal reversed; "Dismissal of the federal grand jury indictment based on public policy, supervisory, or other considerations to assertedly bolster future compliance with pertinent time requirements imposed in the context of the independent military court system ... would ... constitute an improvident exercise of authority. In sum, the instant federal prosecution did not violate the defendant's statutory or constitutional speedy trial rights or double jeopardy considerations, did not rise to a level violative of due process, did not result in actual prejudice to the defendant, and did not warrant the extraordinary exercise of supervisory authority or the extreme sanction of dismissal of the indictment.").

244 United States v. Brown, 28 C.M.R. 64 (C.M.A. 1959).

245 R.C.M. 905.

246 United States v. Sloan, 48 C.M.R. 211 (C.M.A. 1974).

247 Failure to raise a *Burton* issue at trial is a waiver "in the absence of a compelling reason to disregard the accused's failure to object at trial."United States v. Sloan, 48 C.M.R. 211, 213 (C.M.A. 1974). *See also* United States v. Smith, 48 C.M.R. 659 (C.M.A. 1974); United States v. Marbury, 4 M.J. 823 (A.C.M.R. 1978); United States v. Scarborough, 49 C.M.R. 580 (A.C.M.R. 1974).

248 R.C.M. 907(b)(2). *But see*United States v. Britton, 26 M.J. 24 (C.M.A. 1988) ("While it is the general rule that failure to make a timely motion at trial may estop one from raising the issue on appeal, failure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief.").

but as a matter of practice the issue is usually raised prior to plea as defense success on the motion will result in the charges being dismissed. Under change 5, a guilty plea which results in a finding of guilty waives a speedy trial issue previously raised and litigated.[249] The inclusion in a pretrial agreement of a waiver of an accused's right to contest a speedy trial issue is contrary to public policy and void.[250]

Once a speedy trial issue is raised, the prosecution has the burden of showing that the delay has not been unreasonable by a preponderance of the evidence.[251] The Government must demonstrate reasonable diligence; it has a duty to account for and explain any delay in bringing charges to trial.[252] The court is not permitted to consider matters in an offer of proof.[253] An "unusually heavy burden" exists to show diligence when the accused is in pretrial confinement or its equivalent for over 90 days.[254] Change 5 should reduce the number of speedy trial issues since they will be fully litigated before the convening authority, military judge, or Article 32 investigating officer. The decision in most cases will be in writing with supporting reasons and dates covering the delay. When the military judge grants a motion to dismiss for lack of speedy trial, the convening authority cannot reverse that ruling.[255] The Government can seek reversal by petitioning for an extraordinary writ or by using the Government appeal procedure of R.C.M. 908.[256]

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[249] R.C.M. 707(c) (C5, 15 Nov. 1991). Under the previous R.C.M. 707, guilty pleas did not waive a previously litigated speedy trial issue. *See, e.g.*, United States v. Schalck, 14 C.M.A. 371, 34 C.M.R. 151 (1964); R.C.M. 910(j) (implied); United States v. McDowell, 19 M.J. 937 (A.C.M.R. 1985); United States v. Voyles, 28 M.J. 831 (N.M.C.M.R. 1989) (failure to raise issue at trial where accused pled guilty waived the issue for appeal; where issue was raised at same trial for other charges, the guilty plea did not waive the speedy trial issue for appeal).

[250] United States v. Holland, 50 C.M.R. 461 (C.M.A. 1975); United States v. Cummings, 38 C.M.R. 174 (C.M.A. 1968); R.C.M. 705(c)(1)(B).

[251] R.C.M. 905(c)(2)(B); R.C.M. 905(c)(1); United States v. Cummings, 21 M.J. 987 (N.M.C.M.R. 1986); United States v. Facey, 26 M.J. 421 (C.M.A. 1988) ("Since the Government has the responsibility of establishing its entitlement to any deductions from the period for which it would otherwise be accountable under R.C.M. 707, any deficiency of evidence must be laid at its door.")

[252] United States v. Bell, 17 M.J. 578 (A.F.C.M.R. 1983); United States v. Washington, 49 C.M.R. 884 (A.F.C.M.R. 1975).

[253] United States v. Cummings, 21 M.J 987 (N.M.C.M.R. 1986); United States v. Thompson, 29 C.M.R. 68 (C.M.A. 1960) (a proffer is not evidence).

[254] United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971). This is really the heart of the *Burton* rules—Government conduct when the accused is in pretrial confinement will be closely scrutinized.

[255] United States v. Rowel, 1 M.J. 289 (C.M.A. 1976).

[256] *See generally* United States v. Dettinger, 7 M.J. 216 (C.M.A. 1979).

Chapter 16
The Article 32 Investigation/The Article 34 Pretrial Advice

Section I
The Article 32 Investigation

16–1. General

No specifications or charge may be referred to a general court-martial unless there has been a thorough and impartial pretrial investigation conducted in substantial compliance with article 32 of the Uniform Code of Military Justice (UCMJ).[1] The UCMJ specifically states that failure to comply with article 32 is not jurisdictional error;[2] however a defective article 32 investigation may deprive the accused of a substantial pretrial right [3] and warrant appropriate relief at trial.[4]

Commentators and courts frequently compare the article 32 investigation to the Federal preliminary hearing and the Federal grand jury.[5] Although the article 32 investigation is not exactly equivalent to either Federal proceeding, it has elements of both and serves as the soldier's counterpart in guaranteeing that the accused will not be tried on baseless charges.[6]

The Court of Appeals for the District of Columbia Circuit has emphasized the significance of the pretrial investigation.[7] In Talbot v. Toth,[8] the accused was charged with murder and was placed in pretrial confinement. He petitioned for a writ of habeas corpus arguing that court-martial procedures denied him due process. He specifically contended that the lack of a grand jury inquiry and indictment constituted a denial of procedural due process. Recognizing that the fifth amendment exempts cases arising in the land or naval forces from the requirement of indictment by grand jury, the Court of Appeals went on to add that:

> These provisions of the Uniform Code [Articles 32 and 34] seem to afford an accused as great protection by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment. … Thus, the basic purpose of a hearing preliminary to trial is being met by a method designed pursuant to constitutional provisions, and the method meets all elements essential to due process.[9]

16–2. Purposes

a. Statutory. The three statutorily recognized purposes of the article 32 pretrial investigation are to inquire into the truth of the matters set forth in the charges, to consider the form of the charges, and to obtain an impartial recommendation as to the disposition that should be made of the case.[10] Although the recommendations of the investigating officer are only advisory,[11] the investigation provides the convening authority with a screening device to identify and dismiss specifications that are not supported by available evidence or which are otherwise legally deficient. The convening authority is specifically precluded from referring a specification to a general court-martial if the staff judge advocate concludes in the pretrial advice that the specification is not warranted by the evidence indicated in the article 32 report of investigation.[12]

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[1] UCMJ art. 32(a); R.C.M. 405(a).

[2] UCMJ art. 32(d) provides that "[t]he requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."

[3] The Court of Military Appeals, following dicta in the case of Humphrey v. Smith, 336 U.S. 695 (1949), has consistently accorded special significance to the pretrial hearing. In United States v. Parker, 19 C.M.R. 201, 207 (C.M.A. 1955) the court held that "an impartial pretrial hearing is a substantial right which should be accorded an accused … . We frown on attempts to whittle it away. We, therefore, start with the premise that a record discloses error when it shows that a perfunctory and superficial pretrial hearing was accorded an accused." In United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958), the court expanded the concept of enforcement of pretrial hearing rights: "If an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial."

[4] R.C.M. 405(a) discussion; R.C.M. 906(b)(3).

[5] *See, e.g.*, United States v. Nichols, 23 C.M.R. 343 (C.M.A. 1957) (sooner or later the military services must realize that this process is the military counterpart of a civilian preliminary hearing, and it is judicial in nature and scope); MacDonald v. Hodson, 42 C.M.R. 184 (C.M.A. 1970) (the article 32 investigation partakes of the nature both of a preliminary judicial hearing and of the proceedings of a grand jury); *see also* Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970); Murphy, *The Formal Pretrial Investigation*, 12 Mil. L. Rev. 1, 9 (1961).

[6] United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959) (it is apparent that the article [32 investigation] serves a twofold purpose; it operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges). *See generally* Fed. R. Crim. P. 5.1 (Preliminary Examination); Fed. R. Crim. P. 6 (The Grand Jury).

[7] Talbot v. Toth, 215 F.2d 22 (D.C. Cir. 1954).

[8] *Id.*

[9] *Id.* at 28.

[10] UCMJ art. 32(a); R.C.M. 405(a) discussion.

[11] R.C.M. 405(a) discussion;*see also* Green v. Widdecke, 42 C.M.R. 178 (C.M.A. 1970) (investigating officer's recommendation that the accused be prosecuted for voluntary manslaughter did not preclude referral of an unpremeditated murder charge).

[12] UCMJ art. 34(a)(2).

b. Discovery purpose. Although the article 32 investigation may not have been originally designed to be a defense discovery procedure,[13] the broad rights afforded the accused to have reasonably available witnesses[14] and evidence[15] produced at the investigation make it a useful discovery tool. Appellate courts have generally recognized that the article 32 investigation does fulfill a legitimate defense discovery purpose.[16] This discovery purpose has also been recognized by the drafters of Military Rule of Evidence 804.[17]

c. Preservation of testimony as a collateral purpose. In addition to its express statutory purposes and recognized discovery purpose, the article 32 investigation also serves a collateral purpose related to the preservation of testimony. The article 32 investigating officer is charged with identifying whether potential witnesses will be available for trial,[18] and evidentiary rules allow for some article 32 testimony to be used as evidence at trial.[19]

(1) *Prior statements under Military Rule of Evidence 801(d)(1).* Under Military Rule of Evidence 801(d)(1), prior statements of a witness are admissible at trial as substantive evidence if the witness testifies at trial and the prior statement fits within one of three categories: (1) prior consistent statements offered to rebut an express or implied charge that the witness' in-court testimony was recently fabricated; (2) statements of identification of a person made after perceiving the person; and (3) prior inconsistent statements given under oath subject to the penalty for perjury at a trial, hearing, or other proceeding.

While all three categories of prior statements can have important applications at trial, the last category, prior inconsistent statements, is the one that is potentially the most useful for counsel. It is not uncommon for witnesses to change the substance of their testimony between the time of the article 32 hearing and the time of trial. Because all testimony at the article 32 hearing must be given under oath[20] (except unsworn statements by the accused)[21] , and false

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[13] R.C.M. 405(a) discussion. There is some disagreement whether the article 32 investigation was originally intended to be a defense discovery device. There is some support in the legislative history for both sides of the issue. Proponents of the position that the article 32 investigation was intended to be a defense discovery device point to the following testimony given by Mr. Larkin before the House Committee on Armed Services:

> [The Article 32 investigation] goes further than you usually find in a proceeding in a civil court in that not only does it enable the investigating officer to determine whether there is probable cause ... but it is partially in the nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to.

Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 997 (1949). Opponents of the defense discovery position point to the fact that the hearings taken as a whole demonstrate an intent to create a mechanism for determining the existence of probable cause. Any utility the investigation may have as a discovery tool is viewed as a purely coincidental by-product of this probable cause determination. *See generally* United States v. Connor, 27 M.J. 378 (C.M.A. 1989). Because the defense discovery purpose is not mentioned anywhere else in the legislative history, or in article 32 itself, the better view is probably that defense discovery was intended only to be a collateral consequence of the investigation.

[14] R.C.M. 405(g)(1)(A). *See generally infra* para. 16–4.

[15] R.C.M. 405(g)(1)(B).*See generally infra* para. 16–4.

[16] *See, e.g.*, United States v. Tomaszewski, 24 C.M.R. 76 (C.M.A. 1957) (the article 32 investigation"operates as a discovery proceeding."); United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959) (it is apparent that the article [32 investigation] serves a twofold purpose; it operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges); United States v. Payne, 3 M.J. 354, 357 n.14 (C.M.A. 1977) (one of Congress' intentions in creating the article 32 investigation was to establish a method of discovery); United States v. Roberts, 10 M.J. 308, 311 (C.M.A. 1981) (there is no doubt that a military accused has important pretrial discovery rights at an article 32 investigation; nevertheless, such pretrial discovery is not the sole purpose of the investigation nor is it unrestricted in view of its statutory origin). *But see* United States v. Eggers, 11 C.M.R. 191, 194 (C.M.A. 1953) (discovery is not a prime object of the pretrial investigation; at most it is a circumstantial by-product—and a right unguaranteed to defense counsel); United States v. Connor, 19 M.J. 631 (N.M.C.M.R. 1984), *aff'd* 27 M.J. 378 (C.M.A. 1989).

[17] In discussing whether testimony at the article 32 investigation should fall with the Federal "former testimony" exception to the hearsay rule, the drafters of Mil. R. Evid. 804 specifically addressed the discovery role of the article 32 investigation:

> Because Article 32 hearings represent a unique hybrid of preliminary hearings and grand juries with features dissimilar to both, it was particularly difficult for the Committee to determine exactly how ... the Federal Rule would apply to Article 32 hearings. The specific difficulty stems from the fact that Article 32 hearings were intended by Congress to function as discovery devices for the defense as well as to recommend an appropriate disposition of charges to the convening authority.

Mil. R. Evid. 804(b) analysis. *See also* R.C.M. 405 After outlining the primary (statutorily recognized) purposes of the article 32 investigation, the drafters of R.C.M. 405 stated that "[t]he investigation also serves as a means of discovery." R.C.M. 405(a) discussion.

[18] R.C.M. 405(h)(1)(A) discussion; DA Pam 27–17, para. 3–3*a* (15 Mar. 1985); *see also* DD Form 457, Investigating Officer's Report, block 16 (Aug. 1984).

[19] Mil. R. Evid. 613 (impeachment with prior inconsistent statements); Mil. R. Evid. 801(d)(1) (prior statements of witnesses admissible as substantive evidence); Mil. R. Evid. 804(b)(1) (former testimony of unavailable witnesses admissible as substantive evidence).

[20] R.C.M.405(h)(1)(A).

[21] R.C.M. 405(f)(12); R.C.M. 405(h)(1)(A).

testimony at the article 32 hearing can be punished as perjury,[22] article 32 testimony can be admitted as a prior inconsistent statement. Unlike prior statements offered pursuant to Military Rule of Evidence 613, the prior testimony serves not only to impeach the witness' in-court testimony,[23] it also can be considered on the merits as substantive evidence to establish an element of the offense or to raise a defense.[24]

(2) *Former testimony under Military Rule of Evidence 804(b)(1).* Under Military Rule of Evidence 804(b)(1), testimony given at an article 32 hearing is admissible at a subsequent trial if: (a) there is a verbatim transcript of the article 32 testimony; (b) the witness is now unavailable to testify at the trial; and (c) the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony at the article 32 hearing.[25]

(a) Verbatim transcript. The report of the article 32 investigation must include the substance of the witness testimony taken on both sides.[26] The investigating officer ordinarily will summarize the testimony and, when practical, will have the witness swear to the truth of the summary.[27] Although the accused has no right to have a verbatim transcript of the article 32 hearing prepared,[28] the appointing authority can direct that a verbatim transcript be taken.[29] When a verbatim transcript is not ordered originally but audio recordings of the testimony are made to assist the investigating officer in producing a summarized transcript, those tape recordings may later constitute a verbatim record of testimony under Military Rule of Evidence 804(b)(1).[30]

(b) Unavailability. Witness unavailability for the purpose of admitting article 32 testimony as an exception to the hearsay rule is generally defined in Military Rule of Evidence 804(a).[31]

When the former article 32 testimony is to be introduced by the Government, the accused's right to confront the witness also impacts on the Government's obligation to demonstrate unavailability. The confrontation clause requires the Government to demonstrate a good faith effort to obtain the witness' presence at trial.[32] The Supreme Court defined this "good faith" requirement in Ohio v. Roberts:[33]

> [I]f no possibility of procuring a witness exists … "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith

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[22] Military witnesses are subject to court-martial for perjury under article 131. UCMJ art. 131 defines the crime of perjury as follows:

> Any person subject to … [the Code] who in a judicial proceeding or in a course of justice willfully and corruptly … 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 … is guilty of perjury and shall be punished as a court-martial may direct.

The phrase "in a course of justice" includes an investigation conducted under article 32. MCM, 1984, Part IV, para. 57c(1); *see also* United States v. Crooks, 31 C.M.R. 263, 266 (C.M.A. 1962) ("That the Article 32 investigation is a 'judicial proceeding or in a course of justice' within the meaning of Article 131 is not open to question."; United States v. Poole, 15 M.J. 883 (A.C.M.R. 1983) (the accused was convicted of committing perjury while testifying at an article 32 investigation).

Civilian witnesses and military witnesses who testify falsely at an article 32 hearing can be tried in Federal court for perjury in violation of 18 U.S.C.§ 1621 (1982), which provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury… . This section is applicable whether the statement or subscription is made within or without the United States.

A more difficult, and unanswered, question exists regarding the admissibility under M.R.E. 801(d)(1) of prior article 32 testimony given by a foreign national who is not amenable to a perjury prosecution before a U.S. tribunal. Arguably, the prior inconsistent statement would be admissible if the false article 32 testimony would be punishable as perjury under the laws of the nation where the testimony occurred or under the laws of the nation where the witness held citizenship. Alternatively, counsel could attempt to have the statement admitted under the general hearsay exception in Mil. R. Evid. 804(b)(5).

[23] *See* Mil. R. Evid. 613.

[24] Mil. R. Evid. 801(d)(1).

[25] Mil. R. Evid. 804(b)(1). See United States v. Conner, 27 M.J. 378 (C.M.A. 1989); United States v. Hubbard, 28 M.J. 27 (C.M.A. 1989).

[26] R.C.M. 405(j)(2)(B).

[27] R.C.M. 405(h)(1)(A) discussion.

[28] United States v. Allen, 18 C.M.R. 250 (C.M.A. 1955); United States v. Fredrick, 7 M.J. 791 (N.C.M.R. 1979); United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982) (lack of a verbatim article 32 transcript in a capital case did not deprive the accused of the sixth amendment right to effective representation by counsel).

[29] R.C.M. 405(c) gives the appointing authority the power to establish procedures for conducting the investigation so long as the procedures established are not inconsistent with the Rules for Courts-Martial.

[30] The requirement that a verbatim record of the testimony be produced was added to Fed. R. Evid. 804(b)(1) to ensure accuracy of the former statement. The actual tape recordings of the testimony would be the most accurate record of the testimony available. Mil. R. Evid. 804(b)(1) analysis.

[31] Mil. R. Evid. 804(a) provides that a declarant is unavailable when the declarant—

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance … by process or other reasonable means; or
(6) is unavailable within the meaning of article 49(d)(2).

[32] Barber v. Page, 39 U.S. 719 (1968).

[33] 448 U.S. 56 (1980).

may demand their effectuation. "The lengths to which the prosecution must go to produce a witness … is a question of reasonableness."[34]

(c) Opportunity and similar motive. The greatest stumbling block to the admissibility of article 32 testimony pursuant to Military Rule of Evidence 804(b)(1) is the requirement that opposing counsel had an opportunity and similar motive to develop the article 32 testimony through direct, cross, or redirect examination.[35] The proponent of the evidence bears the burden of establishing this"opportunity and similar motive."[36]

Opportunity. There are two typical situations where counsel opposing the admission of former testimony may argue the lack of opportunity to develop the testimony at the article 32. First, counsel opposing the evidence at trial may argue that they were not personally present at the article 32. The defense counsel representing the accused at trial may not have been hired until after the article 32 hearing or may have allowed detailed military counsel to handle the pretrial investigation.[37] Government counsel also may decide not to attend the article 32 hearing, even though entitled to attend as the Government's representative,[38] and instead allow the investigating officer to conduct the examination.

Second, counsel may argue that they had no opportunity to inquire into certain areas of cross- examination because of limited investigation and preparation time, or because important evidence concerning the case was not discovered until after the investigation.[39]

Federal courts have not taken such a restrictive view of the opportunity requirement.[40] Common law required an identity of parties and an identity of issues between the trial and the pretrial hearing,[41] but these requirements may be somewhat relaxed when admissibility is analyzed in terms of opportunity and similar motive.[42] In United States v. Hubbard[43] the Court of Military Appeals held that prior testimony is not rendered inadmissible simply because after the giving of the testimony, the defense obtains material information concerning which there was no opportunity to cross-examine the absent witness.[44]

Similar motive. There is little doubt that in any given case a defense counsel's motive to develop a Government witness' testimony at the article 32 hearing may be different than the motive the defense counsel would have at trial. The defense counsel may treat the article 32 hearing as a discovery device to conduct an"initial interview" of the witness; as a practice opportunity to try a new advocacy technique; or as a pro forma proceeding where little or no defense counsel participation is necessary. Because the recommendations of the investigating officer are purely advisory[45] it may not be to the accused's benefit to discredit the Government witness at the article 32 hearing. If the defense counsel believes the charges inevitably will be referred to trial by general court-martial, the prudent defense counsel will seek to conceal the defense strategy and will save effective areas of cross-examination and impeachment for trial where the element of surprise can be used to the best tactical advantage. Notwithstanding that the defense counsel's motives may be dissimilar in fact, the courts vary in how they assess the presence or absence of this"similar motive" as a matter of law.

The drafters' analysis to Military Rule of Evidence 804(b)(1) suggests that a defense counsel who uses the article 32 hearing for discovery rather than impeachment would not have a "similar motive" within the intended meaning of Military Rule of Evidence 804(b)(1).[46] The drafters go on to suggest that although the defense counsel's assertion of his or her motive is not binding on the military judge, the prosecution has the burden of establishing admissibility, and that burden "may be impossible to meet should the defense counsel adequately raise the issue."[47]

Military courts have not found it as difficult to find "similar motive" as the drafters suggested in their analysis. In United States v. Conner[48] the Court of Military Appeals expressly recognized the discovery role of the article 32 investigation but went on to state that "unlike the Drafters Analysis, we do not believe that this right of discovery

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[34] *Id.* at 74.
[35] Mil. R. Evid. 804(b)(1).
[36] Mil. R. Evid. 804(b)(1) analysis.
[37] At the article 32 hearing, the accused has the right to be represented by detailed military counsel, to request available individual military counsel, or to hire a civilian counsel. R.C.M. 405(d)(2).
[38] R.C.M. 405(d)(3).
[39] The investigating officer is charged with conducting a timely investigation. R.C.M. 405(j)(1). If the accused is in pretrial confinement the report of investigation should be forwarded to the general court-martial convening authority within 8 days of the imposition of the confinement. UCMJ art. 33.
[40] *See generally* M. Graham, Handbook on Federal Evidence 903 (1981). *See also* United States v. Zurosky, 614 F.2d 779, 791 (1st Cir. 1979) ("[Fed. R. Evid. 804(b)(1)] doesn't focus on practical realities facing defense counsel but rather upon the scope and nature of the opportunity for cross-examination permitted by the court."). A change in counsel after the pretrial hearing will not, standing alone, defeat the admissibility of former testimony under Mil. R. Evid. 804(b)(1). United States v. Kelly, 15 M.J. 1024 (A.C.M.R. 1983). *Accord* Ohio v. Roberts, 448 U.S. 56 (1980).
[41] M. Graham, Handbook on Federal Evidence 903 (1981).
[42] *Id; see also* United States v. Hubbard, 18 M.J. 678, 683 n.1 (A.C.M.R. 1984).
[43] 28 M.J. 27 (C.M.A. 1989).
[44] *Id.* at 32 (citing United States v. Conner, 27 M.J. 378 (C.M.A. 1989)); *see also* United States v. Spindle, 28 M.J. 35 (C.M.A. 1989).
[45] R.C.M. 405(a) discussion.
[46] Mil. R. Evid. 804(b)(1) analysis.
[47] *Id.*
[48] 27 M.J. 378 (C.M.A. 1989).

precludes the subsequent reception at trial of testimony taken during the pretrial hearing."[49] Specifically addressing the "similar motive" requirement, the court noted that the investigating officer not only investigates whether the charges are substantiated but also makes recommendations as to disposition. Thus, the defense has "a 'motive' to bring out by cross-examination or otherwise any circumstances that might induce the convening authority to dismiss the charges or refer them to a court-martial of limited jurisdiction."[50] The court held that while tactical considerations may affect cross-examination by defense counsel at article 32 investigations, "if the defense counsel has been allowed to cross-examine the government witness without restriction on the scope of cross-examination, then the provisions of Military Rule of Evidence 804(b)(1) and of the Sixth Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial."[51]

In United States v. Hubbard,[52] the Army Court of Military Review noted with approval the broad interpretation that Federal courts have given the term"similar motive" used in Federal Rule of Evidence 804(b)(1).[53] Instead of accepting the defense counsel's assertion as to motive, the court determined the issue by an objective examination of counsel's conduct at the article 32 hearing.[54] In Hubbard, the defense counsel conducted a thorough, lengthy, and vigorous cross-examination that covered all obvious areas of possible attack;[55] and thus objectively demonstrated a similar motive. The Court of Military Appeals affirmed the Army Court's holding on that issue citing Conner.[56]

Despite the holdings in Hubbard and Conner, it should be remembered that the "similar motive" requirement is more than a suggestion by the drafters of the Military Rules of Evidence. It is a foundational element specifically contained in both Federal Rule of Evidence 804(b)(1) and Military Rule of Evidence 804(b)(1), and actually replaced the old requirements of identity of parties and identity of issues.[57] Additionally, the "similar motive" requirement plays a role in satisfying the confrontation clause by ensuring that the former testimony has the requisite indicia of reliability.[58]

An unresolved issue is the extent to which one party can impose a "similar motive" on opposing counsel by announcing beforehand that it intends to use the witness' article 32 testimony as "former testimony" should the witness become unavailable for trial.

16–3. Participants

a. Appointing authority. Unless prohibited by service regulations, any court-martial convening authority can appoint an article 32 investigating officer and direct that an investigation be conducted.[59] There is no requirement that the appointing authority be neutral and detached. In fact, by definition, the appointing authority will order an article 32 investigation only after making a determination that the charged offenses possibly merit trial by general court-martial.[60] Although all convening authorities have the general authority to order an article 32 investigation, that prerogative can be curtailed or circumscribed by a superior convening authority.[61]

b. Investigating officer. The appointing authority who directs an article 32 investigation also appoints an investigating officer to conduct the investigation.[62] The investigating officer must be mature[63] and impartial,[64] and must conduct the investigation as a quasi-judicial proceeding.[65]

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[49] *Id.* at 388.
[50] *Id.* at 389.
[51] *Id.*
[52] 18 M.J. 678 (A.C.M.R. 1984).
[53] *Id.* at 683 n.1.
[54] *Id.* at 682. *Accord* S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 679–680 (2d ed.) (1986).
[55] 18 M.J. at 683 (the court specifically noted that the defense counsel attempted to discredit the Government witness with prior inconsistent statements and by showing past criminal activity of the witness).
[56] 28 M.J. 27 (C.M.A. 1989).
[57] M. Graham, Handbook on Federal Evidence 903 (1981). The Navy-Marine Court of Military Review relied on United States v. Eggers, 11 C.M.R. 191 (C.M.A. 1953) and United States v. Burrow, 36 C.M.R. 250 (C.M.A. 1966). Both cases predated Mil. R. Evid. 804(b)(1). In *Eggers* and *Burrow*, the Court of Military Appeals declined the opportunity to read a "similar motive" requirement into the reported testimony hearsay exception. The court did not address the issue of what"similar motive" would mean were it an actual part of the evidentiary rule contained in the Manual for Courts-Martial.
[58] *See* Ohio v. Roberts, 448 U.S. 56 (1980); *see also*United States v. Thornton, 16 M.J. 1011 (A.C.M.R. 1983). In *Thornton,* the Government introduced a sworn statement of the victim under the residual hearsay exception, Mil. R. Evid. 804(b)(5), arguing in part that defense cross-examination of the victim at the article 32 investigation provided the "indicia of reliability" required by the confrontation clause. The Army Court of Military Review rejected that argument, saying "it is more than a possibility that the defense counsel used the Article 32 hearing for discovery purposes alone." *Thornton,* 16 M.J. at 1014.
[59] R.C.M. 405(c).
[60] United States v. Wojciechowski, 19 M.J. 577 (N.M.C.M.R. 1984) (no error occurred where special court-martial convening authority told the accused he was going to send the case to a general court-martial, even though the special court-martial convening authority had not yet received the report of the article 32 investigation).
[61] United States v. Turner, 17 M.J. 997 (A.C.M.R. 1984) (the general court-martial convening authority can require subordinate convening authorities to appoint one of two designated officers to perform any investigation conducted pursuant to article 32, UCMJ).*See generally* United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983).
[62] R.C.M. 405(d)(1).
[63] R.C.M. 405(d)(1) discussion.
[64] R.C.M. 405(a).
[65] R.C.M. 405(d)(1) discussion; United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

(1) *Maturity*. The investigating officer must be a commissioned officer.[66] The Manual for Courts- Martial goes on to define "maturity" in terms of a preference for a field grade officer or an officer with legal training.[67] Although there is no requirement that a lawyer serve as investigating officer, many jurisdictions do make lawyers available to serve as investigating officers—particularly in complex or serious cases.[68] Junior officers, even those who are lawyers, should not be appointed to investigate against senior officers; however, such appointment is not necessarily fatal.[69]

(2) *Impartiality.* Article 32 entitles the accused to a "thorough and impartial investigation,"[70] but neither the UCMJ nor the Manual goes on to further define when an investigating officer should be disqualified because of lack of impartiality. The only specific prohibition in the MCM is that the accuser is disqualified from serving as investigating officer.[71]

Case law does provide some guidance as to when a person should be disqualified from serving as an investigating officer. Prior knowledge about a case, standing alone, does not disqualify an officer from serving as an article 32 investigating officer.[72] By the same token, participation in a related case, as an investigating officer[73] or military judge,[74] is not a disqualification. An officer is disqualified from serving as an investigating officer if he or she has had a prior role in perfecting the case against the accused[75] or has previously formed and expressed an opinion concerning the accused's guilt.[76]

As a general proposition, an investigating officer should be disqualified anytime his or her impartiality might reasonably be questioned.[77]

(3) *Quasi-judicial character.* It is well established in case law that the article 32 investigation is a judicial (or quasi-judicial) proceeding[78] and that the investigating officer performs a quasi-judicial function.[79] Accordingly, courts require the investigating officer to comply with applicable provisions of the ABA Code of Judicial Conduct and the ABA Standards for Criminal Justice.[80] Although there are a number of ethical standards which have been applied to the

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[66] R.C.M. 405(d)(1).

[67] R.C.M. 405(d)(1) discussion. Although the MCM, 1984, does not discuss these qualifications as indicative of "maturity" they are carried over from MCM, 1969, para. 34*a* , which did discuss them in that context.

[68] *See, e.g.*, United States v. Durr, 47 C.M.R. 622 (A.F.C.M.R. 1973); *see also* United States v. Davis, 20 M.J. 61 (C.M.A. 1985) (the court encouraged the use of lawyers as investigating officers, noting that "the use of legally trained persons to perform the judicial duties involved avoids some of the complaints lodged against lay judges").

[69] United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987). The Court of Military Appeals noted that"[a]lthough it may not be fatal that the Article 32 Investigating Officer was junior in rank to the accused, ... we consider it a gross breach of military protocol and courtesy to appoint one who is junior in rank to preside over matters involving a person of higher rank."

[70] UCMJ art. 32(a) (emphasis added).

[71] R.C.M. 405(d)(1); United States v. Cunningham, 12 C.M.A. 402, 30 C.M.R. 402 (1961) (appointment of an accuser as the pretrial investigating officer is inconsistent with the codal requirement of a thorough and impartial investigation of the charges).

[72] United States v. Schreiber, 16 C.M.R. 639 (A.F.B.R. 1954) (the investigating officer detailed to investigate Schreiber's case had previously been the article 32 investigating officer in a related case; the board of review held that mere familiarity with the facts and details of a case was not a disqualification).

[73] United States v. Collins, 6 M.J. 256 (C.M.A. 1979). During the course of Airman Collins' article 32 hearing, the investigating officer discovered that Collins had threatened potential witnesses in the investigation. After the investigating officer passed this information to the appointing authority, the appointing authority directed the same investigating officer to include the allegations of communicating a threat in the ongoing article 32 investigation. The court held that the investigating officer's actions did not make him an accuser and did not manifest a lack of impartiality.

[74] United States v. Jones, 20 M.J. 919 (N.M.C.M.R. 1985); United States v. Wager, 10 M.J. 546 (N.C.M.R. 1980) (a military judge who presides over a companion case is not automatically disqualified from later serving as the article 32 investigating officer in a co-accused's case).

[75] United States v. Parker, 19 C.M.R. 201 (C.M.A. 1955). In *Parker,* a "serious incident investigator" was assigned the task of assisting CID in the investigation of a series of offenses. This investigator accompanied the accused to CID headquarters and assisted in the interrogation, eventually getting the accused to confess. This same serious incident investigator was then appointed the article 32 investigating officer. As the article 32 investigating officer, his "hearing"consisted of no more than a consideration of his own prior investigative file. Calling this scenario "not even token compliance with Article 32," the Court of Military Appeals held that the investigating officer's prior role in "solving these mysteries and insuring an ironclad conviction of the wrongdoer" deprived him of impartiality. *See also* United States v. Lopez, 42 C.M.R. 268 (C.M.A. 1970).

[76] United States v. Natalello, 10 M.J. 594 (A.F.C.M.R. 1980). In *Natalello*, an investigating officer of a related case determined from his investigation that Natalello was also involved in the offenses he was investigating. Charges were brought against Natalello and the same investigating officer was detailed to conduct the article 32 investigation. The court held that he should have been disqualified because of "his prior conclusions drawn and expressed about the accused's culpability."

[77] United States v. Castleman, 11 M.J. 562 (A.F.C.M.R. 1981). The article 32 investigating officer in *Castleman* was a good friend of the accuser/main Government witness in the case. In holding that the investigating officer should have disqualified himself, the court relied on the ABA Standards for Criminal Justice, The Function of the Trial Judge, Standard 1.7 (1972), which states "[T]he trial judge should recuse himself whenever he has any doubt as to his ability to preside impartiality in a criminal case *or whenever he believes his impartiality can reasonably be questioned*" (emphasis added).*Compare* United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987) (where the court held that a judge advocate was not disqualified from being the article 32 investigating officer in a case where the trial counsel, assistant trial counsel, and Government witnesses were all co-workers assigned to other branches of the same staff judge advocate office) *with*United States v. Davis, 20 M.J. 61 (C.M.A. 1985) (investigating officer should have recused himself where his supervisory relationship with defense counsel could have impaired defense counsel's effectiveness in representing the accused).

[78] *See, e.g.*, United States v. Nichols. 23 C.M.R. 343, 348 (C.M.A. 1957) ("Its judicial character is made manifest by the fact that testimony taken at the hearing can be used at the trial if the witness becomes unavailable."); United States v. Samuels, 27 C.M.R. 280, 286 ("It is judicial in nature.").

[79] United States v. Payne, 3 M.J. 354, 355 n.5 (C.M.A. 1977) ("[T]he investigating officer must be viewed as a judicial officer, and function accordingly."); United States v. Collins, 6 M.J. 256, 258 (C.M.A. 1979) (the article 32 investigating officer is referred to as "the Article 32 judicial officer").

[80] United States v. Payne, 3 M.J. 354 (C.M.A. 1977); United States v. Collins, 6 M.J. 256 (C.M.A. 1979); United States v. Grimm, 6 M.J. 890 (A.C.M.R. 1979).

article 32 investigating officer,[81] the most significant provisions involve the prohibition against ex parte communications.[82] Such prohibited communications include ex parte contact with counsel,[83] witnesses,[84] the accused's commanding officer,[85] and the accuser.[86] An ex parte visit to the scene of the offense has been condemned,[87] as well as the ex parte consideration of two police reports included in the investigative packet.[88] The Army court recently held that it was improper for the investigating officer to ex parte develop background information for the investigation by contacting CID post housing office, post finance office, and talking with a potential witness.[89] There was no prejudice, however, to the accused.

The general rule is that the article 32 investigating officer must receive all legal advice from a neutral judge advocate, and no advice concerning substantive matters can be given ex parte.[90]

While the rule itself is easily stated, the courts have struggled in defining the parameters of the specific prohibitions.

(a) Neutral legal advisor. When the article 32 investigating officer is not legally trained, it is usually desirable to have a legally trained "advisor" available to assist the investigating officer in conducting a legally sufficient investigation and to address the myriad of legal questions which arise during the course of a typical investigation.

The investigating officer must get all legal advice from a neutral legal advisor.[91] Communications with nonneutral personnel are permissible only if they involve patently trivial administrative matters, that is, when to take a lunch break.[92] The trial counsel appointed to attend the proceedings as the Government representative clearly is not neutral.[93] Generally, anyone performing a"prosecutorial function" is disqualified from serving as legal advisor to the article 32 investigating officer.[94] Although the determination of whether a chief of criminal law or a trial counsel for another jurisdiction is performing a "prosecutorial function" depends on the specific facts in the case, [95] the better practice is to appoint a judge advocate having no criminal law related responsibilities as the legal advisor for the article 32

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[81] *See, e.g.*, United States v. Collins, 6 M.J. 256, 259 (C.M.A. 1979) ("The Standards Relating to the Administration of Criminal Justice, as compiled by the American Bar Association regarding the Function of the Trial Judge, provide proper guidelines for any person acting in a judicial capacity or quasi-judicial capacity. Without fully reiterating all the General Standards relating to the judicial person's obligations, we regard the duty to protect the witness [ABA Standards, The Function of Trial Judge § 5.4 (1972)] and the duty to maintain order [ABA Standards, The Function of Trial Judge § 6.3 (1972)] as pertinent to the facts of this case.")

[82] Code of Judicial Conduct Canon 3A(4) (1972) provides:

> A judge should ... neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. *Commentary*: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

Standards for Criminal Justice, Special Functions of the Trial Judge § 6–2.1 (1980) provide that "The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge *ex parte,* except after adequate notice to all other parties and when authorized by law or in accordance with approved practice."

[83] United States v. Payne, 354 (C.M.A. 1977); United States v. Francis, 25 M.J. 614 (C.G.C.M.R. 1987).

[84] United States v. Whitt, 21 M.J. 658 (A.C.M.R. 1985); United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985).

[85] United States v. Francis, 25 M.J. 614 (C.G.C.M.R. 1987).

[86] *Id.*

[87] United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985).

[88] *Id.* The article 32 investigating officer is also prohibited from receiving *ex parte* legal advice concerning substantive matters. United States v. Payne, 3 M.J. 354 (C.M.A. 1977). United States v. Grimm, 6 M.J. 890, 893 (A.C.M.R. 1979) interpreted*Payne* as follows:

> We read *Payne* as forging two tests for error. First, does the individual furnishing *any* advice to an I.O. serve in a prosecutorial function? If so, there is error. Second, did the I.O. obtain advice from a non-prosecutor advisor on a*substantive* question without prior notice to all other parties? If so, again there is error.

[89] United States v. Rushatz, 30 M.J. 525 (A.C.M.R. 1990).

[90] *Id.*

[91] United States v. Payne, 3 M.J. 354 (C.M.A. 1977) (to do otherwise would constitute an abandonment of the required impartiality and would result in a derogation of the judicial functions inherent in that office).

[92] United States v. Grimm, 6 M.J. 890, 893 n.8 (A.C.M.R. 1979), the court stated:

> We believe that reason mandates that the "advice"*Payne* condemns does not include patently trivial matters, *e.g.*, scheduling of a hearing room or arranging for a legal clerk or court reporter to assist the I.O. Notwithstanding, the better practice would be minimize I.O. and prosecution contracts on even administrative matters.

[93] United States v. Payne, 3 M.J. 354, 355 (C.M.A. 1977) ("However laudable ... [the investigative officer's] ... desire to confer with someone more'familiar' with the case may have been, we find that these *ex parte* discussions with the prosecuting attorney were violative of his role as a judicial officer.").

[94] United States v. Payne, 3 M.J. 354 (C.M.A. 1977); United States v. Grimm, 6 M.J. 890 (A.C.M.R. 1979).

[95] United States v. Grimm, 6 M.J. 890 (A.C.M.R. 1979). In *Grimm,* the court discussed whether the chief of criminal law at Fort Ord performed a "prosecutorial function" within the meaning of *Payne*. Holding that regular duty titles are not dispositive of the issue, the court went on to look at the actual duty functions of the chief of criminal law. The court concluded that*this* chief of criminal law did not perform a prosecutorial function where his duties were primarily administrative in nature, consisting of monitoring pretrial and post-trial processing, making recommendations to the staff judge advocate regarding disposition of a case, assigning trial counsel to cases, and rating trial counsel on efficiency reports. The chief of criminal law did not appear in court as a trial counsel, did not direct the trial tactics or strategy of trial counsel, and did not routinely advise law enforcement personnel.

investigation.[96]

(b) Substantive matters. Even when the article 32 investigating officer does go to a neutral legal advisor for advice, if the advice involves substantive matters, it cannot be given ex parte.[97] In theory, advice concerning purely procedural matters can be given ex parte; however, the distinction between substance and procedure is too ill- defined to be of practical use.[98] The safest approach is to treat all advice as a matter of substance.

(c) Ex parte communications. When a neutral legal advisor gives advice on substantive matters, the advice cannot be given ex parte.[99] Unfortunately, it is unclear just what makes a communication "ex parte." Specifically, when must the parties be given notice of the substantive advice sought and what forum must be utilized in providing the parties an opportunity to respond to the advice received?

The ABA Code of Judicial Conduct seems to sanction after-the-fact notice to the parties[100] while the ABA Standards for Criminal Justice and case law require prior notice to the parties.[101] Although no authority requires that the legal advice be given in the context of a full adversarial proceeding,[102] none of the cases discusses minimum acceptable procedures.

As a practical matter, the Government's interests are best protected by using procedures which fully document the context of all investigating officer— legal advisor communications. Once the defense fairly raises the issue of substantive ex parte advice, the Government bears the burden of showing by clear and convincing evidence that substantive matters were not discussed or that the accused was not prejudiced by the advice received.[103]

(4) *Future disqualification.* Once an officer has served as an article 32 investigating officer in a case, he or she is disqualified from subsequently serving as trial counsel,[104] military judge,[105] court member,[106] or staff judge advocate[107] with respect to that case. The investigating officer subsequently can serve as defense counsel only if

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[96] For example, legal assistance officers, claims judge advocates, or administrative law specialists.

[97] United States v. Grimm, 6 M.J. 890, 894 (A.C.M.R. 1979).

[98] In United States v. Payne, 3 M.J. 354, 355 n.4 (C.M.A. 1977), the court cited "questions of the applicable burden of proof, evidentiary standards, and most critically, the legality of the search which produced the incriminating evidence" as examples of substantive rather than procedural matters. In United States v. Grimm, 6 M.J. 890, 894 (A.C.M.R. 1979), Government counsel at trial and on appeal conceded that substantive advice was given "regarding the role a weapon would have to play to support an aggravated assault charge." In United States v. Saunders, 11 M.J. 912 (A.C.M.R. 1981), the article 32 investigating officer had an *ex parte* conversation with the accused's battalion commander regarding the accused's mental capacity and mental responsibility. The court treated this as an impermissible *ex parte* communication.*But see* Judge Lewis' dissent:

> I cannot believe that Congress intended that the full panoply of the American Bar Association Canons of Judicial Ethics be applicable to investigating officers. Few could find fault with the notion that an investigating officer loses his required neutrality and detachment where he is received *ex parte* substantive advice from the person who will later prosecute the case as occurred in *Payne*. Here the communication was with a non-prosecutor and conveyed the same information that later came before the investigating officer properly.

Id. at 916 (Lewis, J., dissenting).

[99] United States v. Grimm, 6 M.J. 890 (A.C.M.R. 1979).

[100] Code of Judicial Conduct Canon 3A(4) (1972) provides that a judge "may obtain the advice of a disinterested expert on the law … if he gives notice to the parties of the person consulted and the substance of the advice … ."

[101] Standards for Criminal Justice, Special Functions of the Trial Judge § 6–2.1 (1980) provide that no person may "discuss a pending case with the judge *ex parte*, except after adequate notice to all other parties … ." In United States v. Grimm, 6 M.J. 890, 894 (A.C.M.R. 1979), the court, after finding that the neutral legal advisor had discussed a substantive matter with the investigating officer, went on to conclude that "[i]nasmuch as counsel for the accused and the prosecution were not given prior notice, we find a violation of *Payne*."

[102] In two concurring opinions, Judge Jones distinguished the article 32 hearing from a trial and suggested that:

> The Article 32 investigating officer should be required to list in his report the names of all persons from whom he obtained legal advice on substantive questions, but he should not be required to obtain the advice in an adversary proceeding. This would convert the investigation into a "mini-trial" and only cause delay without adding a concurrent benefit to the accused or the Government. United States v. Grimm, 6 M.J. 890, 896 (A.C.M.R. 1979) (Jones, J., concurring). *See also* United States v. Crumb, 10 M.J. 520, 528 n.3 (A.C.M.R. 1980) (Jones, J., concurring).

[103] United States v. Payne, 3 M.J. 354, 357 (C.M.A. 1977).

> Although we determine that the Article 32 investigating officer was acting in violation of the applicable standards of conduct for the judicial office he served, it is nonetheless incumbent upon us to examine the record for a determination of whether the impropriety prejudiced the appellant. We are not unmindful of the inherent difficulty presented by requiring a defendant to demonstrate the prejudice resulting from improper actions by a judicial officer, the full extent or text of which he may be unaware in part or whole. We conclude that this is *a matter requiring a presumption of prejudice*. Absent clear and convincing evidence to the contrary, we will be obliged to reverse the case.

In *Payne,* the Government was able to meet the burden because of the extensive testimony of the article 32 investigating officer and because the officer who rendered the advice prepared extensive notes outlining the matters discussed. The court concluded its decision, however, by warning that in "future cases when testing for prejudice, we will resolve doubts against the judicial officer who participates in such a practice." *Id.* at 358.

[104] UCMJ art. 27(a)(2).

[105] UCMJ art. 26(d).

[106] UCMJ art. 25(d)(2).

[107] UCMJ art. 6(c) (investigating officer is disqualified from serving as staff judge advocate to any reviewing authority upon the same case); UCMJ art. 64(a) (investigating officer is disqualified from preparing the post-trial review); *accord* United States v. Jollif, 46 C.M.R. 95 (C.M.A. 1973) (article 32 investigating officer is disqualified from later drafting the post-trial review for the staff judge advocate); *see also* R.C.M 405(d)(1) ("The investigating officer is disqualified to act later in the same case in any other capacity."). *But see* United States v. Beard, 15 M.J. 768 (A.F.C.M.R. 1983). The article 32 investigating officer, who was subsequently made the staff judge advocate to the accused's special court-martial convening authority, was not "acting as a staff judge advocate" where the only function he performed relating to the accused's case was the ministerial act of recommending changes in court-martial panel membership.

requested by the accused.[108]

c. Counsel.

(1) *Government counsel.* The appointing authority who directed the article 32 investigation may detail, or request an appropriate authority to detail, counsel to represent the Government at the investigation.[109] Counsel representing the Government appears as a partisan advocate and cannot function as the legal advisor to the article 32 investigation officer.[110] As a partisan advocate, the Government representative may question witnesses who appear at the article 32 hearing,[111] examine any evidence considered by the investigating officer,[112] and argue for an appropriate disposition of the case.[113]

(2) *Counsel for the accused.* The article 32 investigation is a critical stage in the prosecution of a case and, therefore, the accused is entitled to be represented by counsel.[114] The accused's rights to counsel at the article 32 hearing are the same as they are at trial[115] and generally include: (1) the right to be represented by a detailed military counsel;[116] (2) the right to be represented by individually requested military counsel if that counsel is reasonably available;[117] and (3) the right to be represented by civilian counsel at no expense to the United States Government.[118]

The accused must be advised of the right to be represented by counsel at the investigation[119] and the accused's elections regarding the right to counsel should be documented in the report of investigation.[120] Although the accused has the right to hire civilian counsel, the Government is not required to delay the investigation for an unreasonable

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[108] UCMJ art. 27(a)(2).

[109] R.C.M. 405(d)(3)(A). UCMJ art. 32 is silent regarding the presence of Government counsel at the investigation. Originally the article 32 hearing was treated as an *ex parte* proceeding in that the Government was not formally represented as a party. United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959). In United States v. Young, 32 C.M.R. 134 (C.M.A. 1962), the legal advisor to the article 32 investigating officer attended the hearing and assisted the investigating officer by examining witnesses and advising on legal rulings. The same legal advisor was subsequently detailed trial counsel and prosecuted the case. The court sanctioned this practice holding that it did not violate article 27(a) because the legal advisor had not become the de facto investigating officer, and the participation of the legal advisor or even a member of the prosecution was permissible so long as it did not displace or encroach upon the impartiality of the investigating officer. In United States v. Weaver, 32 C.M.R. 147 (C.M.A. 1962) the court specifically approved the practice of having a Government representative participate in the article 32 investigation.

> The Article 32 investigation is an important part of court-martial procedure. Manifestly, the Government as well as the accused has an immediate and material interest in the proceedings. Although no provision of the Uniform Code or the Manual requires the Government to be present, its appearance may be desirable and helpful … "we can find no fault" with the practice, which has the legitimate effect of making the investigation an adversary proceeding, presided over by the investigating officer.

Id. at 149 (citations omitted).

Based on *Weaver,* the 1969 Manual for Courts-Martial contained a specific authorization that "if the accused is represented by counsel, the Government may be represented by counsel with equivalent qualifications designated by the officer who directed the investigation, at the discretion of the latter." MCM,1969, para. 34*c*; DA Pam 27–2, Analysis of Contents, Manual for Courts-Martial, United States 1969, Revised Edition, 7–4 (July 1970). This provision was later changed to simply provide that "the government may be represented at the investigation by counsel designated by the officer who directed the investigation." MCM, 1969, para. 34*c* (C6, 1 Sept. 1982).

[110] United States v. Payne, 3 M.J. 354, 357 (C.M.A. 1977). The court specifically overruled United States v. Young, 32 C.M.R. 134 (C.M.A. 1962) an d its progeny to the extent they sanctioned this practice.

[111] DA Pam 27–17, para. 1–2*d.*

[112] R.C.M. 405(h)(1)(B).

[113] DA Pam 27–17, para. 1–2*d.*

[114] UCMJ art. 32(b) ("the accused has the right to be represented at that investigation as provided in … Article 38 … and in regulations prescribed under that section"); R.C.M. 405(f)(4).

[115] UCMJ art. 32(b); *see also* United States v. Tomaszewski, 24 C.M.R. 76 (C.M.A. 1957), where the court rejected the Government's argument that counsel could include nonlawyer officers.

> [T]he connection between the investigation and the trial itself is so close that we are of the opinion that Congress did not intend to differentiate between the two in regard to the qualifications of counsel appointed for the accused. We conclude, therefore, that the accused is entitled to be represented by the same kind of counsel to which he is entitled at trial, namely, counsel qualified within the meaning of Article 27(b).

Id. at 79. For a detailed discussion of a military accused's right to counsel, see *supra* chap. 5.

[116] UCMJ art. 38(b)(3)(A); R.C.M. 405(d)(2)(A).

[117] UCMJ art. 38(b)(3)(B); R.C.M. 405(d)(2)(B); *see also* United States v. Courtier, 43 C.M.R. 118, 119 (C.M.A. 1971) (the right to the assistance of counsel of one's own choice during the pretrial proceedings, when such counsel is reasonably available, is a substantial right entitled to judicial enforcement). For a discussion of the procedures used in processing a request for individual military counsel and in determining when counsel is "reasonably available,"*see*R.C.M. 506 and AR 27–10, para. 5–7.

[118] UCMJ art. 38(b)(2); R.C.M. 405(d)(2)(c); *see also*United States v. Nichols, 23 C.M.R. 343 (C.M.A. 1957) (accused's right to be represented by civilian counsel cannot be curtailed by a service-imposed obligation to obtain a security clearance for access to service classified matter).

[119] UCMJ art. 32(a).

[120] R.C.M. 405(j)(2)(A); *See also* DA Pam 27–17, para. 2–3; DD Form 457.

amount of time to facilitate the retention of civilian counsel.[121]

Counsel for the accused has the right to cross- examine witnesses at the investigation,[122] to compel production of reasonably available witnesses and evidence,[123] and to argue for an appropriate disposition of the case.[124]

d. Other personnel. Interpreters and reporters may be detailed, as needed, at the direction of the convening authority who initiated the investigation.[125]

16–4. Matters considered by the article 32 investigating officer.

a. Scope of the investigation. Article 32 requires the investigating officer to conduct a "thorough" investigation of all matters set forth in the charges and specifically directs that this include an inquiry as to the truth of the matters set forth in the charges, a consideration of the form of the charges, and recommendation as to the disposition which should be made of the case.[126]

Article 32 does not provide an unlimited mandate to investigate criminal activity or criminal suspects, but rather should be limited to an investigation of issues raised by the charges and necessary to a proper disposition of the case.[127] The investigation may properly include an inquiry into the legality of a search, seizure, or confession, even though such an inquiry is not required[128] and the article 32 investigating officer need not rule on the admissibility of evidence.[129] The investigation is not limited to an examination of witnesses and evidence mentioned in the allied documents accompanying the charges[130] but should include all reasonably available witnesses and evidence relevant to the investigation.[131]

b. Evidentiary considerations.

(1) *Application of the Military Rules of Evidence.* The Military Rules of Evidence, other than Rules 301, 302, 303, 305, and section V, do not apply in pretrial investigations.[132] If, during the investigation, the investigating officer

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[121] R.C.M. 405(d)(2)(c) ("The investigation shall not be unduly delayed for [the purpose of obtaining civilian counsel]"). *See generally* United States v. Brown, 10 M.J. 635 (A.C.M.R. 1980) (military judge did not abuse his discretion in denying a continuance for the accused to hire a civilian counsel where the accused had known for some time about his rights to counsel and the date of the scheduled trial; the Government had relied on the scheduled date to produce witnesses at great expense and inconvenience; and the nature of the delay was to resolve a fee problem); United States v. Bowie, 17 M.J. 821 (A.C.M.R. 1984) (military judge did not abuse his discretion in denying the accused a continuance to hire a civilian counsel where the accused had already been given more than 2 months' delay, the accused was still unable to name a specific firm or counsel he desired to retain, and the Government had gone to the expense of bringing witnesses from a substantial distance). *But see* United States v. Maness, 48 C.M.R. 512, 517 (C.M.A. 1974) ("[O]nly in 'an extremely unusual case' should an accused be forced to forego civilian counsel." On the facts of the case, it was error not to postpone the(article 32 hearing to allow the accused's retained civilian counsel to participate); United States v. Lewis, 8 M.J. 838 (A.C.M.R. 1980) (article 32 investigating officer denied the accused a substantial right in failing to delay the investigation for a reasonable effort to seek out civilian counsel; although the accused asked for no specific time delay, there was no indication that the request was made for an improper motive and there was no indication that a few days' delay would have inconvenienced or prejudiced the interests of the Government).

[122] UCMJ art 32(b); RCM 405(f)(8).

[123] UCMJ art. 32(b); R.C.M. 05(f)(9), (10).

[124] DA Pam 27–17, para. 3–3*i.*

[125] R.C.M. 405(d)(3). For a discussion of when a verbatim record is required, see *infra* para. 9–5c.

[126] UCMJ art. 32(a); R.C.M. 405(e).

[127] R.C.M. 405(a) discussion.

[128] R.C.M. 405(e) discussion.

[129] R.C.M. 405(i) discussion (an investigating officer may consider any evidence, even if that evidence would not be admissible at trial); R.C.M. 405(h)(2) (an investigating officer is not required to rule on any objections made by counsel at the article 32 hearing).

[130] R.C.M. 405(a) discussion.

[131] *See generally* RCM 405(g).

[132] Mil. R. Evid. 1101(d); R.C.M. 405(i). The military "rape shield" protections in Mil. R. Evid. 412 do not expressly apply to the article 32 investigation, although the investigating officer arguably can afford similar protection to a rape victim by enforcing article 31(c), Mil. R. Evid. 303's prohibitions against degrading questions. M.R.E. 303 analysis; R.C.M. 405(i) analysis. *See also* United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985) (error for the investigating officer to consider matters covered by the marital privilege, Mil. R. Evid. 504(b)). *Cf.* United States v. Dagenais, 15 M.J. 1018 (A.F.C.M.R. 1983) (witness at an article 32 investigation could properly refuse to answer questions concerning her alleged homosexuality where the questions were not material to the offenses being investigated and did not impact on the witness' credibility).

suspects a military witness of committing an offense under the UCMJ, the investigating officer should comply with the warning requirements of Military Rule of Evidence 305.[133]

(2) *Form of the evidence.* All testimony at the article 32 investigation, except the testimony of the accused,[134] must be given under oath.[135] There is a preference for the personal appearance of witnesses and the actual production of relevant evidence,[136] but alternative forms of evidence are permissible under some circumstances.[137]

(a) Alternatives to sworn testimony. When a witness is not reasonably available to personally appear at the article 32 investigation,[138] the investigating officer can consider: (i) Sworn statements; (ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed; (iii) Prior testimony under oath; and (iv) Depositions of that witness.[139] Arguably, these alternative forms of evidence cannot be considered if the defense objects and the witness is reasonably available.[140] The investigating officer cannot consider unsworn statements,[141] stipulations of fact, stipulations of expected testimony, or offers of proof of expected testimony if the defense objects.[142]

(b) Alternatives to consideration of actual physical evidence. When the actual physical evidence is not reasonably available,[143] the investigating officer may consider testimony describing the evidence, or an authenticated copy, photograph, or reproduction of similar accuracy of the evidence.[144] Arguably, these alternatives cannot be considered if the defense objects and the actual physical evidence is reasonably available.[145]

If the defense counsel objects, the investigating officer cannot consider a stipulation of fact or a stipulation of expected testimony concerning the evidence; a stipulation as to the contents of a document; an unsworn statement describing the evidence; or an offer of proof concerning pertinent characteristics of the evidence.[146] Arguably, other alternative forms of the evidence, that is, unauthenticated copies, photographs, or reproductions, can never be considered.[147]

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[133] UCMJ art. 31; Mil. R. Evid. 305; R.C.M. 405(h)(1)(A) discussion; *See also*United States v. Poole, 15 M.J. 883 (A.C.M.R. 1983) (article 32 investigating officer is required to give rights warnings to a military witness when the investigator actually suspects that the person being questioned has committed an offense or "when the totality of circumstances are such that the questioner reasonably should have harbored that suspicion"). In *Poole*, the accused was convicted of committing perjury at the article 32 investigation of PFC Houck. PFC Houck was charged with being one of four soldiers who committed an assault and robbery near the 1–2–3 Club on post. PFC Houck's alibi was that he had been in PVT Poole's barracks room all evening. The allied documents accompanying the charges against PFC Houck contained several conflicting statements from PVT Poole. Two sergeants who escorted PVT Poole to the MP station for questioning made statements saying that PVT Poole admitted being at the 1–2–3 Club and intervening in a fight involving PFC Houck sometime during the weekend in question. In the sworn statement given to the military police, PVT Poole denied being near the 1–2–3 Club on Saturday night and supported PFC Houck's alibi. The allied papers also contained a second statement given by PVT Poole to the military police maintaining the alibi defense. This second statement was given after the military police advised Poole of his article 31 rights. The military police suspected Poole of being involved in the assault and attempted robbery along with PFC Houck, and false swearing in his first statement. At PFC Houck's pretrial investigation, PVT Poole again supported PFC Houck's alibi. The court held that the totality of the circumstances were not such that the investigating officer should reasonably have suspected PVT Poole of any offense. The "mere existence of some circumstances that would suggest to a suspicious mind that a witness might have been involved" in the offense being investigated is not enough to trigger the rights warning requirement. *Id.* at 887. The court also indicated that, although the test is an objective standard, it was appropriate to consider that the article 32 investigating officer was not a trained investigator, had not done an article 32 investigation before, and did not have a legal advisor present at the hearing. *Cf.* United States v. Williams, 9 M.J. 831 (A.C.M.R. 1980). PVT Williams was also convicted of committing perjury as a witness at an article 32 investigation. Unlike Poole, PVT Williams was never implicated as being involved in the offenses being investigated. Instead, PVT Williams was a Government confidential informant who had made preinvestigation statements inculpating a SP5 Johnson. PVT Williams was then called to testify as a Government witness at SP5 Johnson's article 32 investigation. At the article 32 investigation, PVT Williams had a"memory lapse" and was unable to remember the events being investigated and could not recall making any previous statements. At William's court-martial (for AWOL and perjury), the defense argued that at some point during William's article 32 testimony, either the investigating officer or the Government representative should have recognized that Williams was lying and should have read Williams his article 31 rights for perjury. The court held that article 31 applied to witnesses at an article 32 investigation when they are suspected of having committed *past* criminal offenses, but article 31 did not apply to future offenses and did not require the interruption of testimony at the article 32 investigation to advise witnesses that if they continue, they subject themselves to possible perjury charges.

[134] R.C.M. 405(f)(12) (the accused has the right to make a statement in any form).

[135] R.C.M. 405(h)(1)(A). For a suggested form of the oath to be administered, *see* R.C.M. 405(h)(1)(A) discussion.

[136] R.C.M. 405(g)(2)(B) discussion.

[137] *See generally* R.C.M. 405(g)(4), (5).

[138] For a discussion of reasonable availability, *see*R.C.M. 405(g)(2) and *infra* para. 16–4c(1)(a).

[139] R.C.M.405(g)(4)(B).

[140] The 1969 Manual contained the simple prohibition that "Upon objection by the acused or his counsel, statements of unavailable witnesses which are not under oath or affirmation will not be considered by the investigating officer." MCM, 1969, para. 34*d.* The 1984 Manual went further and attempted to address consideration of various alternatives to testimony with more particularity. Although the drafters clearly did not intend these provisions to be more restrictive than the standards contained in the 1969 Manual, a literal reading of R.C.M. 405(g)(4)(B) arguably is more restrictive. The intent of the drafters was probably to acknowledge that if the defense objected and the witness was reasonably available, the witness had to be produced *in addition to* consideration of the sworn statement or other recognized testimony alternative.

[141] R.C.M 405(g)(4)(A)(vi);*see also* United States v. Samuels, 27 C.M.R. 280, 287 (C.M.A. 1959) (a "statement of a witness may be considered by the investigating officer only if it is supported by oath or affirmation").

[142] R.C.M.405(g)(4)(A).

[143] For a discussion of reasonable availability, see R.C.M. 405(g)(2)(C).

[144] R.C.M.405(g)(5)(B).

[145] *See supra* note 135.

[146] R.C.M. 405(g)(5)(A).

(c) Consideration of matters outside the hearing. The investigating officer can consider other matters, such as a personal observation of the crime scene, so long as the parties are informed of the other evidence that will be considered and are given an opportunity to examine the evidence.[148]

c. Defense evidence. At the pretrial investigation, the defense has broad rights to have reasonably available witnesses and evidence produced, to cross-examine witnesses, and to present anything they may desire in defense or mitigation.[149]

(1) *Witness production.* The witness production provisions of article 32 provide the basis for a statutory confrontation guarantee and make the article 32 investigation a useful defense discovery tool.[150] The courts recognize that the article 32 investigation does perform a legitimate, but not unlimited, discovery purpose.[151] Defining the limits of the defense right to have witnesses produced at the investigation has provided the courts with some difficulty. The general rule is that upon timely request by the accused "any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available."[152]

(a) Witnesses within 100 miles of article 32:"A witness is 'reasonably available' when the witness is within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweigh the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance."[153] This balancing test should be applied to determine the"reasonable availability" of any witness regardless whether the witness will be called by the prosecution or the defense at trial.[154] If the requested witness is not one which the prosecution is going to call at trial, the defense has the burden of providing enough information to the investigating officer to demonstrate the significance of the witness' testimony.[155]

A witness who would be unavailable for trial under Military Rule of Evidence 804(a) is per se "not reasonably available" for testimony at the article 32 investigation.[156]

(b) Witnesses located more than 100 miles: The article 32 investigating officer makes the initial determination whether a military witness located more than 100 miles from the article 32 is reasonably available.[157] The witness' commander can "veto" the IO's determination. Production of civilian witnesses located more than 100 miles from the article 32 is within the discretion of the officer ordering the investigation.[158]

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[147] *See supra* note 135. This interpretation has the anomalous effect of creating a more restrictive authentication requirement at the article 32 hearing than at the actual court-martial despite the clear legislative intent that the Military Rules of Evidence should not encumber the pretrial investigation.

[148] R.C.M. 405(h)(1)(B);*see also* United States v. Craig, 22 C.M.R. 466 (A.B.R. 1956) (error for the article 32 investigating officer to consider an Inspector General's report which he then refused to disclose to the defense counsel because of its"confidential" classification).

[149] UCMJ art.32(b) provides "At the investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused."

[150] *See, e.g.*, United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959); United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); United States v. Roberts, 10 M.J. 308 (C.M.A. 1981). Although courts readily recognized that article 32 provides for a statutory confrontation, the exact difference has never been defined. As a general proposition, statutory confrontation under article 32 has a more liberal definition of unavailability which in turn triggers the admissibility of testimony alternatives which have a lower indicia of reliability than would be required at an actual trial. *Compare*United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976) (balancing test for availability … sworn statements as testimony substitute) *with* Ohio v. Roberts, 448 U.S. 56 (1980) (good faith effort by Government to procure the witness required … testimony substitute required to have extra indicia of reliability).

[151] United States v. Roberts, 10 M.J. 308, 311 (C.M.A. 1981) ("There is no doubt that a military accused has important pretrial discovery rights at an article 32 investigation. Nevertheless, such pretrial discovery is not the sole purpose of the investigation nor is it unrestricted in view of its statutory origin."). *See also* United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957):

> There is a distinct advantage in having a dress rehearsal, and Congress has given that privilege to an accused. When it is taken away, among other things, the opportunity to probe for weaknesses in the testimony of witnesses is denied; the probability of developing leads for witnesses who may be of assistance to the defense is decreased.

Id. at 352.

[152] R.C.M.405(g)(1)(A).

[153] R.C.M. 405(g)(1)(A). The "100-mile" bright line rule is intended to simplify the IO's determination of"reasonably available."

[154] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

[155] United States v. Thomas, 7 M.J. 655 (A.C.M.R. 1979) (the defense request that a confidential informant be brought from the United States to testify at an article 32 hearing in Germany was properly denied where the Government did not intend to call the informant as a witness, and the defense could only speculate that the informant's testimony might support a possible entrapment defense); United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981) (the defense request that members of a vessel's crew be brought from South America to testify at an article 32 hearing in Charleston, South Carolina, was properly denied where the Government did not plan to call the individuals as witnesses, and the defense wanted to question them regarding the character of the accused and the victim but was unable to do more than speculate as to the significance of their testimony).

[156] R.C.M. 405(g)(1)(A). Mil. R. Evid. 804(a) provides that a witness is unavailable when the witness:

> (1) is exempted by ruling of the military judge on the ground of privilege from testimony concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance … by process or other reasonable means; or (6) is unavailable within the meaning of [UCMJ] Article 49(d)(2).

[157] R.C.M.405(g)(2)(A).

[158] R.C.M. 405(g)(1)(A) (Analysis).

Any determination by the investigating officer or the witness' immediate commander that the witness is not reasonably available is reviewable at trial by the military judge.[159]

(c) Civilian witnesses. As a general proposition, a civilian witness cannot be compelled by subpoena to attend an article 32 investigation.[160] If the civilian witness is employed by the United States Government and the article 32 investigation concerns matters which are related to the civilian's job, the civilian witness can be ordered to testify as an incident of employment.[161] If the civilian witness is a foreign national, compulsion to testify at an article 32 investigation would be covered by local law.[162]

Although a civilian witness may not be compelled to testify, if the witness is reasonably available they may be invited to attend,[163] and when previously approved by the general court-martial convening authority,[164] they may be paid transportation expenses and a per diem allowance.[165] As an alternative, civilian witnesses possibly can be subpoenaed to a deposition proceeding.[166]

(d) Expert witnesses. The Manual contains no separate provisions concerning the production of expert witnesses at the article 32 investigation. Although at least one court of review has attempted to treat expert witnesses as a different category[167] the better view is that their production should be governed by the same reasonable availability balancing test applicable to other witnesses.

(2) *Evidence production.* Upon timely request by the accused, any document or physical evidence "which is under the control of the Government and which is relevant to the investigation and not cumulative shall be produced if reasonably available."[168]

"Reasonable availability" is initially determined by the investigating officer by applying a balancing test weighing the significance of the evidence against the difficulty, expense, delay, and effect on military operations of obtaining the evidence.[169] If the release of the evidence is privileged under section V, Military Rules of Evidence,[170] it is not reasonably available.[171]

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[159] *Id.*

[160] R.C.M. 405(g)(2)(B) discussion. This principle has been generally accepted in prior Manuals and in case law. *See, e.g.*, MCM, 1951, para. 34*d*; United States v. Chuculate, 5 M.J. 143 (C.M.A. 178). *But see*United States v. Roberts, 10 M.J. 308, 310 n.1, 311 n.3 (C.M.A. 1981), where the court hinted that there may be some authority to support subpoena power at the article 32 investigation. Citing the Index and Legislative History, Uniform Code of Military Justice, Hearings Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. on H.R. 2498, pp. 996–98, the court opined that "the legislative hearings on Article 32 provide some indication that the use of a subpoena at the pretrial investigation was contemplated in extraordinary situations." 10 M.J. at 311 n.3. Although the majority apparently saw the issue as being open, the better view was probably expressed by Judge Cook in the concurring opinion, "I see no justification for the suggestion, in footnotes 1 and 3, that there is uncertainty in military law as to whether a subpoena may issue to compel a civilian witness to appear and testify at an Article 32 investigation." 10 M.J. at 316 (Cook, J., concurring).

[161] *See, e.g.*, Weston v. Department of Housing & Urban Development, 724 F.2d 943 (Fed. Cir. 1983) (Federal employee can be removed from his or her position for failure to cooperate in an integral agency investigation relating to matters which affect the efficiency of the agency; if the employee's testimony would tend to be incriminatory, the testimony can still be compelled by granting the employee immunity from prosecution).

[162] The U.S. military has no inherent authority to compel a foreign national to appear before an article 32 hearing being held overseas; however, local status of forces agreements may provide a mechanism for compelling attendance through host nation procedures.*See generally* United States v. Clements, 12 M.J. 842 (A.C.M.R. 1982).

[163] R.C.M. 405(g)(2)(B) discussion.

[164] AR 27–10, para. 5–12. No civilian witness will be requested to appear at an article 32 investigation until after approval by the GCM convening authority. The authority to approve the payment of transportation expenses and per diem may be delegated to the investigating officer or the GCM convening authority's staff judge advocate. Only the GCM convening authority can disapprove the payment of expenses to an otherwise reasonably available civilian witness.

[165] R.C.M. 405(g)(3) authorizes the payment of transportation expenses and a per diem allowance. Procedures to effect payment are to be prescribed by the Secretary of a Department. *See, e.g.*, AR 27–10, para. 5–12; DOD Joint Travel Regulations, paras. C3054, C6000.

[166] UCMJ art. 47(a)(1). While it is clear that a civilian witness can be subpoenaed to attend a deposition proceeding pertaining to a court-martial case which has been referred to trial, it is less clear whether a civilian may be subpoenaed to provide a deposition for use at an article 32 investigation. For a general discussion of the issue, *see* United States v. Roberts, 10 M.J. 308, 316 (C.M.A. 1981) (Cook, J., concurring). R.C.M. 702 specifically provides that a witness may be deposed so that the deposition may be considered at the article 32 investigation. A request for deposition may only be denied "for good cause.""Good cause" normally includes the fact that the witness will be available *for trial*, however, the drafters contemplate the use of depositions when there has been an improper denial of a witness request at an article 32 hearing or when an essential witness is unavailable to appear at the article 32 hearing. R.C.M. 702 discussion. *But see* R.C.M. 702(a) analysis (depositions are intended for exceptional circumstances when necessary to preserve testimony and are not generally to be used as a discovery device).

[167] United States v. Taylor, CM 832910 (N.M.C.M.R. 21 Dec. 1983). In *Taylor*, the defense requested that Mr. Flynn, a fibers expert, be produced to testify at the article 32 investigation. The defense had not previously interviewed the fiber expert and did not articulate any specific reason why the expert's presence was necessary. The court refused to apply the*Ledbetter* balancing test for "reasonable availability" in reviewing the nonproduction of Mr. Flynn. Instead, the court held that the defense had not met the threshold "foundational" requirements of United States v. Vietor, 10 M.J. 69 (C.M.A. 1980). In *Vietor,* the admission of a laboratory report into evidence at trial did not give the accused the automatic right to the attendance of the person who performed the tests. Instead the defense counsel was required to show that the expert's testimony would reveal some "chink in the competence or credibility of the analyst, or cast doubt, in the slightest degree, on the reliability of the processes or the analysis or its results." 10 M.J. at 72. *But see* United States v. Broadnax, 23 M.J. 389 (C.M.A. 1987) (military judge erred in admitting laboratory report concerning handwriting analysis without requiring defense requested live testimony), distinguished by the court from *Vietor* based upon the subjective nature of the handwriting analysis. The Navy-Marine Court of Military Review acknowledged the"right to discovery" element of the article 32 investigation but held that it was "not so broad as to subsume the *Vietor* foundational rule."

[168] R.C.M. 405(g)(1)(B). Although the Jencks Act is not expressly applicable to pretrial investigations (R.C.M. 914), the defense can use this provision to discover pretrial statements made by Government witnesses.

[169] R.C.M. 405(g)(2)(C). *But cf.* United States v. Jackson, 33 C.M.R. 884, 890 (A.F.B.R. 1963) ("[W]e conclude, as a matter of fundamental fairness under the general concept of "military due process" … that the rights accorded under the "Jencks Statute" should be available to an accused during an Article 32 investigation and we so hold.").

[170] Section V privileges are applicable to article 32 investigations. Mil. R. Evid. 1101(d).

[171] R.C.M.405(g)(1)(B).

The investigating officer's determination that evidence is reasonably available can be reversed by the custodian of the evidence.[172] Any determination by the investigating officer (or the custodian of the evidence) that the evidence is not reasonably available is reviewable at trial by the military judge.[173]

(3) *Testimony of the accused.* At the article 32 hearing, the accused has the right to remain silent[174] or to make a statement in any form.[175] At trial, the trial counsel may not directly produce evidence (or comment) on the fact that the accused elected to remain silent at the article 32 investigation;[176] however, the accused's silence at the pretrial investigation may be raised collaterally if the Government attempts to show that the accused's in-court testimony was recently fabricated.[177]

16–5. Procedure

a. Sequence of events. The article 32 investigation was originally designed to be an informal proceeding with relaxed rules of evidence.[178] Although the Military Rules of Evidence generally do not apply,[179] the adversary nature of the current proceedings tends to make the hearing more formal.[180] The appointing authority has the power to prescribe specific procedures to be followed in conducting the investigation.[181] If the appointing authority does not provide procedural guidance or if (as is usual) the appointing authority directs the use of DA Pam 27-17[182] as procedural guidance, the investigating officer will have broad discretion in determining the sequence of events necessary to complete the investigation. The investigation may extend over as many sessions as necessary to thoroughly investigate the charges.[183] The investigating officer is free to determine the order in which the witnesses and evidence are presented,[184] and the order in which individual witnesses will be questioned by the investigating officer and counsel.[185]

Prior to commencement of any investigation the accused must be informed of the charges under investigation,[186] the identity of the accuser,[187] the witnesses and other evidence known to the investigating officer,[188] the purpose of the investigation,[189] and the right against self– incrimination.[190]

b. Timeliness of the investigation. The investigating officer is charged with conducting the investigation as expeditiously as possible and issuing a timely written report of the investigation.[191] Normally duties as an article 32 investigating officer take priority over all other assigned duties.[192] Although there are no hard and fast time limits for conducting a thorough investigation, the appointing authority will typically set a deadline as part of the procedural guidance to the investigating officer.[193] If the accused is ordered into arrest or confinement, the charges and the report

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172 R.C.M.405(g)(2)(C).

173 R.C.M. 405(g)(2)(C); R.C.M. 906(b)(3). Disagreement between the investigating officer and the custodian of the evidence can also be resolved in command channels. R.C.M. 405(g) analysis.

174 R.C.M. 405(f)(7).

175 R.C.M. 405(f)(12). Although the Manual does not specify what forms the accused's statement may take, the broad language used is probably intended to include all the traditional testimonial options, *e.g.*, sworn statement, personal unsworn statement, and unsworn statement through counsel.

176 *See, e.g.*, United States v. Stegar, 37 C.M.R. 189 (C.M.A. 1967); United States v. Tackett, 36 C.M.R. 382 (C.M.A. 1966); United States v. Suttles, 15 M.J. 972 (A.C.M.R. 1983); United States v. Langford, 15 M.J. 1090 (A.C.M.R. 1983).

177 United States v. Fields, 15 M.J. 34 (C.M.A. 1983); United States v. Reiner, 15 M.J. 38 (C.M.A. 1983); United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983). These three cases all deal with a similar scenario: the accused remained silent at the article 32 investigation; all (or substantially all) of the Government's evidence was presented at the article 32 hearing, and at trial the accused testified to an exculpatory version of the facts which, to the maximum extent possible, was consistent with, or fit "between the cracks" of, the Government evidence. On cross-examination of the accused, the trial counsel elicited testimony: (1) that the accused had an opportunity to hear all of the Government's case at the article 32 investigation; (2) that since the pretrial investigation, the accused had a long time to prepare a defense; and (3) that the in-court testimony at trial was the first time the trial counsel had heard the accused's version of the facts. The defense argued that this cross-examination amounted to an impermissible comment on the accused's silence at the article 32 investigation. The Court of Military Appeals disagreed, holding that the totality of the cross-examination was not designed to highlight the accused's exercise of his right to remain silent. Instead, the trial counsel was properly showing that the accused had the motive and the opportunity to fabricate a version of the facts consistent with the Government evidence.

178 *See, e.g.*, United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959) (comparing the article 32 hearing to its Federal counterpart, the Federal preliminary examination, the court endorsed the Federal position that "proceedings in a preliminary examination are not expected nor required to be as regular and formal as in a final trial.").

179 Mil. R. Evid. 1101(d).

180 The article 32 investigation was originally an *ex parte* proceeding with no Government representative present. Now R.C.M. 405(d)(3) specifically provides for the appointment of counsel to represent the Government.

181 R.C.M. 405(c) (so long as the procedural guidance is not inconsistent with the Rules for Courts-Martial).

182 *See generally* DA Pam 27–17.

183 DA Pam 27–17, para. 2–4b.

184 *Id.*

185 *See* DA Pam 27–17, app. F, for suggestions regarding the examination of witnesses at the article 32 hearing.

186 UCMJ art. 32(b); R.C.M. 405(f)(1);*see also* DA Pam 27–17, app. B, for a sample notification letter informing the accused of rights afforded at the article 32 investigation; DA Pam 27–17, app. A, for a boilerplate procedural guide to be used to advise the accused of rights at the article 32 hearing; and DD Form 457.

187 R.C.M. 405(f)(2).

188 R.C.M. 405(f)(5).

189 R.C.M. 405(f)(6).

190 UCMJ art 32(b); RCM 405(f)(7).

191 R.C.M. 405(j)(1); DA Pam 27–17, para. 2–1.

192 DA Pam 27–17, para. 1–2a.

193 R.C.M. 405(c); DA Pam 27–17, para. 2–1.

of investigation "should" be forwarded to the general court-martial convening authority within 8 days after the restraint.[194] Generally, time spent conducting the article 32 investigation is chargeable to the Government for speedy trial purposes,[195] so the investigating officer should maintain a chronology documenting all delays.[196]

c. Control of the proceeding.

(1) *Presence of the accused.* The accused will normally be present throughout the taking of evidence.[197] The only two exceptions to this general rule are voluntary absence after being notified of the time and place of the proceeding,[198] and removal by the investigating officer for disruptive conduct after being warned that continued disruptive conduct will cause removal.[199]

(2) *Presence of the counsel for the accused.* The accused is entitled to the presence and assistance of counsel throughout the hearing.[200] Civilian defense counsel cannot be excluded from the investigation because of the lack of a security clearance.[201]

(3) *Presence of the public.* Although there is a preference for a "public" pretrial investigation,[202] the Manual provides that "access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer."[203] This provision makes it seem like there is unfettered discretion to deny the public access to the article 32 hearing. The better view, based on case law,[204] is that the proceedings should be closed only if there is a reasonable, articulable reason why closure is required,[205] and the closure should be limited to only those portions of the investigation where it is necessary.[206] In the event that portions of the investigation are closed to the public, the investigating officer or appointing authority must ensure that the basis for the closure is clearly articulated in the written report of investigation.[207]

d. Report of investigation. Article 32 provides that "if the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused."[208] The Manual goes further and specifies that the report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;
(B) The substance of the testimony taken on both sides, including any stipulated testimony;

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[194] UCMJ art. 33. Failure to comply with the eight-day limitation does not necessarily result in any remedy for the accused. *See generally* United States v. Rogers, 7 M.J. 274 (C.M.A. 1979); United States v. Nelson, 5 M.J. 189 (C.M.A. 1978).

[195] United States v. Talavera, 8 M.J. 14 (C.M.A. 1979) ("We … start with the concept that all article 32 time is chargeable to the Government, unless it can establish that one or more portions thereof are excludable because the "attendant circumstances" were such that more time than "normal" was required for each part.") *See* United States v. Cook, 23 M.J. 882 (A.F.C.M.R. 1987) for an application of the rule enunciated in *Talavera.* Moreover, no case law specifically excludes time spent conducting the article 32 investigation from Government accountability under the "90-day rule" of United States v. Burton, 44 C.M.R. 166 (1971). The 1984 Manual provides for a regulatory"120-day rule" and specifically purports to exclude from Government accountability "any period of delay resulting from a delay in the Article 32 hearing" under certain conditions. R.C.M. 707(c)(5). This provision has been very strictly an narrowly constructed by the courts, however. *See, e.g.*, United States v. Kuelker, 20 M.J. 715 (N.M.C.M.R. 1985) (per curiam) (delay charged to Government where prosecutor did not request continuance from investigating officer or appointing authority); *see also* United States v. Cook, 27 M.J. 212 (C.M.A. 1988) (defense request that Government produce its witnesses for cross-examination not a request or consent to delay); United States v. Broden, 25 M.J. 580 (A.C.M.R. 1987) (defense objecte to investigating officer considering unauthenticated statement, resulting delay in proceedings to obtain testimony charge to Government).

[196] R.C.M. 405(j)(2)(F); DA Pam 27–17, para. 2–1.

[197] R.C.M. 405(f)(3).

[198] R.C.M. 405(h)(4)(A).

[199] R.C.M.405(h)(4)(B).

[200] R.C.M. 405(f)(4).

[201] United States v. Nichols, 23 C.M.R. 343, 394 (C.M.A. 1957) ("[T]he accused's right to a civilian attorney of his choice cannot be limited by a service-imposed obligation to obtain clearance for access to service classified matter.").

[202] R.C.M. 405(h)3) discussion.

[203] R.C.M. 405(h)(3).

[204] *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (a qualified first amendment right of access attaches to preliminary hearings in California); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (extends the sixth amendment right to a "public trial" to *voir dire* proceedings; Waller v. Georgia, 467 U.S. 39 (1984) (extends the sixth amendment right to a"public trial" to pretrial suppression hearings). *But see* MacDonald v. Hodson, 42 C.M.R. 194 (C.M.A. 1970). In *MacDonald* the accused, Captain Jeffrey MacDonald, sought a writ of injunction and temporary restraining order enjoining the article 32 investigating officer and the appointing authority from closing his pretrial investigation to the public. The court denied the petition, holding that the article 32 investigation was not a "trial" within the meaning of the sixth amendment. It should be noted, however, that this decision predates recent Supreme Court cases in the area and that the court in *MacDonald* relied in part on the fact that at the time the article 32 investigation was an *ex parte* and not an adversarial proceeding.

[205] *See, e.g.*, R.C.M. 405(h)(3) discussion ("closure may encourage complete testimony by an embarrassed or timid witness"); R.C.M. 405(h) analysis (which suggests looking to R.C.M. 806 for examples of some reasons why a pretrial investigation hearing might be closed); Press-Enterprise v. Superior Court, 106 S. Ct. 2735 (1986) ("the hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights").

[206] Even if the article 32 investigation were held to be a "trial" within the meaning of the sixth amendment right to a public trial, the right to an open proceeding is not absolute. The right to a public trial may give way to overriding concerns such as ensuring that the accused will have a fair trial or protecting the Government from disclosure of sensitive information. If the article 32 investigation is a"trial," closure is still permissible under*Waller v. Georgia*, if: (1) there is an overriding interest likely to be prejudiced; (2) closure is tailored to a specific harm; (3) the article 32 investigating officer considers reasonable alternatives; and (4) the article 32 investigating officer articulates the basis for closure "on the record."

[207] *Id.*

[208] UCMJ art. 32(b).

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;
(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;
(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;
(F) An explanation of any delays in the investigation;
(G) The investigating officer's conclusion whether the charges and specifications are in proper form;
(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and
(I) The recommendations of the investigating officer, including disposition.[209]

Normally, the report of investigation will consist of a completed DD Form 457 (Investigating Officer's Report),[210] and an attached summary of the witnesses' testimony.[211] There is no requirement for, and the accused has no right to, a verbatim transcript of the witnesses' testimony.[212] The appointing authority has the discretion to order a verbatim transcript and should normally do so in particularly complex or serious cases, or when it is necessary to preserve a witness' testimony for later use at trial.[213]

When there is no verbatim transcript authorized, the investigating officer is responsible for preparing a summary of each witness' testimony.[214] Typically, a legal clerk or some other assistant will be present at the hearings to assist in preparing this summary. If substantially verbatim notes, or tape recordings, of a witness' testimony are made to assist in preparing the report of investigation, they should be preserved until completion of the trial.[215] The accused has no right to tape record the article 32 proceeding but taping may be permitted as a matter within the investigating officer's discretion.[216] The substance of a witness' testimony which is produced for the report of investigation should, whenever possible, be shown to the witness so that the witness can sign and swear to the truth of the summary.[217] When the article 32 report of investigation is complete, a copy must be furnished to the appointing authority who will in turn ensure that a copy is served on the accused.[218]

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[209] R.C.M. 405(j)(2).

[210] R.C.M. 405(j)(2) discussion; DA Pam 27–17, para. 4–1.

[211] R.C.M. 405(j)(2)(B).

[212] United States v. *Allen,* 18 C.M.R. 250 (C.M.A. 1955). In *Allen*, the defense challenged the article 32 report of investigation based on the omission of some portions of witness testimony. Interpreting the article 32(b) requirement that the "substance" of the testimony be included in the report, the court held that it was:

> manifest that this phrasing authorizes an impartial condensation of the information obtained from witnesses during this stage of the proceedings … . [I]t was not the Congressional intendment that the summaries of testimony taken during a proceeding held in conformity to Article 32 must of necessity reflect every clue which might possess meaning for a Sherlock Holmes.

Allen, 18 C.M.R. at 255. *See also* United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982) (where retained civilian defense counsel voluntarily elected not to attend the article 32 hearing and the accused was instead represented by detailed military counsel, the accused was not denied any sixth amendment right to effective assistance of counsel when the Government failed to order a verbatim transcript of the article 32 investigation); United States v. Frederick, 7 M.J. 791 (N.C.M.R. 1979).

[213] R.C.M. 405(c); *see generally* Mil. R. Evid. 804(b)(1); *supra* para. 16–2c.

[214] R.C.M.405(j)(2)(B).

[215] R.C.M. 405(h)(1)(A) discussion. *See generally* R.C.M. 914 (codification of Jencks Act); United States v. Thomas, 7 M.J. 655 (A.C.M.R. 1979) (the Jencks Act, 18 U.S.C. § 3500 (1982), is applicable to testimony given at an article 32 investigative hearing). In *Thomas,* a court reporter made tape recordings of the witnesses' testimony at the article 32 hearing to assist the reporter in providing the investigating officer a summarized transcription. The trial defense counsel specifically requested preservation of the tapes until final disposition of the charges. Due to a breakdown in communication between the investigating officer and the court reporter, the tapes were recorded over. When the Government witnesses testified at trial, the defense counsel requested production of the tapes pursuant to the Jencks Act or in the alternative moved to strike the Government witnesses' testimony from the record (the prescribed statutory remedy for Jencks Act violations). The court held that, although the Jencks Act applied to tapes of article 32 testimony, there was no prejudice in this case and the testimony need not be stricken. In finding a lack of prejudice, the court noted the ample opportunity defense counsel had to observe, listen to, and cross-examine the witnesses, and pointed out that the testimonial summaries contained in the article 32 report of investigation had only slight variances from the tape recordings; *see also* United States v. Scott, 6 M.J. 547 (A.F.C.M.R. 1977) (the Jencks Act was applied to tape recordings of article 32 testimony and the court held that the testimony of Government witnesses should have been stricken at trial where: (1) the Government had a duty under applicable Air Force regulations to preserve the tapes; (2) the Government could not claim any "good faith" loss because of the negligence of Government officials in handling the tapes; and (3) the error was not harmless because the summaries of the witnesses' testimony contained in the report of investigation were inadequate to use as impeachment vehicles); United States v. Patterson, 10 M.J. 599 (A.F.C.M.R. 1980) (in evaluating whether the negligent destruction of article 32 tapes prejudiced the accused or was harmless error, the court should look at whether the summarized statements made by the investigating officer substantially incorporated the|testimony of the witness). *Cf.* United States v. McDaniel, 17 M.J. 553 (A.C.M.R. 1983) (no Jencks Act issue was raised where the legal clerk attempted to record testimony at the article 32 investigation but produced only blank tapes due to a lack of familiarity with the equipment; the blank tapes did not constitute a "statement" within the meaning of the Jencks Act; the sketchy written notes by the legal clerk were also not"statements" where they were not substantially verbatim and they were never signed or adopted by the witnesses).

[216] United States v. Milan, 16 M.J. 730 (A.F.C.M.R. 1983); United States v. Svoboda, 12 M.J. 866 (A.F.C.M.R. 1982); United States v. Rowe, 8 M.J. 542 (A.F.C.M.R. 1979).

[217] R.C.M. 405(h)(1) discussion. *See also* United States v. Goda, 13 M.J. 893 (N.M.C.M.R. 1982) (Manual provision [in 1969 MCM] providing that the summarized testimony should be adopted by the witness under oath is not mandatory, but rather, is advisory in nature).

[218] R.C.M. 405(j)(3).

16–6. Nature of the article 32 investigation

a. General. Because the article 32 pretrial investigation is sui generis, having no exact counterpart in any civilian criminal jurisdiction,[219] courts have struggled to define the precise nature of the proceeding.

Article of War 70 (1920), the precursor to UCMJ article 32, was the subject of extensive litigation in Federal district court based on writs of habeas corpus from soldiers alleging errors in their pretrial investigations.[220] Initially, a majority of the Federal district courts dealing with the issue held that the military's failure to provide an accused with all the rights guaranteed in Article of War 70 constituted either "jurisdictional error"[221] or a denial of due process.[222] Eventually, the Supreme Court addressed the nature of the military pretrial investigation in Humphrey v. Smith,[223] holding that defects in the investigative procedures were nonjurisdictional.

Based on Humphrey v. Smith, the drafters of the Uniform Code of Military Justice specifically provided that the "requirements of . . . [Article 32] are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."[224]

Although defects in the article 32 investigation are not jurisdictional, courts have consistently maintained that the pretrial investigation is a "judicial proceeding"[225] and that it is "not a mere formality"[226] but rather is "an integral part of the court-martial proceedings"[227] providing the accused with "substantial pretrial rights."[228]

Defining the nature of the article 32 investigation involves much more than merely a semantical exercise in assigning labels. Whether the proceedings are categorized as "judicial," "nonjurisdictional," or as"a substantial pretrial right" has practical consequences impacting on how the proceedings must be conducted and affecting what remedies are available to an accused who has been afforded a less-than-perfect pretrial investigation.

b. Adequate substitutes for the article 32 investigation. No article 32 investigation is necessary if the subject matter of the charged offenses has already been investigated at a proceeding which afforded the accused the opportunity to be present, to be represented by counsel, to cross-examine available witnesses, and to present matters in his or her own behalf.[229] After being officially informed of the charges, the accused does have the right to demand further investigation to recall witnesses for further cross-examination and to offer any new evidence.[230]

When an article 32 investigating officer discovers through the presentation of evidence at the hearing that the accused has committed additional uncharged offenses, additional charges may be referred to trial along with the original charges without conducting an additional article 32 investigation unless specifically requested by the accused.[231]

c. Waiver of the article 32 investigation. The accused may waive the right to an article 32 investigation.[232] The waiver may be an explicit waiver of any investigation or an implicit waiver by failure to object to a defective

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[219] *See supra* notes 5 and 6.*See also* United States v. Schaffer, 12 M.J. 4 25, 530 (C.M.A. 1982) (Fletcher, J., concurring) ("An Article 32 investigation is akin to a grand jury indictment or a preliminary examination, not a brother but a cousin.").

[220] *See, e.g.*, Henry v. Hodges, 76 F. Supp. 968 (S.D.N.Y. 1948); Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946).

[221] *See, e.g.*, Henry v. Hodges, 76 F. Supp. 968 (S.D.N.Y. 1948) jurisdictional error for military not to provide the accused a "thorough and impartial"investigation in accordance with Article of War 70 when the accuser in the case was also appointed as the investigating officer).

[222] *See, e.g.*, Anthony v. Hunter, 71 F. Supp. 823, 831 (D. Kan. 1947) (the court found error in a general court-martial conviction because the accused was not afforded the opportunity to cross-examine available witnesses at the pretrial investigation as guaranteed by Article of War 70. In ordering the accused's release from detention, the court held that "whether failure to do the things required be construed as a defect precluding the acquiring of jurisdiction or whether the failure be held to deprive the accused of due process contemplated by organic law, the result is the same"); Hicks v. Hiatt, 64 F. Supp. 238, 249 (M.D. Pa. 1946) (the accused was denied due process of law when the investigating officer failed to develop, or allow the defense to develop, testimony concerning the alleged rape victim's bad moral character). *But see*Waide v. Overlade, 64 F.2d 722 (7th Cir. 1947) (alleged relaxations of pretrial investigation requirements were not of a nature to seriously impair any of the accused's fundamental constitutional rights).

[223] 336 U.S. 695, 700 (1949) ("We hold that a failure to conduct pre-trial investigations as required by article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments.").

[224] UCMJ art. 32(d); *see generally Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 998 (1949);*Hearings on S. 857 Before the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 170 (1949).

[225] *See, e.g.*, United States v. Payne, 3 M.J. 354, 355 n.5 (C.M.A. 1977) ("[I]t has long been recognized that the investigation under Article 32 is judicial in nature … . Clearly for that premise to have viability, the investigating officer must be viewed a a judicial officer, and function accordingly."); United States v. Samuel, 27 C.M.R. 280, 286 (C.M.A. 1959) ("It is judicial in nature."); United States v. Nichols, 23 C.M.R. 343, 348 (C.M.A. 1957) ("Its judicial character is made manifest by the fact that testimony taken at the hearing can be used at the trial if the witness becomes unavailable.").

[226] United States v. Nichols, 23 C.M.R. 343, 348 (C.M.A. 1957).

[227] *Id.*

[228] *See, e.g.*, United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958). *But see* United States v. Bramel, 29 M.J. 958 (A.C.M.R. 1990) ("Although the article 32, UCMJ, pretrial investigation is an important pretrial right it is not a critical stage or crucial step in the trial. The 6th amendment right of face-to-face confrontation in Cox v. Iowa did not apply to pretrial investigation.").

[229] UCMJ art. 32(c); R.C.M. 405(b).*See generally* United States v. Gandy, 26 C.M.R. 135 (C.M.A. 1958) (commander's board of investigation appointed to investigate the theft of clothing from the ship's clothing sales store satisfied the requirements of article 32(c)).

[230] UCMJ art. 32(c); R.C.M. 405(b).

[231] *See, e.g.*, United States v. Lane, 34 C.M.R. 744 (C.G.B.R. 1964) (but if the investigating officer prefers the additional charges and thereby becomes the accuser, he or she is disqualified from presiding over any additional sessions of the investigation that may be demanded by the accused); United States v. Holstrom, 3 C.M.R. 910 (A.F.B.R. 1967) (the fact that the investigating officer of the prior investigation became the accuser for the subsequent charges is not by itself error).

[232] R.C.M. 405(k); *see also*United States v. Frentz, 21 M.J. 813 (N.M.C.M.R. 1985).

investigation.[233] Relief from such waiver is available only upon a showing of good cause.[234] A change in the accused's plea from guilty to not guilty itself is not sufficient "good cause" to require relief from a previous waiver, at least where the waiver is not a condition of a pretrial agreement.[235] Waiver may be made a condition of a pretrial agreement[236] so long as the accused freely and voluntarily entered into the agreement.[237] An accused's offer to waive the article 32 investigation is not binding on the Government.[238]

d. Treatment of defects. One of the consequences of having the clear but unembellished congressional mandate that "defects in the Article 32 investigation are not jurisdictional,"[239] is that the President and the courts are left to fashion guidelines for granting relief to cure defects which are raised at the trial and appellate levels. Some basic guidance is provided in the legislative history to article 32(d):

> There has been a considerable amount of difficulty in construing the binding nature of the pretrial investigation… The point we are trying to make clear is that the pretrial investigation is a valuable proceeding but that it should not be a jurisdictional requirement. It is a valuable proceeding for the defendant as well as for the Government. We desire that it be held all the time. But in the event that a pretrial investigation, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn't seem to be any reason … the case should be set aside if the lack of full compliance doesn't materially prejudice his substantial rights … Now if it has, that is and should be grounds for reversal of a verdict of guilty.[240]

The courts have adopted this reasoning and consistently have held that even though defects in the article 32 investigation are not jurisdictional, they may constitute grounds for appropriate relief,[241] usually in the form of a continuance to cure the defect.[242] Additionally, when the defect operates to prejudice a substantial right of the accused, it may constitute grounds for reversing a conviction without regard to whether it touches jurisdiction.[243]

(1) *General rule.* The best, and most often cited, statement of how defects in the pretrial investigation should be treated is contained in United States v. Mickel:

> [I]f an accused is deprived of a substantial pretrial right on a timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial. At that stage of the proceedings, he is perhaps the best judge of the benefits he can obtain from the pretrial right. Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at the trial; the rights accorded to the accused in the pretrial stage merge into his rights at trial. If there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused's rights at the trial, there is no good reason in law or logic to set aside his conviction.[244]

Although the Manual provisions are somewhat less clear, they are essentially consistent with the Mickel standard. R.C.M. 405 provides that no charge may be referred to a general court-martial unless there has been a thorough and impartial investigation made in"substantial compliance" with the Manual.[245] A motion for appropriate relief[246] made prior to trial[247] should be granted to cure defects in the article 32 investigation[248] which are raised and preserved

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[233] R.C.M. United States v. Nickerson, 25 M.J. 541, 543 (A.C.M.R. 1987).
[234] R.C.M. 405(k); United States v. Nickerson, 27 M.J. 30 (C.M.A. 1988).
[235] 27 M.J. at 32.
[236] R.C.M. 705(c)(2)(E); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982). In *Schaffer,* the court held that waiver of the article 32 investigation did not violate public policy where the accused proposed waiver as an inducement for a beneficial pretrial agreement. The court did not address the validity of waiver which originated from the Government as a precondition to plea negotiations. R.C.M. 705(d) only requires that the offer to plead guilty must originate with the accused. Once the defense initiates negotiations, the Government is free to propose terms.
[237] R.C.M.705(c)(1)(A).
[238] R.C.M. 405(a) discussion.
[239] UCMJ art. 32(d).
[240] United States v. Allen, 18 C.M.R. 250, 257 (C.M.A. 1955) quoting testimony of Mr. Larkin at*Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 998 (1949) (emphasis added).
[241] *See, e.g.*, United States v. Worden, 38 C.M.R. 284 (C.M.A. 1968) (the defense motion to dismiss charges because of a defective article 32 investigation was treated as a motion for appropriate relief because that was the real basis for relief and counsel's misdesignation of the motion was not fatal).
[242] R.C.M. 906(b)3) discussion.
[243] United States v. Allen, 18 C.M.R. 250 (C.M.A. 1955); United States v. Rhoden, 2 C.M.R. 99 (C.M.A. 1952).
[244] United States v. Mickel, 36 C.M.R. 104, 107 (C.M.A. 1958) (emphasis added). In *Mickel,* the accused was represented at the article 32 investigation by a counsel who was not certified under the provisions of article 27(b). The accused did not object to this defect until after trial on the merits. The court held that although the accused was excused from making a timely objection (because at the time the accused could not have fully understood his rights to qualified counsel), no relief should be granted unless there was a showing that the pretrial error prejudiced him at trial.
[245] R.C.M. 405(a).
[246] R.C.M. 906.
[247] R.C.M. 905(b)(1) requires objections to nonjurisdictional defects in the pretrial investigation of charges to be made at trial prior to the entry of a plea.
[248] R.C.M. 906(b)(3) (correction of defects in the article 32 investigation is a proper ground for appropriate relief).

through timely objection[249] if the defect "deprives a party of a right or hinders a party from preparing for trial or presenting its case."[250]

(2) *Timeliness of objections.* The first step for the accused in getting judicial enforcement of substantial pretrial rights is to make a timely objection to the alleged defect.[251] If a defect is not objected to in a timely manner, the accused is entitled to relief only if there was less than substantial compliance with article 32[252] or if the defect prejudiced the accused at trial.[253]

(a) Defects discovered during the course of the investigation. Defects in the pretrial investigation which are discovered during the course of the investigation must be raised to the investigating officer "promptly upon discovery of the alleged error."[254] The investigating officer can require that the objection be made in writing.[255] This requirement for prompt objection allows the Government to cure obvious defects without unnecessary delay;[256] however, the investigating officer is not required to act on,[257] or even render a ruling on,[258] the objection. If the objection raises a substantial question regarding the validity of the proceedings, the appointing authority should be notified immediately.[259] Normally, the investigating officer should discuss defense objections with a neutral legal advisor.[260]

All objections should be noted in the report of investigation even though the Manual only makes this mandatory when the objection relates to nonproduction of a defense-requested witness or evidence[261] or when the defense counsel specifically requests that it be noted.[262]

Objections to defects discovered during the course of the investigation which are not raised in a timely manner are waived absent a showing of good cause.[263]

(b) Defects in the report of investigation. After the accused receives a copy of the report of investigation, the defense has only 5 days to object to the appointing authority about defects contained in the report.[264] Objections not timely made are waived absent a showing of good cause.[265] This provision will require some development of what constitutes "good cause," because the 5–day time period begins with service of the report on the accused rather than service on the defense counsel.[266] This provision places a heavy burden on defense counsel to preserve objections because the rule purports to require defense counsel to object "again" if objections made during the course of the investigation are not noted in the report of investigation.[267]

(c) Motion for appropriate relief at trial. If objections to defects in the article 32 investigation are preserved, the accused may be entitled to relief at trial by making a motion for appropriate relief prior to entry of the plea.[268] Failure to make the motion prior to plea constitutes waiver of the objection absent a showing of good cause for relief from waiver.[269]

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[249] *See generally* R.C.M. 405(h)(2); R.C.M. 405(j)(4).

[250] R.C.M. 906(a).

[251] United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958); *see also* R.C.M. 405(h)(2), (j)(4).

[252] United States v. Persinger, 37 C.M.R. 631 (A.B.R. 1966). In *Persinger,* the accused voluntarily waived representation by counsel. The investigation consisted only of the investigating officer's consideration of military police reports and an accusatory letter from an Assistant U.S. Attorney. Despite the absence of any defense objection at trial, the Army Board of Review reversed the accused's conviction because of this less than token compliance with article 32, holding that substantial departures from fundamental pretrial procedures required reversal without "nice calculations as to the amount of prejudice" which resulted from the error.

[253] *See, e.g.*, United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978) (investigating officer's denial of the defense request to produce two civilian witnesses deprived the accused of a substantial pretrial right, but as the defense made no effort to depose the witnesses, the defect was not raised in a timely manner and the issue was waived). For examples of other defects which were waived by the defense's failure to make a motion for appropriate relief at trial, *see*United States v. McCormick, 12 C.M.R. 117 (C.M.A. 1953) (investigating officer failed to inquire into one of the charges); United States v. Lassiter, 28 C.M.R. 313 (C.M.A. 1950) (investigating officer denied a defense request for the presence of a witness and instead considered the witness' unsworn statement); United States v. Donaldson, 49 C.M.R. 542 (C.M.A. 1975) (two months after the article 32 investigation was completed on the original charges, additional charges were preferred and referred to the same trial without re-opening the pretrial investigation); United States v. Tatum, 17 M.J. 757 (C.G.C.M.R. 1984) (investigating officer engaged in *ex parte* discussions with Government counsel).

[254] R.C.M. 405(h)(2). This standard has some obvious enforcement problems. While it will be obvious when some defects were discovered, other defects will only be capable of being analyzed in terms of when they"reasonably should have been discovered."

[255] *Id.*

[256] R.C.M. 405(h)(2) analysis.

[257] R.C.M. 405h)2) discussion.

[258] R.C.M. 405(h)(2).

[259] R.C.M. 405h)2) discussion.

[260] These discussions cannot be held *ex parte* if they involve substantive matters.*See generally supra* para. 16–3(b)(3).

[261] R.C.M. 405(g)(2)(D) (the investigating officer shall include a statement detailing the reasons why the witness or evidence was determined to be unavailable).

[262] R.C.M. 405(h)(2); United States v. Cunningham, 21 M.J. 585 (A.C.M.R. 1985) (error for the investigating officer not to note defense counsel objections when requested).

[263] R.C.M. 405(k).

[264] R.C.M. 405(j)(4). Because there is no qualification placed on the time limit, this should be interpreted to mean five calendar days.

[265] R.C.M. 405(k).

[266] Are objections waived when the defense counsel is unavailable for consultation during the 5-day period? When the accused is not permitted to consult with counsel? When the accused negligently fails to consult with counsel? When the accused loses the report of investigation?

[267] R.C.M. 405(k) discussion."If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from waiver."It is unclear whether this was meant to apply to all objections made during the course of the investigation or only to objections which the defense requested be noted in the report of investigation.

[268] R.C.M. 905(b)(1).

(d) Requests for production of witnesses—the deposition alternative. The Manual suggests that "even if the accused made a timely objection to the investigating officer's failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review."[270] Although this requirement is not very well defined, either in the Manual or in case law, some courts have maintained that a request to depose the witness is necessary as a matter of timeliness.[271] This contemplated use of the deposition as a discovery and interviewing device (or to cure error committed by the article 32 investigating officer) is specifically authorized by the Manual[272] despite the fact that it clearly exceeds the permissible uses of the deposition sanctioned by Federal courts.[273]

(3) *Standard for relief.* Once the threshold requirement of a timely objection is satisfied, the court must then decide whether the alleged defect involves a substantial pretrial right of the accused, which is thus entitled to enforcement without any showing of benefit at trial, or whether the accused must demonstrate some specific prejudice to get relief.[274] Analyzing cases in these terms, a direct result of the court's language in Mickel,[275] is essential to understanding the reported decisions in the area, but it also presents practical problems. The courts have never defined what constitutes a "substantial pretrial right" and they continually blur the distinction between "prejudice at the Article 32 investigation" and "prejudice at trial."[276] As a practical matter, the defense should get relief at trial (or on appeal) only if the defect is such that it denied the accused the right to discover evidence material to the charges, the right to confront adverse witnesses, the right to present matters which might affect the disposition of the case, or the right to a neutral recommendation as to disposition from the article 32 investigating officer.

(a) "Substantial pretrial rights." The courts have never expressly defined the distinction between defects involving substantial pretrial rights and "other defects." On a case-by-case basis courts have held that the accused was denied a substantial pretrial right when the article 32 investigation was ordered by an officer who lacked authority to appoint one;[277] when the accused was improperly denied representation at the investigation by the civilian counsel-of-choice;[278] when the accused was denied the effective representation of counsel at the investigation;[279] when the

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[269] R.C.M. 905(e).

[270] R.C.M. 405(k) discussion.

[271] United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978). In *Chuculate,* the defense requested the production of two civilian witnesses, one of whom was the victim of the charged offenses, at the article 32 investigation. The witnesses were invited to attend the investigation but refused. Instead of deciding the case based solely on the fact that the witnesses were not "reasonably available," the court decided that the refusal of the civilians to attend did not *eo ipso*nullify the defense right to cross-examine them, and the court specifically held that the accused had been deprived of a substantial pretrial right. The court nonetheless denied the defense motion to reopen the article 32 investigation because the defense had failed to timely urge the accused's substantial right—in this instance, the opportunity to depose in lieu of cross-examination at th e article 32 investigation—with no adverse effect at trial; *see also* United States v. Matthews, 15 M.J. 622 (N.M.C.M.R. 1982) (when the defense declined the military trial judge's offer to order a deposition of a witness the defense alleged was improperly denied at the pretrial investigation, it waived further litigation of the issue because it failed to timely urge the accused's substantial pretrial rights); United States v. Stratton, 12 M.J. 998 (A.F.C.M.R. 1982).

[272] R.C.M. 702(c)(3)(A) discussion provides:

> The fact that the witness is or will be available for trial is good cause for denial [of the request for deposition] in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, [or] unavailability of an essential witness at an Article 32 hearing … .

[273] *See generally* R.C.M. 702(a) analysis (where the drafters recognized that under Federal law the deposition is properly used only to preserve the testimony of witnesses likely to be unavailable at trial).

[274] United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958). In United States v. Freedman, 23 M.J. 82 (N.M.C.M.R. 1987), the Navy-Marine Court of Military Review expressed the opinion that all errors in the article 32 investigation should be tested for prejudice. It rejected the holding in Mickel that those errors involving substantial pretrial rights entitle the accused to enforcement of the right without any showing of benefit at trial.

[275] *See supra* note 236 and accompanying text.

[276] *See, e.g.*, United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958). In *Mickel,* the accused was excused from making a timely objection to his representation at the pretrial investigation by a counsel who was not qualified under UCMJ art. 27(b). When the court evaluated this defect for "prejudice to the accused,"it considered both the fact that counsel at the article 32 investigation performed well and the fact that nothing which occurred at the pretrial investigation was used against the accused at trial.

[277] United States v. Donaldson, 49 C.M.R. 542 (C.M.A. 1975) (the pretrial investigation was ordered by an officer-in-charge who exercised no court-martial jurisdiction over the accused).

[278] United States v. Maness, 48 C.M.R. 512 (C.M.A. 1974). In *Maness,*the accused's retained civilian defense counsel was denied an opportunity to be present at the article 32 hearing because the investigating officer arbitrarily denied a reasonable defense request for postponement. The court held that it was "well settled that … improper exclusion of civilian counsel denies the accused a substantial right." *Id.* at 518.

[279] United States v. Porter, 1 M.J. 506 (A.F.C.M.R. 1975); United States v. Worden, 38 C.M.R. 284 (C.M.A. 1968); United States v. Miro, 22 M.J. 509 (A.F.C.M.R. 1986). In these cases, the accused's defense counsel was denied an opportunity to interview witnesses and to prepare a defense case prior to the pretrial investigation. The courts held that under the circumstances, the defense counsel was unable to prepare cross-examination and the accused was denied effective representation of counsel. When the accused is denied the effective assistance of counsel at the pretrial investigation, the court "will not indulge in nice calculations as to prejudice." *Worden,* 38 C.M.R. at 287. *But see* United States v. Davis, 20 M.J. 61 (C.M.A. 1985) (the court refused to reverse the accused's conviction even though he had been ineffectively represented at the article 32 investigation, examining for prejudice, the court concluded that there was nothing more that any other counsel could have done at the article 32 hearing *or* at trial).

investigating officer failed to produce reasonably available key Government witnesses;[280] and when the accused was not mentally competent to understand the nature of the proceedings or to participate in the defense.[281] In each of these cases the accused was entitled to judicial enforcement of the right to a properly conducted article 32 investigation without regard to whether it would eventually benefit the accused at trial. In fact, in United States v. Saunders,[282] the Army Court of Military Review actually found that there was no reasonable possibility that the accused had been prejudiced either at the investigation or at trial. The court called upon the Court of Military Appeals to adopt a "test for prejudice" standard in all cases involving defective article 32 investigations except those which, like Mickel,[283] involved a denial of the right to counsel.[284]

(b) Testing for prejudice. If the alleged defect in the pretrial investigation is objected to in a timely manner, but does not involve a substantial pretrial right, the court must determine whether the defect prejudiced the accused at trial.[285] Defects which should be tested for prejudice fall into five categories: minor/technical irregularities; nonproduction of defense-requested witnesses;[286] lack of impartiality of the investigating officer;[287] investigating officer's improper receipt of ex parte or nonneutral legal advice;[288] and consideration of improper evidence.[289]

Minor and technical irregularities. The accused is not entitled to a perfect article 32 investigation. Accordingly, the courts will evaluate "minor irregularities" (such as the investigating officer's limitation of defense cross-examination on impeachment matters),[290] and "technical defects" (such as the defense counsel's lack of certification under article 27(b))[291] to see whether the defect prejudiced the accused at trial by affecting the convening authority's referral to general court-martial[292] or by hindering the accused's ability to conduct a defense.[293]

Nonproduction of defense-requested witnesses. On at least two occasions, the Court of Military Appeals has determined that the failure to produce the key Government witness at the article 32 investigation deprived the accused of a substantial pretrial right.[294] An alternate view is that nonproduction should be tested for prejudice. Obviously, the

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[280] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1967). In both cases, the defense was forced to proceed to trial without interviewing the key Government witness under oath because the investigating officer failed to properly assess the reasonable availability of the witness to testify at the article 32 investigation. The court in *Chestnut* succinctly reviewed the standard applicable to this type of defect saying, "This Court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial. Thus, Government arguments of 'if error, no prejudice' cannot be persuasive."*Chestnut*, 2 M.J. at 85 n.4. *But see*United States v. Teeter, 12 M.J. 716 (A.C.M.R. 1981) and United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981), where the courts went on to analyze whether the accused was prejudiced by the Government's failure to provide a defense requested witness at the article 32 investigation.

[281] United States v. Saunders, 11 M.J. 912 (A.C.M.R. 1981).

[282] *Id.*

[283] United States v. Mickel, 26 C.M.R. 104 (1958).

[284] *Saunders,*11 M.J. at 915 n.2.

> We respectfully request the Court of Military Appeals to reexamine its position … to the effect that an accused is entitled to the enforcement of a pretrial right without regard to whether such enforcement will benefit him at trial. The rule announced in *Mickel* … involved the denial of a right to counsel… . A violation of the right to counsel is of such magnitude that it can never be harmless… . We believe the rule in *Mickel* should be limited to the denial of the right to counsel.

It is interesting to note that the court in *Saunders*decided it could not test for prejudice because of*Mickel* when the court in *Mickel*actually denied the accused any relief by applying a prejudice test.

> From one who is not aware of the error until after trial, we can except no less than a showing that the pretrial error prejudiced him at the trial. Here, the board of review concluded that the accused"could not" have fully understood his rights to qualified counsel at the pretrial investigation, but it did not inquire whether the failure to provide such counsel prejudiced him at trial. In the absence of such prejudice, the pretrial error did not contaminate the proceedings in which the accused's guilt was actually determined. *Mickel*, 26 C.M.R. at 107–08.

[285] *See supra* note 244 and accompanying text.

[286] For a discussion of the accused's right to have reasonably available witnesses produced at the pretrial investigation, *see supra* para. 16–4(c)(1).

[287] For a discussion of what constitutes impartiality, *see supra* para. 16–3(b)(2).

[288] For a discussion of the investigating officer's obligation to perform duties in a quasi-judicial manner, *see supra* para. 9–3(b)(3).

[289] United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985). In *Martel,* the investigating officer gave *ex parte* consideration to police reports, a crime scene visit, and a discussion with a potential witness. Because of the difficulty in demonstrating prejudice from *ex parte* actions, the court applied a presumption of prejudice which the Government was required to rebut by clear and convincing evidence. In *Martel,* the investigating officer also improperly considered testimony and witness statements that should have been excluded by the marital privilege, Mil. R. Evid. 54(b). Because this information was presented at the hearing in the presence of defense counsel, the court did not apply any presumptions and instead put the burden on the defense to show specific prejudice.

[290] United States v. Harris, 2 M.J. 1089 (A.C.M.R. 1977). In *Harris,* the investigating officer denied the defense counsel for Harris (a black soldier) the opportunity to cross-examine the victim (a white soldier) about his racial biases and prejudices; *see also* United States v. Cunningham, 21 M.J. 585 (A.C.M.R. 1985) (the investigating officer failed to note defense counsel objections in the report of investigation).

[291] United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958).

[292] In *Harris,* the court considered the investigating officer's testimony that even if the victim had admitted racial bias it would not have influenced his recommendation as to disposition, and the court concluded that there was "no reason to believe that the convening authority would have disposed of this case differently." 2 M.J. at 1091.

[293] In *Harris,* the accused was permitted to fully attack the witness' credibility at trial and the evidence of the accused's guilt was compelling. 2 M.J. at 1091. In *Mickel*, the court noted that the accused's counsel did a good job at the article 3 hearing, that nothing which occurred at the pretrial investigation was later used against the accused at trial, and that, in fact, the defense used evidence developed at the article 3 investigation to impeach Government witnesses at trial. *Mickel*, 6 C.M.A. at 327, 26 C.M.R. at 107.

[294] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976).

accused is prejudiced when the Government denies the defense an opportunity to interview the key Government witness prior to trial.[295] On the other hand, as the Army and Navy-Marine Courts of Military Review have recognized, there is no good reason to reopen an article 32 investigation if the witness' testimony would not affect the disposition of the case and the accused's "rights" to discovery and to cross-examine the witness under oath have been vindicated by granting the defense an opportunity to depose the witness prior to trial.[296] This view is consistent with provisions in the 1984 Manual that clearly contemplate the use of depositions to cure errors in the nonproduction of defense-requested witnesses at the article 32 investigation.[297]

Impartiality of the investigating officer. When there is evidence that the article 32 investigating officer may not have been "impartial," the courts will generally test for prejudice by looking at the way the investigation was actually conducted for indicia of impartiality, for example, the thoroughness of the investigation and the reasonableness of the recommendations in light of the evidence.[298]

Ex parte communications. When the defense shows that the investigating officer engaged in ex parte communications on substantive matters, the courts will apply a presumption of prejudice which the Government must rebut by clear and convincing evidence.[299] If there have been impermissible conversations and the Government witnesses are unable to document or recall what the substance of the conversations were, the accused is entitled to a new article 32 investigation.[300]

(c) Waiver by guilty plea. There are a number of cases that hold that a plea of guilty at trial waives all pretrial objections that do not amount to jurisdictional error or that do not constitute a denial of due process.[301] This waiver has been applied to defects in the article 32 proceeding which otherwise would have constituted a deprivation of a substantial pretrial right.[302] While a guilty plea clearly will waive errors that might otherwise have affected findings of guilty as to the offenses covered by the plea, the plea should not constitute a waiver of objection to defects which might have affected the level of referral.[303]

e. Remedy to cure defects. At trial, the normal remedy available to cure a defective article 32 investigation is a continuance to reopen the investigation.[304] Because the article 32 investigation is not jurisdictional, charges do not have to be re-referred after the corrective action is taken at the investigation.[305] It is sufficient that the convening authority reaffirm the original referral.[306]

Section II
The Article 34 Pretrial Advice

16–7. General

a. Statutory requirement. "Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice."[307] A written pretrial advice must be provided by

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[295] This was the situation faced in both *Ledbetter* and *Chestnut, see supra* note 280. The results in both of those cases would have been the same if the court had tested for prejudice.

[296] United States v. Teeter, 12 M.J. 716 (A.C.M.R. 1981); United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981).

[297] R.C.M.702(d)(3)(A).

[298] *See, e.g.*, United States v. Cunningham, 30 C.M.R. 402 (C.M.A. 1961) (having the accuser serve as investigating officer was prejudicial error where the investigation failed to cover all the elements of the charged offenses and the investigating officer failed to examine a number of available witnesses); United States v. Natalello, 10 M.J. 594 (A.F.C.M.R. 1980) (accused was specifically prejudiced by the fact that the investigating officer had already formed and expressed an opinion that the accused was guilty before ever conducting the investigation). *But see* United States v. Castleman, 11 M.J. 562 (A.F.C.M.R. 1981) (accused's substantial right to an impartial investigation was abridged where the investigating officer was the best friend of the main Government witness and the accused was thus entitled to relief without any showing of specific prejudice).

[299] United States v. Payne, 3 M.J. 354 (C.M.A. 1973).

> We are not unmindful of the inherent difficulties presented by requiring a defendant to demonstrate the prejudice resulting from improper actions by a judicial officer, the full extent or text of which he may be unaware in part or whole. We, conclude that this is a matter requiring a presumption of prejudice. Absent clear and convincing evidence to the contrary, we will be obliged to reverse the case.

Id. at 357. *See also* United States v. Whitt, 21 M.J. 658 (A.C.M.R. 1985); United States v. Francis, 25 M.J. 614 (C.G.C.M.R. 1987).

[300] *See, e.g.*, United States v. Brunson, 15 M.J. 898 (C.G.C.M.R. 1982) (court reluctantly set aside the accused's conviction where the record of trial did not contain the substance of *ex parte* conversations which had taken place between the investigating officer and the Government representative). The General Counsel, Department of Transportation, requested that the Court of Military Appeals review whether the Court of Military Review erred in holding that the *ex parte* conversations were presumptively prejudicial rather than requiring a showing of actual prejudice. United States v. Brunson, 15 M.J. 72 (C.M.A. 1982). The Court of Military Appeals affirmed the lower court's use of the presumption of prejudice standard announced in *Payne*. United States v. Brunson, 17 M.J. 181 (C.M.A. 1983).

[301] *See, e.g.*, United States v. Rehorn, 26 C.M.R. 267 (C.M.A. 1958) (accused's counsel at the pretrial investigation was not certified under article 27(b)); United States v. Courtier, 43 C.M.R. 118 (C.M.A. 1971) (accused was improperly denied individually requested counsel at the pretrial investigation); United States v. Lopez, 42 C.M.R. 268 (C.M.A. 1970) (investigating officer was not impartial); United States v. Judson, 3 M.J. 908 (A.C.M.R. 1977) (accused was denied effective assistance of counsel at the investigation).

[302] United States v. Judson, 3 M.J. 908 (A.C.M.R. 1977); United States v. Courtier, 43 C.M.R. 118 (C.M.A. 1971).

[303] R.C.M. 910(j); United States v. Engle, 1 M.J. 387 (C.M.A. 1976).

[304] R.C.M. 96(b)(3) discussion.

[305] United States v. Clark, 11 M.J. 179 (C.M.A. 1981); United States v. Packer, 8 M.J. 785 (N.C.M.R. 1980).

[306] United States v. Clark, 11 M.J. 179 (C.M.A. 1981); United States v. Packer, 8 M.J. 785 (N.C.M.R. 1980).

[307] UCMJ art. 34(a); R.C.M. 406(a).

the staff judge advocate to the convening authority in every general court-martial, but such written advice is not required for referral of charges to any inferior court-martial.[308] Failure to provide a pretrial advice regarding charges referred to a general court-martial is error that is tested for prejudice.[309] This requirement cannot be waived by the accused, either expressly or by implication.[310]

b. Purpose of the pretrial advice. The courts have been inconsistent in discussing the nature and purpose of the pretrial advice. On one end of the spectrum, the pretrial advice has been called "a substantial pretrial right"[311] which protects the accused from being brought to trial on baseless charges and from having the case referred to an inappropriate level of courts-martial in contravention of the policy that charges be disposed of at the lowest appropriate level.[312] On the other end of the spectrum, the pretrial advice has been labeled a "prosecutorial tool"[313] which merely affords the accused the"salutary" benefit of having the charges examined by someone with legal training.[314]

(1) *UCMJ art. 34 (1951).*

> The legislative history of the 1951 Code made it clear … that the purpose of the pretrial advice is to inform the convening authority concerning the circumstances of a case in such a manner that he personally will be able to make an informed decision whether there has been compliance with the other pretrial procedures; whether the case should be tried; and the type of tribunal to which the charges should be referred.[315]

The role of the staff judge advocate was strictly one of a "legal advisor." The courts required that the pretrial advice contain all the facts which might have a substantial effect on the convening authority's decision to refer the case to trial[316] or which might have a substantial effect on the convening authority's decision as to level of court-martial.[317] In many respects the staff judge advocate's role was a matter of efficiency, saving the convening authority "the duty of going through a record with a fine tooth comb."[318] All of the staff judge advocate's legal conclusions and recommendations contained in the pretrial advice were purely advisory.[319] The convening authority exercised unfettered prosecutorial discretion.

(2) *UCMJ art. 34 (1983).* In response to criticism that the pretrial advice had become an administrative burden on staff judge advocates and commanders,[320] Congress provided for a streamlined pretrial advice in the Military Justice Act of 1983.[321] Rather than have commanders make legal determinations about jurisdiction and the legal sufficiency of the charges, the new article 34 requires the staff judge advocate to provide advice on these determinations.[322]

A direct consequence of this change is that some prosecutorial discretion is taken away from the convening authority. If the staff judge advocate concludes that there is no jurisdiction to try the accused by court-martial,[323] that

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[308] R.C.M. 406(a) discussion.

[309] United States v. Murray, 25 M.J. 445 (C.M.A. 1988).

[310] United States v. Hayes, 24 M.J. 786 (A.C.M.R. 1986).

[311] *See, e.g.*, United States v. Schuller, 17 C.M.R. 101, 105 (C.M.A. 1984) (accused was deprived of "his right to have a qualified Staff Judge Advocate make an independent and professional examination of the expected evidence and submit to the convening authority his impartial opinion as to whether it supported the charges"); United States v. Heaney, 25 C.M.R. 268, 269 (C.M.A. 1958) ("Article 34 is an important pretrial protection accorded to an accused."); United States v. Greenwalt, 20 C.M.R. 285, 288 (C.M.A. 1955) (pretrial advice "is an important protection accorded to an accused and Congress had in mind something more than adherence to an empty ritual"); United States v. Edwards, 32 C.M.R. 586 (A.B.R. 1962) (sending the accused to a general court-martial on charges that were different than the ones discussed in the pretrial advice deprived the accused of a substantial pretrial right).

[312] R.C.M. 306(b).

[313] United States v. Hardin, 7 M.J. 399 (C.M.A. 1979). In *Hardin,* the court rejected the view that the pretrial advice provided any judicial-type protection of a fundamental nature for the military accused. Instead the court held that the military trial judge judicially enforces the accused's "fundamental right"under article 34 to have charges referred to a general court-martial only if the charge alleges an offense under the Code and is warranted by evidence indicated in the report of investigation. *Id.* at 403–04.

[314] Hardin, 7 M.J. at 404.

[315] United States v. Foti, 30 C.M.R. 303 (C.M.A. 1961).

[316] *See, e.g.*, United States v. Foti, 30 C.M.R. 303 (C.M.A. 1961) (accused is entitled to an individualized treatment of factors in the case which would have a substantial influence on the convening authority's referral decision); United States v. Henry, 50 C.M.R. 685 (A.F.C.M.R. 1975) (it was error for the pretrial advice to discuss a witness' unsworn statement in a misleading manner because it might have affected the convening authority's decision to refer the case to trial).

[317] *See, e.g.*, United States v. Rivera, 42 C.M.R. 198 (C.M.A. 1970) (it was error for the pretrial advice to omit the unit commander's opinion that the accused should not receive a punitive discharge).

[318] United States v. Foti, 30 C.M.R. 303, 304 (C.M.A. 1961).

[319] MCM, 1969, para. 35*b.*

[320] *See generally*Military Justice Act of 1983: Hearings on S.974 Before the House Comm. on Armed Services, 98th Cong., 1st Sess. (1983).

> The staff judge advocate's advice has become a legal brief which can run from a few pages in length in simple cases, to scores of pages in more complicated ones. This takes the time and resources of lawyers, staff, and most importantly, the commander. The amendment of Article 34 removes the requirement that the convening authority examine the charges for legal sufficiency, and puts the burden where it belongs—on the shoulders of the staff judge advocate who is a lawyer. *Id.* at 43 (statement of MG Hugh J. Clausen, Judge Advocate General of the Army).

[321] The Military Justice Act of 1983 requires only that the pretrial advice include a written and signed statement by the staff judge advocate expressing his/her *conclusions* that: "(1) the specification alleges an offense … (2) the specification is warranted by the evidence indicated in the report of investigation … and (3) a court-martial would have jurisdiction over the accused and the offense." The advice must also include the staff judge advocate's recommendation as to disposition.

[322] UCMJ art. 34(a).

[323] UCMJ art. 34(a)(3).

the form of a charge is legally deficient,[324] or that a charge is not warranted by the evidence in the article 32 report of investigation,[325] then the convening authority is precluded from referring that charge to a general court-martial.[326]

An indirect consequence of the 1983 changes to article 34 may be that the pretrial advice has become less of a "prosecutorial tool" and become more "a substantial pretrial right of the accused." Correspondingly, the role of the staff judge advocate in rendering a pretrial advice may be less like a district attorney presenting a complaint to a grand jury for action[327] and more like a quasi-judicial magistrate making a probable cause determination that protects the accused from being prosecuted on baseless charges.[328] Changing the fundamental nature of the staff judge advocate's pretrial advice could arguably have an impact on the standard of impartiality required of the staff judge advocate,[329] the role of the trial counsel in pretrial processing,[330] and the treatment of defects in the pretrial advice.[331]

16–8. Contents

a. Mandatory contents. The Military Justice Act of 1983 contemplates that a legally sufficient pretrial advice need contain only the staff judge advocate's legal conclusions regarding jurisdiction, the form of the charges, the sufficiency of the evidence at the article 32 investigation, and the staff judge advocate's recommended disposition of the case.[332] This is in sharp contrast to prior case law which required that the pretrial advice highlight any matter which might have a substantial effect on the convening authority's referral decision.[333]

While the staff judge advocate is required to decide whether the charge is "warranted by the evidence indicated in the report of investigation,"[334] neither the UCMJ nor the Manual sets out an express standard against which the evidence must be weighed. The best view is that the charges must be supported by that "quantum of evidence … which would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it."[335]

b. Optional contents. The legislative history to article 34[336] and the nonbinding discussion to the Manual[337] suggest that, when appropriate, the pretrial advice "should" include such things as "a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations" by others who have forwarded the charges.[338] The Manual further suggests that failure to include these items can never constitute error,[339] presumably because all these matters are contained in the case file which accompanies the pretrial advice and the convening authority can review all or part of the case file before making a referral decision.

What matters are actually put into the pretrial advice is left to local practice influenced primarily by the predilections of the convening authority. Any matters put into the pretrial advice, whether required or not, must be accurate.[340]

c. Form of the advice. Neither the UCMJ nor the Manual require that the pretrial advice be in any particular form. The only requirement is that the advice "shall include a written and signed statement" containing the mandatory conclusions and recommendation discussed above.[341] So long as this minimum requirement is met, additional matters can arguably be presented for the convening authority's consideration orally[342] or in the form of an unsigned back-up

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[324] UCMJ art. 34(a)(1).

[325] UCMJ art. 34(a)(2).

[326] UCMJ art. 34(a). The three legal conclusions that the staff judge advocate must make are binding on the convening authority; the staff judge advocate's recommended disposition is not. Even if the staff judge advocate's legal conclusions preclude referral of a charge to a general court-martial the convening authority would, in theory, retain the prerogative to send the charge to some inferior level of court.

[327] United States v. Hayes, 22 C.M.R. 267 (C.M.A. 1957).

[328] Federal case law recognizes that the article 32 pretrial investigation and the article 34 pretrial advice, taken together, provide the military accused with due process guarantees which are equivalent to civilian indictment by grand jury or the federal preliminary examination. *See generally* Talbot v. Toth, 215 F.2d 22 (D.C. Cir. 1954). In the past, the article 32 investigating officer has been the individual imbued with a judicial quality (United States v. Payne, 3 M.J. 354 (C.M.A. 1977)), and the article 32 investigation was the substantial pretrial right which protected the accused against baseless charges. United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959). This result is arguably skewed now that the staff judge advocate, a trained lawyer, makes binding legal conclusions concerning the sufficiency of the evidence to proceed to trial while the investigating officer, usually a lay person, merely makes an advisory recommendation regarding disposition of the charges.

[329] *See generally* supra para. 16–3b(2).

[330] *See generally supra* para. 16–3b(3) regarding *ex parte* advice to a "quasi-judicial" article 32 investigating officer.

[331] *See generally supra* para. 16–6 regarding the enforcement of substantial pretrial rights without any showing of benefit at trial.

[332] UCMJ art. 34(a); R.C.M. 406(b).

[333] United States v. Foti, 30 C.M.R. 303 (C.M.A. 1961).

[334] UCMJ art. 34(a)(2).

[335] United States v. Engle, 1 M.J. 387 (C.M.A. 1976).*Accord* Gerstein v. Pugh, 420 U.S. 103 (1975).

[336] S. Rep. No. 98–53, 98th Cong., 1st Sess. 17 (1983).

[337] R.C.M. 406(b) discussion.

[338] *Id.*

[339] Id.

[340] *Id.*

[341] R.C.M. 406(b).

[342] United States v. Treadwell, 7 M.J. 864 (A.C.M.R. 1979). In *Treadwell,* the Government urged that the staff judge advocate's oral advice to the convening authority cured a defective written pretrial advice which misstated the maximum punishment the accused could receive for the charged offenses. The court, *in dicta*, opined that "although the Manual … requires that the pretrial advice include a 'written and signed statement' concerning specified matters (not including the maximum punishment), we know of no reason why the pretrial advice cannot be altered orally at least as to other matters, as was done in this case." *Id.* at 866 n.2. *See also* United States v. Heaney, 25 C.M.R. 268 (C.M.A. 1958) (because article 34 does not prescribe the form or the manner of the advice, it may be submitted in such manner and form as the convening authority may direct); United States v. Clements, 12 M.J. 842 (A.C.M.R. 1982) (Staff judge advocate can orally cure a defective written pretrial advice).

memorandum.

The Manual does require that a "copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial."[343] Arguably this provision would require the staff judge advocate to disclose oral communications with the convening authority which are provided to assist the convening authority in making a referral decision.[344]

16–9. Preparation of the pretrial advice

The staff judge advocate need not personally draft the pretrial advice, but the final version which is presented to the convening authority must reflect the independent professional judgment of the staff judge advocate.[345]

If the advice remains a purely prosecutorial tool, as suggested in United States v. Hardin,[346] it may be acceptable for the trial counsel to draft the preliminary pretrial advice, although a safer approach would be to have a neutral judge advocate perform that function.[347]

16–10. Treatment of defects

Unlike the article 32 pretrial investigation,[348] the pretrial advice generally has not been held to encompass substantial pretrial rights which are judicially enforceable without any showing by the accused of benefit at trial.[349] By making a timely motion for appropriate relief,[350] the accused may be entitled to a continuance[351] and a new pretrial advice if the existing advice is so"incomplete, ill-considered, or misleading"[352] as to a material matter that the convening authority might have made an erroneous referral.[353] Objections to defects are waived if they are not raised prior to the entry of a plea[354] or if the accused pleads guilty.[355] Failure to provide a written pretrial advice to the convening authority is error which will be tested for prejudice.[356]

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[343] R.C.M. 406(c).

[344] R.C.M. 406(c) analysis provides that"the entire advice" should be provided to the defense so that"the advice can be subjected to judicial review when necessary."

[345] R.C.M. 406(b) discussion.*See also* United States v. Schuller 17 C.M.R. 101, 105 (C.M.A. 1954) (accused has the right to "have a qualified Staff Judge Advocate make an independent and professional examination of the expected evidence and submit to the convening authority his impartial opinion as to whether it supported the charges"); United States v. Greenwalt 20 C.M.R. 285 (C.M.A. 1955) (article 34 "places a duty on the staff judge advocate to make an independent and informed appraisal of the evidence as a predicate for his recommendation"); United States v. Foti 30 C.M.R. 303 (C.M.A. 1961) (under the circumstances of the case the staff judge advocate's use of a mimeographed form pretrial advice failed to afford the accused the"individualized treatment" required by article 34).

[346] 7 M.J. 399 (C.M.A. 1979).

[347] *Id.* at 403. In *Hardin*, the court relied at least in part on the fact that the advice was not binding on the convening authority, and the fact that with all the content requirements the court could review the 28-page pretrial advice and conclude it was an"exemplary," "dispassionate evaluation"of the case. The court held that having the trial counsel prepare the advice was not per se error and that under the facts of *Hardin* there was no error. The opinion however, falls far short of a wholesale endorsement of that procedure. 7 M.J. at 404–05.

[348] *See generally supra* para. 9–6.

[349] *But cf.* United States v. Porter, 1 M.J. 506 (A.F.C.M.R. 1975) (where the pretrial advice omitted relevant information about the accused's prior service history, the court ordered a new advice without speculating on whether the new information might affect the convening authority's referral decision and instead held that "an accused is entitled to have his case considered in light of accurate information.").

[350] R.C.M. 905(b)(1); R.C.M. 906(b)(3).

[351] R.C.M. 906b)3) discussion.

[352] R.C.M. 406(b) discussion; United States v. Greenwalt, 6 C.M.A. 569, 20 C.M.R. 285 (1955); United States v. Kemp, 7 M.J. 760 (A.C.M.R. 1979).

[353] *See, e.g.*, United States v. Rivera, 42 C.M.R. 198 (C.M.A. 1970) (reversible error not to inform the convening authority of the unit commander's opinion that the accused should not receive a punitive discharge); United States v. Greenwalt, 20 C.M.R. 285, 288 (C.M.A. 1955) (statement in the pretrial advice that the article 32 investigating officer recommended trial by general court-martial, when in fact he recommended special court-martial, was a defect "likely to mislead the convening authority in the exercise of his power of referral"); *cf.* United States v. Kemp, 7 M.J. 760, 761 (A.C.M.R. 1979) (although there were several misstatements of fact in the pretrial advice, even taken together the court did "not believe that the convening authority might have referred the case to an inferior court"); United States v. Riege, 5 M.J. 938, 944 (N.C.M.R. 1978) (not error to fail to discuss the element "prejudicial to good order and discipline" in the pretrial advice where the convening authority "was adequately advised of all the facts that might have had a substantial influence upon his decision"); United States v. Skaggs, 40 C.M.R. 344, 346 (A.B.R. 1968) (failure to include unit commander's recommendation against a punitive discharge was not reversible error where there was "no reasonable likelihood ... that the convening authority would have disposed of the charges differently") .

[354] R.C.M. 905(c); United States v. Fountain, 2 M.J. 1202 (N.C.M.R. 1978); United States v. Heaney, 25 C.M.R. 268 (C.M.A. 1958). *But see* United States v. Edwards, 32 C.M.R. 586 (A.B.R. 1962).

[355] *See generally* R.C.M. 910(j);*supra* para. 9–6.*See also* United States v. Packer, 8 M.J. 785 (N.C.M.R. 1980); United States v. Blakney, 2 M.J. 1135 (C.G.C.M.R. 1976); United States v. Henry, 50 C.M.R. 685 (A.F.C.M.R. 1975).

[356] United States v. Murray, 25 M.J. 445 (C.M.A. 1988); United States v. Nelson, 28 M.J. 553 (A.C.M.R. 1989).

Chapter 17
The Convening of the Court-Martial

17–1. General

A trial is the adjudication of a dispute by a court having jurisdiction over the parties and the dispute. Jurisdiction is the power of a court to hear and decide a dispute. When a court has jurisdiction, it has the power to deprive an individual of liberty or even life. Without jurisdiction a court is powerless. Federal civilian and military courts both have criminal jurisdiction; but the courts differ in the source of their jurisdiction, the manner of their creation, and the duration of their existence.

Federal civilian courts derive their authority from the United States' sovereign power. In particular, they derive their authority from article III of the Constitution.[1] Congress establishes the Federal civilian courts,[2] and with the Senate's advice and consent, the President appoints judges to the courts.[3] The judges have tenure during good behavior.[4] Once Congress has established a civilian court, the court remains in existence continuously. Whether the court is in session or not, the court may assemble to hear and determine any Federal criminal case arising within its district.

Courts-martial derive their authority from Congress' constitutional power to "make Rules for the Government and Regulation of the land and naval Forces"[5] and to "make all laws which shall be necessary and proper for carrying into Execution"[6] this power. Congress has delegated the power to convene courts- martial to the President, then in turn to the military departments' Secretaries, and commanding officers.[7] The court-martial comes into existence only upon the order of a commander authorized to convene a court. In theory, the court-martial exists indefinitely after its creation. However, in practice, the court-martial hears a small number of cases and then adjourns permanently. The court-martial is "a special purpose tribunal of limited jurisdiction and transitory existence."[8] The court-martial consists of the persons detailed to the court.[9] The court-martial can hear only the cases the convening authority refers to the court. Unless the convening authority properly creates the court and refers charges to the court, the court-martial lacks jurisdiction.

Because the manner in which the commander convenes the court-martial determines whether the court-martial has jurisdiction, appellate courts have developed the general rule that courts-martial must be convened strictly in accordance with statute.[10] If the commander has not properly constituted the court or referred charges to it, the court has no power to hear and determine a case. Under such circumstances, any conviction would be void [11] and cannot be retroactively validated.[12] While the courts characterize such proceedings as void, the proceedings are not complete nullities. Rather than dismissing the charges, the courts often order rehearings. There have been cases where an unauthorized commander convened a court-martial. In those cases, the Court of Military Appeals held that the proceedings were a nullity. Yet the court concluded its opinion by noting that "[a] new trial may be ordered before a properly appointed court-martial."[13]

17–2. The convening authority

As previously stated, the convening authority technically creates the court-martial. The convening authority does so by exercising the power to detail participants to form the court and to refer charges to the court. If the commander does not qualify as a convening authority, he or she lacks these powers, and the attempt to create a court-martial will be ineffectual.[14] Articles 22, 23, and 24 of the Code list the commanders empowered to convene courts- martial.[15] If a commander holds one of the listed positions, he or she has the power to detail court members and refer charges. The

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[1] U.S. Const. art. III.

[2] *Id.* at § 1.

[3] *Id.* at art. II, § 2 art. III, § 1.

[4] *Id.*

[5] *Id.* at art. I, § 8.

[6] *Id.*

[7] UCMJ art. 22-24. It can be argued that in one's capacity as Commander-in-Chief, the President has inherent power to establish courts-martial. In United States v. Swaim, 28 Ct. Cl. 173 (1893), *aff'd*, 165 U.S. 553 (1897), the court held that the President may convene a court-martial without specific congressional authorization. Congress probably may preempt whatever power the President has, however. In *Swaim*, the Supreme Court held that the President had power "in the absence of legislation expressly prohibitive." 165 U.S. at 558. The Court of Military Appeals seems to have adopted this view. The court has held that the UCMJ, enacted by Congress, prevails over the Manual, promulgated by the President. *See*, *e.g.*, United States v. Varnadore, 26 C.M.R. 251 (C.M.A. 1958); United States v. Price, 23 C.M.R. 54 (C.M.A. 1957); United States v. Jenkins, 22 C.M.R. 51 (C.M.A. 1956).

[8] United States v. Goudge, 39 C.M.R. 324, 328 (A.B.R. 1968).

[9] As an entity, the court-martial resembles a civilian jury; it is a particular group of persons which tries a small number of cases and disbands.

[10] United States v. Emerson, 1 C.M.R. 43 (C.M.A. 1951); United States v. Caldwell, 16 M.J. 575 (A.C.M.R. 1983).

[11] United States v. Harnish, 31 C.M.R. 29 (C.M.A. 1961) (two unappointed persons sat as court members); United States v. Roberts, 22 C.M.R. 112 (C.M.A. 1956) (charges not properly referred); United States v. Schmidt, 1 C.M.R. 498 (N.B.R. 1951) (court without quorum). While a conviction would be a nullity, the accused may try to invoke an acquittal in such a case to bar reprosecution. United States v. Culver, 46 C.M.R. 141 (C.M.A. 1973); *but see* R.C.M. 907(b)(2)(c)(iv), which states, "No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule."

[12] United States v. Caldwell, 16 M.J. 575 (A.C.M.R. 1983); United States v. Cameron, 13 C.M.R. 738 (A.F.B.R. 1953). *But see* United States v. Galyon, 19 C.M.R. 541 (N.B.R. 1955) (convening authority's ratification of unappointed trial counsel's prior participation constitutes harmless error).

[13] United States v. Sims, 43 C.M.R. 96, 97 (C.M.A. 1971); United States v. Riley, 42 C.M.R. 337 (C.M.A. 1970).

[14] United States v. Sims, 43 C.M.R. 96, 97 (C.M.A. 1971); United States v. Riley, 42 C.M.R. 337 (C.M.A. 1970); United States v. Pazdernik, 22 M.J. 503 (A.F.C.M.R. 1986).

[15] UCMJ arts. 22-24.

commander who has these powers must exercise them properly. The following is a discussion of the manner in which the convening authority should exercise these powers.

a. The power to detail court members. The convening authority must exercise this power personally. The authority is nondelegable.[16] Congress has required that the convening authority select and detail persons who "in his opinion" are best qualified for the duty.[17] The convening authority may not permit staff members or other subordinates to make the selections.[18] They may, however, assist in the administrative aspects on gathering and forwarding the list of nominees to the convening authority.[19] The list is forwarded to the convening authority through the staff judge advocate. The staff judge advocate may make recommendations. The convening authority then personally selects the court members.

The accused can challenge the selection method if the convening authority selected the members by relying upon a list furnished by a presumably biased source such as the trial counsel.[20]

The convening authority must exercise this power subject to the limitation that only qualified participants be selected. Earlier sections of this pamphlet discussed the qualifications of the various participants in courts-martial. Generally, court members must be on active duty and be in a proper personnel category.[21] The court members may be from the convening authority's immediate command, a geographically separate command, or another armed force.[22] Depending upon the accused's personnel category, members may be commissioned officers, warrant officers, or enlisted soldiers.[23] There may be enlisted members only if the accused submits a request, orally on the record or in writing, for enlisted members before the court's assembly.[24] When the accused submits such a request, at least one-third of the court members after excusals and challenges must be enlisted members unless physical conditions or military exigencies make them unavailable.[25] When the convening authority denies a request on the ground of unavailability, a detailed written explanation must accompany the record of trial.[26] The appellate court reviews the explanation to determine whether the convening authority denied the request arbitrarily.[27]

The convening authority must not exercise this power to select court members in a manner which would create even the appearance of unlawful command control. The issue of unlawful command control has already been discussed in chapter 2. There is, for example, an appearance of evil where the convening authority breaks with the command's past practice and selects a panel composed entirely of lieutenant colonels and colonels.[28] Also, a selection problem may arise when the convening authority selects military police personnel as court members.[29] The selection process may be challenged, and the court-martial proceedings stayed, on the grounds that the members were selected improperly.[30] This area is covered in detail in chapter 4.

b. The power to refer cases. The convening authority must personally exercise the power to refer cases to trial.[31] Like the power to detail members, the power to refer cases to trial is nondelegable.[32] The convening authority must decide the type of court-martial to which to refer the case.[33]

It is arguable that, in addition to selecting the type of court-martial, the convening authority must select a particular court-martial.[34] The Manual states that the convening authority ordinarily refers a case to trial by indorsing the DD Form 458 (charge sheet). The charge sheet's wording contemplates that the convening authority will refer the case to a particular court-martial.[35] However, the Court of Military Appeals has held that a court-martial had jurisdiction even

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[16] United States v. Newcomb, 5 M.J. 4 (C.M.A. 1978).*See also* United States v. Ryan, 5 M.J. 97 (C.M.A. 1978).

[17] UCMJ art. 25(d)(2). *See generally* Schwender, *One Potato, Two Potato ... : A Method to Select Court Members*, The Army Lawyer, May 1984, at 12.

[18] United States v. Ryan, 5 M.J. 97 (C.M.A. 1978); United States v. Allen, 18 C.M.R. 250 (C.M.A. 1955) (dissenting opinion); *see also* United States v. England, 24 M.J. 816 (C.M.A. 1987 (art. 25(d)(2) does not foreclose the convening authority personally adopting membership of a court-martial appointed by a predecessor in command).

[19] United States v. Marsh, 21 M.J. 445 (C.M.A. 1986); United States v. Kemp, 46 C.M.R. 152 (C.M.A. 1973).*See also* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).

[20] United States v. Marsh, 21 M.J. 445 (C.M.A. 1986); United States v. Cherry, 14 M.J. 251 (C.M.A. 1982); United States v. Cook, 18 C.M.R. 715 (A.B.R. 1955).

[21] UCMJ art. 25. *See supra*chap. 4.

[22] R.C.M. 503(a)(3).

[23] R.C.M. 502(a).

[24] UCMJ art. 25; R.C.M. 503(a)(2).

[25] R.C.M. 503(a)(2).

[26] *Id.*

[27] United States v. Rivera, 24 C.M.R. 519 (C.G.B.R. 1957) (no abuse of discretion).

[28] United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Autrey, 20 M.J. 912 (A.C.M.R. 1985); United States v. James, 24 M.J. 894 (A.C.M.R. 1987); United States v. Daigle, 50 C.M.R. 655 (C.M.A. 1975) (improper exclusion of qualified persons from court membership by rank); United States v. Greene, 43 C.M.R. 72 (C.M.A. 1970).

[29] United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983).

[30] R.C.M. 912(b)(1).

[31] United States v. Roberts, 22 C.M.R. 112 (C.M.A. 1956); United States v. Greenwalt, 20 C.M.R. 285 (C.M.A. 1955).

[32] R.C.M. 504(b)(4); United States v. Motes, 40 C.M.R. 876 (A.C.M.R. 1969).

[33] *Id.*

[34] In United States v. Simpson, 36 C.M.R. 293 (C.M.A. 1966), where the convening authority selected the type of court but the trial counsel assigned cases to particular courts, the court held that the error was nonprejudicial. *See also* United States v. Sands, 6 M.J. 666 (A.C.M.R. 1978), *petition denied*, 6 M.J. 302 (C.M.A. 1979) (error, but not jurisdictional).

[35] In pertinent part, DD Form 458 reads: "Referred for trial to the __ court-martial convened by __."

though the case was tried by another court-martial appointed by the convening authority.[36] Also, where the referral block on the charge sheet contained an erroneous special court- martial number, the administrative error was considered nonprejudicial.[37] The Army Court of Military Review has found error where the convening authority permitted a delegate to join a referred case with a preselected panel for trial.[38]

The UCMJ prohibits the convening authority from referring charges if he or she is an accuser in the case.[39] The UCMJ and Manual have extended this prohibition to special courts-martial.[40] The convening authority is an accuser if he or she swears out charges, nominally directs another to do so, or has a personal interest rather than a mere official interest in the case's outcome.[41]

c. Convening Authority for Reserve Component soldiers. The Active Component convening authority, as geographically defined by AR 15-9, must refer charges against a RC soldier for a special or general courts- martial.[42] RC or AC summary courts-martial convening authorities may refer charges for RC soldiers to be tried by summary-courts martial.

17–3. Statutory authority

a. Officers having authority to convene general courts-martial. The UCMJ provides that the following persons may convene a general court-martial:

> (1) the President of the United States;
> (2) the Secretary concerned;
> (3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of Army or Marine Corps; . . . .
> (6) any other commanding officer designated by the Secretary concerned; or
> (7) any other commanding officer in any of the armed forces when empowered by the President… [43]

Under subsection (7), the Secretaries of the Armed Forces also have the power to designate persons to convene general courts-martial.

(1) *Announcement of authority to convene courts- martial.* When a commanding officer is empowered to convene a general court-martial by authority granted by the President or by the Secretary of the Army, such authority customarily is announced in Department of Army General Orders.

In the nonbinding discussion of the MCM, 1984, the drafters noted that "[t]he authority to convene courts- martial … is retained as long as the convening authority remains a commander in one of the designated positions."[44] When a commanding officer's military organization is redesignated, reorganized, or otherwise changes its name, a request for a new designation as a general court-martial authority should be submitted to The Judge Advocate General of the Army for recommendation to the Secretary for approval or disapproval.[45]

During periods of great growth in military strength or large reductions in force, the need to update designations of general court-martial convening authorities is important. As new commands are created or as old units draw down, new requests for designation as a general court-martial authority must be submitted.

The buildup and drawdown in Vietnam created problems in this area. One case illustrating the difficulties experienced by commanders during the drawdown is *United States v. Masterman.*[46] In *Masterman*, the accused was charged with 26 violations of wrongful sale of heroin and conspiracy to sell heroin. He was tried and convicted in Vietnam by a general court-martial convened by the commanding general, United States Army Forces, Military Region 2. In accordance with a formal redesignation of the commanding general's military organization, the action approving the findings and sentence was signed by the commanding general, Second Regional Assistance Group, United States Army Forces, Military Region 2.

On appeal the accused contended that the commanding officer who took the action on his case did not have general court-martial authority. The Court of Military Review noted that "The Commanding General, Second Regional Assistance Group, United States Army Forces, Military Region 2, is not a commander directly vested with general court-martial authority as provided in Article 22, Uniform Code of Military Justice, 10 U.S.C. 822."[47]

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[36] United States v. Emerson, 1 C.M.R. 43 (C.M.A. 1951).
[37] United States v. Blascak, 17 M.J. 1081 (A.F.C.M.R. 1984).
[38] United States v. Sands, 6 M.J. 666 (A.C.M.R. 1978), *petition denied*, 6 M.J. 302 (C.M.A. 1979).
[39] UCMJ art. 22(b).
[40] United States v. Bloomer, 44 C.M.R. 82 (C.M.A. 1971); United States v. Trahan, 11 M.J. 566 (A.F.C.M.R. 1981); UCMJ art. 23(b); R.C.M. 601(c).
[41] UCMJ art. 1(9).
[42] AR 27–10, para. 21–8b.
[43] UCMJ art. 22(a). Certain Navy and Air Force convening authorities are omitted. Note that in United States v. Wilson, 47 C.M.R. 353, 354 (C.M.A. 1973) the general court-martial convening authority was considered to be the commanding officer of an "Army Corps ... or corresponding unit." The commander was in charge of a combined command consisting of Korean troop units, a U.S. Army Division, and various U.S. Army support units.
[44] R.C.M. 504(b)(1) discussion.
[45] United States v. Masterman, 46 C.M.R. 615 (A.C.M.R. 1972); *see* AR 27–10, para. 5-2*a.*
[46] 46 C.M.R. 615 (A.C.M.R. 1972).
[47] *Id.* at 616.

The court agreed with the accused and held that the commander who took the action on the accused's case did not have general court-martial authority.[48]

The Judge Advocate General of the Army certified the correctness of the Court of Military Review's decision to the United States Court of Military Appeals. The Court of Military Appeals reversed the Court of Military Review's decision and held that "the command designation of [Second Regional Assistance Group, United States Army Forces, Military Region 2] does not, under the circumstances… render the [action] taken null and void."[49]

The court noted that during the reorganization of the Armed Forces in Vietnam, United States Army Forces, Military Region 2, the organization which convened the accused's court-martial, was reduced to zero strength and a new organization was designated to assume its responsibilities. The old organization, however, remained in existence on paper as part of the newly created organization. The commanding general who convened the accused's court-martial became the deputy senior advisor to the commander of the new organization and continued to occupy the position of commanding general of the old organization. The Court of Military Appeals noted that the commanding general of the old organization "simply exercised … authority from a differently denominated Headquarters."[50] Thus, the court held that, under the circumstances, the redesignation of the command did not "render the actions taken [by the commanding general] null and void."[51]

The Court of Military Appeals decision in Masterman indicates that the court will go a long way to find that the exercise of court-martial jurisdiction is proper, at least in circumstances where, because of a technical defect, a large number of cases tried by a command would have to be retried if the court decided the convening authority did not have general court-martial authority.

(2) *Citation of authority to convene general courts-martial.* When a commanding officer is designated by the Secretary of the Army to convene general courts-martial, the convening order will cite such authorization.[52] Jurisdiction, however, is a matter of fact and not solely a matter of pleading. The Government may augment the record whenever the issue of jurisdiction is raised.[53]

In *Givens v. Zerbst*,[54] a post commander empowered by the President to convene general courts- martial failed to cite his authority in the record of trial or in the appointing order. The defense filed a writ of habeas corpus after conviction, alleging in part the "illegality of the court because of want of power in the officer by whom it was called to convene it."[55] The Supreme Court held that as long as a jurisdictional fact exists it could be proved upon collateral attack even though such jurisdictional fact did not appear in the record of trial by court-martial.[56] Thus, the Government was allowed to show such authority and the petition was dismissed.

b. Officers having authority to convene special courts-martial. The Code provides that the following persons can convene special courts-martial:

> (1) any person who may convene a general court-martial;
> (2) the commanding officer of a district, garrison, fort, camp, station . … or other place where members of the Army … are on duty;
> (3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;
> …
> (6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or
> (7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.[57]

As in the case of general courts-martial, authorization by the Secretary of the Army must be shown in the order appointing the court. The authority to convene special courts-martial in which a bad conduct discharge may be

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[48] *Id. See also* United States v. Charleston, 46 C.M.R. 619 (A.C.M.R. 1972); *contra* United States v. Aubert, 46 C.M.R. 848 (A.C.M.R. 1972). For a discussion of a similar problem arising out of the deactivation of Headquarters Fourth Army and the transfer of Headquarters Fifth Army to the former situs of the inactivated Fourth Army Command, *see* United States v. Sandall, 45 C.M.R. 660 (A.C.M.R. 1972).

[49] United States v. Masterman, 46 C.M.R. 250, 254 (C.M.A. 1973).

[50] *Id.* at 253.

[51] *Id.* at 254.

[52] R.C.M. 504(d)(1); *see*MCM, 1984, app. 6.

[53] United States v. Roberts, 22 C.M.R. 112 (C.M.A. 1956).

[54] 255 U.S. 11 (1921).

[55] *Id.* at 17.

[56] *Id.* at 20.

[57] UCMJ art. 23(a). *See*United States v. Greenwell, 42 C.M.R. 62 (C.M.A. 1970) (the power given to the Secretary of the Navy to designate commanders to be special court-martial convening authorities is not a power which can be delegated to flag or general officers). The issue of whether *Greenwell* should be applied retroactively was presented to, but not answered by the Court of Military Appeals in United States v. Ferry, 46 C.M.R. 339 (C.M.A. 1973). The same question also was presented to the Third Circuit Court of Appeals which ruled that *Greenwell* was not to be applied retroactively. Brown v. United States, 508 F.2d 618 (3rd Cir. 1975). *See also* United States v. Sims, 43 C.M.R. 96 (C.M.A. 1971); United States v. Riley, 42 C.M.R. 337 (C.M.A. 1970); United States v. Hevner, 42 C.M.R. 272 (C.M.A. 1970); United States v. Walker, 42 C.M.R. 271 (C.M.A. 1970); United States v. Ortiz, 36 C.M.R. 3 (C.M.A. 1965).

adjudged is restricted by Army regulation to general court-martial convening authorities.[58]

In *United States v. Edwards*[59] the convening authority misstated in the convening order his authority to convene the special court-martial which tried the accused. The issue of the commander's lack of authority to convene a special court-martial was not raised during the accused's trial, but was raised by the accused on appeal. In deciding that the court-martial was properly convened, the court observed that while "miscitation of authority in the convening order demonstrates lack of attention to administrative details … [it] does not deprive the court of jurisdiction."[60] In addition, the court noted that so long as a commanding officer has "the authority to convene special courts-martial, it makes no difference even if … [he is] mistaken as to precisely how he received such authority."[61] For these reasons, the court concluded that the commanding officer who convened the court-martial that tried the accused "possessed special court-martial jurisdiction under Article 23 of the Uniform Code of Military Justice,"[62] and the accused's conviction was affirmed.

c. Officers having authority to convene summary courts-martial. The Code also provides that the following commanders can convene summary courts- martial:

> (1) any person who may convene a general or special court-martial; (2) the commanding officer of a detached company or other detachment of the Army; … (4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.[63]

As in the cases of general and special courts-martial, if the commander is empowered by the Secretary of the Army to convene summary courts-martial, authorization must be shown in the order appointing the court.[64]

d. Meaning of "detached" or "separate." The Code provides that commanding officers of "separate" or"detached" units may be empowered with authority to convene special and summary courts-martial. The words"separate" and "detached" are used in a disciplinary rather than a physical or tactical sense. Thus, a battalion, company, or other unit is "separate" or"detached" when it is isolated or removed from the immediate disciplinary control of a superior and the unit's commander is viewed by the superior authority as the officer responsible for the administration of discipline in the isolated unit.[65]

The Court of Military Appeals has stated emphatically that designation of a command smaller than a battalion size as separate and detached does not authorize the commanding officer to convene special courts-martial pursuant to the provisions of article 23(a)(3) or article 23(a)(6) of the Code.[66] A commander of such size unit may be designated as a special court-martial convening authority by action of the Secretary of the Army.[67]

e. Forwarding charges. When an officer who does not exercise any convening authority or a summary court-martial convening authority determines that charges and specifications should be tried by a special or general court-martial, the Manual directs that charge sheets and allied papers be forwarded to a superior commander for disposition.[68] Formerly, paragraph 33i of the Manual for Courts-Martial, United States, 1969 (rev. ed.) provided that:

> When trial by a special or general court-martial is deemed appropriate and the [summary court- martial authority] is not empowered to convene such a court for the trial of the case … , he will forward the charges and necessary allied papers, in accordance with regulations of the Secretary concerned, [ordinarily through the chain of command] to an officer exercising the appropriate kind of court-martial jurisdiction.

In cases where summary court-martial convening authorities failed to follow the Manual procedures set forth in paragraph 33i, accuseds argued that their courts-martial lacked jurisdiction because they were improperly convened.

In *United States v. Pease*,[69] the issue of whether the provisions set forth in paragraph 33i were mandatory or suggestive was presented to the Court of Military Appeals. In Pease, the commanding officer of the accused was without authority to convene special courts-martial. Consequently, the accused was transferred to a neighboring jurisdiction whose commanding officer, although inferior in rank to the accused's original commanding officer, had the power to convene special courts-martial. On appeal, the accused contended that the court lacked jurisdiction because

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[58] AR 27–10, para. 5–24*b.*
[59] 49 C.M.R. 305 (N.C.M.R. 1974).
[60] *Id.* at 307;*see* United States v. Glover, 15 M.J. 419 (C.M.A. 1983).
[61] 49 C.M.R. at 307.
[62] *Id.*
[63] UCMJ art. 24(a).
[64] R.C.M. 504(d)(2).
[65] R.C.M.504(b)(2)(A).
[66] United States v. Ortiz, 36 C.M.R. 3, 5-7 (C.M.A. 1965) (commanding officer of separate company held not to possess authority to convene special court-martial).
[67] UCMJ art. 23(a)(7).
[68] R.C.M. 402, 403.
[69] 12 C.M.R. 47 (C.M.A. 1953).

the convening authority was inferior in rank and not in the chain of command of the accused's original commanding officer.

The Court of Military Appeals ruled that the provisions set forth in paragraph 33i of the 1969 Manual were suggestive rather than mandatory,[70] and held that the special court-martial had jurisdiction to try the accused.[71] In view of the court's decision in Pease, it is clear that where the commanding officer of the accused is not the accuser, there is no requirement that charges be forwarded through the chain of command to a superior officer. In such cases, arrangements for the trial of an accused may be made in any appropriate manner, as transferring the accused to the command of an officer authorized to convene an appropriate court-martial."Of course, if the disability of the commanding officer results from the fact that he is the accuser, the charges *must* be referred to a superior competent authority."[72]

In *Day v. Wilson*,[73] the accused was convicted in Korea by general court-martial of murder and assault with a deadly weapon. After exhausting his rights to appeal in the military, the accused filed a petition for writ of habeas corpus in a Federal district court contesting the jurisdiction of the court-martial because the case was transferred from Eighth Army to I Corps for trial. He also objected because the transfer was accomplished without the personal action of the Eighth Army commander. The district court found that the accused was not prejudiced by the transfer and that the transfer was reasonable under the geographical circumstances. For these reasons, the court held that"the General Court-Martial which tried, convicted and sentenced the petitioner had jurisdiction to do so."[74]

While there has not yet been a challenge to the jurisdictional validity of a court-martial based on a failure to follow the 1984 Manual's guidance on forwarding charges, it seems very unlikely that such a technical defect would be held to adversely affect jurisdiction.

f. Counsel. Trial counsel will be detailed by the staff judge advocate or by the SJA's delegate.[75] Authority to detail the defense counsel is exercised by the Chief, U.S. Army Trial Defense Service, or by his or her delegate.[76] As with the detail of the military judge, the detail of counsel may be by written order included in the record or announced orally on the record.[77]

17–4. The convening order

After the convening authority exercises these convening powers, the convening or appointing order is prepared. By the convening order, the convening authority creates the court-martial.[78] The order lists the court members selected by the convening authority and designates the type of court-martial.[79]

a. Oral convening orders. The UCMJ does not prescribe a form for convening orders. The Manual implies that a written order is necessary, although, the Court of Military Appeals has held that an oral order is valid.[80] In one case, before departing for temporary duty, the convening authority verbally selected the court members, designated the members as a general court-martial, and referred the accused's case to the court.[81] In his absence, written letters orders were published. The court held that the oral appointing order was valid and that the court had jurisdiction. The written letter order was a mere formalization of the valid oral order. If there is a prior written order referring the charges, the convening authority may subsequently orally refer the charges to a different court.[82] Oral orders are valid, but Army regulations provide that oral orders will be confirmed by written orders as soon as practicable.[83] If a person whom the convening authority did not select participated as a court member, the convening authority may not ratify that person's participation by publishing a written order, listing the individual as a court member.[84]

b. Written convening orders. The Manual contains model forms for convening orders.[85] Army regulations elaborate upon the model forms.[86] A written order provides the military judge and appellate courts with information necessary to determine whether the participants are qualified. The judge and courts can easily ascertain the necessary information from the order if the order's wording is clear and unambiguous. Ambiguous orders will be interpreted to effectuate the convening authority's apparent intent.[87] In one case, the letter of appointment was addressed to the court president but

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[70] *Id.* at 49.
[71] *Id.*
[72] *Id.*
[73] 155 F. Supp. 469 (D.D.C. 1957).
[74] *Id.* at 472.
[75] AR 27–10, para. 5–3*a.*
[76] AR 27–10, para. 5–4*a.*
[77] R.C.M. 503(c)(2).
[78] R.C.M. 504(a).
[79] R.C.M. 504(d)(1) (and may designate where the court-martial will meet).
[80] United States v. Napier, 43 C.M.R. 262 (C.M.A. 1971).
[81] United States v. Petro, 16 C.M.R. 302 (A.B.R. 1954).
[82] United States v. Newton, 39 C.M.R. 756 (.B.R. 1968).
[83] AR 27–10, para. 12–2.
[84] United States v. Harnish, 31 C.M.R. 29 (C.M.A. 1961); United States v. Caldwell, 16 M.J. 575 (A.F.C.M.R. 1983).
[85] MCM, 1984, app. 6.
[86] AR 27–10, chap. 12.
[87] United States v. Padilla, 5 C.M.R. 31 (C.M.A. 1952).

did not list him as a court member. The accused argued that the president had not been properly detailed. Rejecting his argument, the court reasoned that the convening authority clearly intended that the addressee would be a court member.[88] On the other hand, convening orders conceivably could be so ambiguous that the judge or court cannot ascertain the convening authority's intention. The drafter can eliminate these problems by taking due care in the initial preparation of the order. If a large number of amendments have been made at different times, it is wise to publish a completely new order.[89]

17–5. Changing court members

After the convening authority has made the initial selection of court members, changes might become necessary. Some members may have to be excused and other persons may have to be added as court members. The procedure for changes in court membership differs depending on which type of change is made. Any time a change is made to the court's membership, except one that excuses members without replacement, the change shall be reduced to writing before authentication of the record of trial.[90]

a. Before assembly. The convening authority may excuse or add members before assembly without showing cause.[91] A change of court members for an improper reason is not permitted, however, and may raise unlawful command control claims.[92] In the absence of evidence of impropriety, the unexplained addition of members to or withdrawal of charges from a court and referral to another court prior to assembly will be presumed valid.[93]

While no one else can add members because the power to detail is nondelegable, the authority to excuse members may be delegated. The power to excuse up to one-third of the court membership, before assembly, may be delegated by the convening authority to either the staff judge advocate or the convening authority's principal assistant.[94] A member's unexplained but unchallenged absence at assembly is presumed to have been authorized.[95] The accused may rebut the presumption by showing that the member was improperly excused.[96]

b. After assembly. After the court has assembled, members may be excused only by the convening authority for good cause, or by the military judge for good cause as a result of challenge.[97] Chapter 26 discusses challenges. "Good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member unable to proceed within a reasonable time.[98] Good cause is"extremely limited in scope,"[99] and the appellate courts will scrutinize the convening authority's decision.[100] A member's assignment to an important classified task,[101] or transfer to a combat zone,[102] has been held to constitute good cause.

Good cause does not include temporary inconveniences which are incident to normal conditions of military life.[103] Whatever the "good cause," it must be shown on the record.[104] The Government has the burden of establishing the good cause for any absence or relief.[105]

The good cause standard is an important safeguard for the accused. The accused might have used his or her own peremptory challenge before assembly. A new member's addition may entitle the accused to exercise an additional peremptory challenge.[106] The accused's only protections against the convening authority's addition of a prosecution-

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[88] United States v. Beard, 8 C.M.R. 144 (C.M.A. 1953).

[89] In United States v. Caldwell, 16 M.J. 575 (A.C.M.R. 1983), a confusing flurry of orders, rescissions, and substitutions resulted in an unappointed "interloper" sitting on the panel. A rehearing was ordered.

[90] United States v. Matthews, 17 C.M.A. 632, 38 C.M.R. 430 (1968); United States v. Beaulieu, 21 M.J. 528 (C.G.C.M.R. 1985) (oral amendment reduced to writing met requirement for written appointment of court); R.C.M. 505(b); (excusals not reduced to writing should be announced on the record), R.C.M. 505(d) discussion.

[91] R.C.M.505(c)(1)(A).

[92] *See*, *e.g.*, United States v. Walsh, 47 C.M.R. 926 (C.M.A. 1973), where the convening authority substituted one panel for another *because* the initial panel was deemed to be too lenient.

[93] United States v. Lord, 32 C.M.R. 78 (C.M.A. 1962) (withdrawal of charges and referral to another court); United States v. Thomas, 2 M.J. 400 (A.C.M.R. 1975) (withdrawal and referral presumed valid in absence of showing of improper motives or reasons); United States v. Andress, 11 C.M.R. 299 (A.B.R. 1953) (excusals presumed valid).

[94] R.C.M. 505(c)(1)(B). Before assembly the delegate may excuse members without cause shown, but the delegate cannot excuse more than one-third of the total members detailed by the convening authority in any one court-martial. R.C.M. 505(c)(1)(B)(ii).

[95] United States v. Andress, 11 C.M.R. 299 (A.B.R. 1953).

[96] United States v. Allen, 18 C.M.R. 250 (C.M.A. 1955) (improper delegation of excusal authority); United States v. Perry, 14 C.M.R. 434 (A.B.R. 1954) (improper excusal by trial counsel failing to notify members of court-martial).

[97] R.C.M. 505(c)(2)(A).*See* United States v. Barrios, 31 M.J. 750 (A.C.M.R. 1990).

[98] R.C.M. 505(f).

[99] United States v. Wright, 40 C.M.R. 616 (A.B.R. 1969).

[100] United States v. Dixon, 18 M.J. 310 (C.M.A. 1984); United States v. Boysen, 29 C.M.R. 147 (C.M.A. 1960); United States v. Grow, 11 C.M.R. 77 (C.M.A. 1953).

[101] United States v. Geraghty, 40 .M.R. 499 (A.B.R. 1969).

[102] United States v. Taylor, 41 C.M.R. 749 (N.C.M.R. 1969).

[103] United States v. Garcia, 15 M.J. 864 (A.C.M.R. 1983) (participation in live fire tactical evaluation did not constitute "good cause"); United States v. Latimer, 30 M.J. 554 (A.C.M.R. 1990) (routine medical exam is not good cause); R.C.M. 505(c)(2)(A).

[104] United States v. Grow, 11 C.M.R. 77 (C.M.A.1953); R.C.M. 505(c)(2)(A).

[105] United States v. Greenwell, 31 C.M.R. 146 (C.M.A. 1961).

[106] United States v. Carter, 25 M.J. 471 (C.M.A. 1988).

minded member are the good cause standard and the procedure of challenges for cause.

A member's improper excusal prevents the court from proceeding even if a quorum is present.[107] If the trial proceeds over the accused's objection, the result may be reversal.[108] The military judge may grant a mistrial over the accused's objection only in exceptional circumstances.[109] The best solution is to grant a continuance to enable the trial counsel to locate the absent member.

17–6. The procedures for changes

a. Amendments to orders. The convening authority's order for a permanent change may be oral or in writing, but a written order must be prepared before authentication of the record of trial to confirm the change.[110] If several amendments are required, it is wise to promulgate a completely new convening order; this procedure reduces the possibility of inadvertent error.[111] If the change is temporary, as where the convening authority authorizes a brief absence from trial, the order need not be confirmed in writing.[112] If the absence occurs after assembly, however, the good cause requirement would apply, and the record of trial would have to demonstrate the facts constituting good cause.[113] Even though written orders are not required for temporary changes, it might be prudent to confirm a temporary change in writing.

b. Trial procedures. The convening authority's excusal of a member can reduce the number of court members below a quorum. Without a quorum, the trial may not proceed,[114] whether the absences are excused or unexcused.

If after a trial has commenced the convening authority adds a member, the member must first be sworn. The defense and prosecution then have an opportunity to challenge the new member; as previously stated, the member's addition entitles the parties to an additional peremptory challenge. In a general court-martial, the recorded evidence previously introduced is read to the entire court in the presence of the new member, the accused, counsel, and military judge. In a special court-martial, the procedure depends upon whether there is a verbatim record of trial. If there is a verbatim record, the procedure is similar to that in a general court-martial. If there is no verbatim record, the trial proceeds as if no evidence had previously been introduced at the trial.

c. Challenges generally. The convening authority initially selects the court members, and, after the initial selection, may add and excuse members. This power to select participants is not exclusive, however. To a limited extent, the defense and trial counsel have the power to select court members. Their power consists of their right to challenge members peremptorily or for cause. At the opening of trial, after the participants have been sworn, counsel have an opportunity to question and challenge the military judge and members.[115]

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[107] United States v. Greenwell, 31 C.M.R. 146 (C.M.A. 1961). The accused waives this defect by failing to object. United States v. Matthews, 38 C.M.R. 430 (C.M.A. 1968).

[108] United States v. Greenwell, 31 C.M.R. 146 (C.M.A. 1961).

[109] *See* Kates,*Former Jeopardy—A Comparison of the Military and Civilian Rights*, 15 Mil. L. Rev. 51, 57-62 (1962). To permit the convening authority to induce a mistrial by improperly excusing members would defeat Congress' intent. *See* United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954); United States v. Ghent, 21 M.J. 546 (A.F.C.M.R. 1985); UCMJ art. 44.

[110] R.C.M. 505(b).

[111] *See*, *e.g.*, United States v. Caldwell, 16 M.J. 575 (A.C.M.R. 1983).

[112] R.C.M. 505(b) (no need for formal reappointment to the court-martial).

[113] R.C.M. 505(c)(2)(A). The convening authority can preserve the quorum by adding a member to replace the excused member.

[114] UCMJ art. 29.

[115] R.C.M. 912; R.C.M. 902; *see infra* chap. 26 for a detailed discussion of challenges.

Chapter 18
Pretrial Agreements

18–1. Pretrial agreements

a. History. Prior to 1984, neither the UCMJ nor the Manual mentioned pretrial agreements. In 1953, Major General Shaw, then The Assistant Judge Advocate General of the Army, became the first outspoken proponent of pretrial agreements. In a letter he sent to all staff judge advocates, Major General Shaw advocated the use of pretrial agreements to encourage speedier disposition of cases and to encourage defense counsel to obtain better results in hopeless cases.[1] He pointed out that pretrial agreements were a common practice in civilian courts. Guidelines for the use of pretrial agreements were published by the Office of The Judge Advocate General in letters and messages to the field.[2] The use of pretrial agreements was sanctioned by the Court of Military Appeals in 1957 in United States v. Allen.[3] The court warned that "the use of pretrial agreement[s] cannot transform the trial into an empty ritual"[4] while recognizing the efficacy of such agreements in a criminal justice system. The convening authority and SJA were free to fashion their own pretrial agreement procedures guided only by letters and messages from OTJAG and occasional appellate decisions construing agreements.

The absence of any Codal or Manual provision meant there was no central guidance available to the field. Therefore, the growth of the law in this area was not smooth.[5]

b. Justification for plea bargaining. Regarding plea agreements, the Supreme Court has stated: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged."[6]

Many reasons have been put forth to justify and encourage plea bargains. Heavy case dockets often dictate a dependence upon plea discussions. But expediency is not the basis for recognizing the propriety of a plea agreement practice. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the criminal law. This is the conclusion reached in the ABA Standards Relating to Pleas of Guilty,[7] to The Prosecution Function,[8] and to The Defense Function.[9]

Where the accused by a plea aids in ensuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual accused. Where the accused has acknowledged guilt and shown a willingness to assume responsibility for criminal conduct, it has been thought proper to recognize this in sentencing. Granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion, particularly where the facts of a case do not warrant the harsh consequences of a long mandatory sentence or collateral consequences which are unduly severe. A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination.[10]

Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders.[11]

c. R.C.M. 705. Although plea bargaining has existed in the military for many years, the process was first codified by the adoption of Rule for Courts- Martial 705. The rule "recognizes the utility of pretrial agreements. At the same time the rule, coupled with the requirement for judicial inquiry in R.C.M. 910, is intended to prevent informal agreements and protect the rights of the accused and the interests of the Government."[12]

It is important to note what R.C.M. 705 does not do. It does not make plea bargaining mandatory. It is obvious that no accused can be obliged to enter into plea negotiations. It is less obvious, but quite firmly settled, that the convening authority cannot be required to enter into negotiations of this kind. The accused has no right to have the Government

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[1] JAGJ 1953/1278, 23 April 1953.

[2] *See, e.g.*, JAGJ 1956/6550, 20 Aug. 1956; JAGJ 1956/7801, 24 Oct. 1956; Letter, DAJA–CL 1978/5512, dated 12 May 1978, subject: Informal Pretrial Agreements; Letter, DAJA–CL, dated 11 July 1984, subject; Inclusion of Waivers of Appellate Rights in Pretrial Agreements.

[3] 25 C.M.R. 8 (C.M.A. 1957). *See also* United States v. Welker, 25 C.M.R. 151 (C.M.A. 1958).

[4] 25 C.M.R. at 11.

[5] *See, e.g.*, United States v. Holland, 1 M.J. 59 (C.M.A. 1975), where a provision which appeared in an article in *The Army Lawyer* was struck down as being contrary to the demands inherent in a fair trial. The provision, that the plea must be entered prior to the litigation of any motions, had received wide dissemination due to the article and was being extensively used in pretrial agreements. Another example of problems in the prior practice was the attempt to include a post trial misconduct provision in a pretrial agreement. Desirous of ensuring that the behavior of the accused comported with the law after his sentence was announced but prior to the CA action, many different versions of post trial misconduct provisions were used. The Court of Military Appeals struck down one such clause in United States v. Dawson, 10 M.J. 142 (C.M.A. 1981). *See* Faulkner, *The Pretrial Agreement Misconduct Provision*, The Army Lawyer, October 1981, at 1.

[6] Santobello v. New York, 404 U.S. 257 (1971); United States v. Cox, 46 C.M.R. 69, 71 (C.M.A. 1972) ("Modern day administration of justice recognizes bargains for pleas as a judicial way of life.").

[7] ABA Standards, Pleas of Guilty § 14–3.1 (1980).

[8] ABA Standards, Prosecution Function, § 3–4.1 (1980).

[9] ABA Standards, Defense Function, § 4–6.1 (1980).

[10] *See* Fed. R. Crim. P. 11, Advisory Committee notes, 1975 Amendments.

[11] United States v. Brown, 13 M.J. 253, 259 (C.M.A. 1982) "In dealing with certain offenses—such as those involving drugs—reliance often must be placed on persons who give information and make controlled purchases in return for promised leniency as to the punishment for their own misdeeds."

[12] R.C.M. 705 analysis.

bargain.[13]

18–2. General nature of plea bargains in the military

a. General nature. Agreements on a plea and sentence are common in both the military and civilian criminal practice, but the military procedure has no counterpart in the civilian community. In civilian practice, the prosecutor agrees with the defendant to recommend a particular sentence to the judge. The agreement binds the prosecutor to make the recommendation, but neither the agreement nor the recommendation binds the judge to impose that sentence, although usually the judge will accept the recommendation. Sometimes, the judge may participate directly in the plea arrangement; depending upon the extent of the participation, the judge may become committed to impose a sentence no more severe than that indicated in the arrangement. In both situations, the sentencing authority knows and takes account of the pretrial agreement. This is not true in the military practice. In the military, a pretrial agreement is negotiated between the accused and the convening authority.[14] Because of the convening authority's power under article 60, UCMJ, to reduce the adjudged sentence, the agreement ordinarily fixes a maximum on the adjudged sentence which the convening authority may approve. The agreement may also include other promises, terms and conditions. The court-martial, whether with members or by military judge alone, adjudges a sentence just as if there were no agreement. It is error to inform any member of the existence of a pretrial agreement.[15]

The military judge may not directly intervene in the pretrial negotiations between an accused and a convening authority.[16] The judge does have the responsibility to police the terms of the agreement and may, as part of the pretrial agreement inquiry at trial, reject or modify the agreement.[17]

Initially, the Court of Military Appeals cautioned that pretrial agreements should be limited to bargaining on the plea and the sentence.[18] Since 1980, the court has been much less suspicious of plea negotiations and pretrial agreements. Underlying the court's more liberal attitude is its perception of the pretrial agreement as an arms length transaction between equal partners.[19]

b. Promises of the accused. The most frequent promise made by an accused is to plead guilty to one or more of the charges. R.C.M. 705 recognizes that the accused may also promise to plead guilty to a lesser included offense or promise to enter into a confessional stipulation of fact.

R.C.M. 705(b)(1) sanctions the use of negotiated confessional stipulations of fact. The primary function of the negotiated confessional stipulation of fact is to preserve preplea motions and objections which would otherwise be waived by a guilty plea.[20]

After negotiation of a sentence limitation in return for agreement to a full confessional stipulation, the accused would plead not guilty. Thereafter, the merits of the case would be decided on the basis of the stipulation. At action, the convening authority would be bound by the negotiated sentence limitation. Later on appeal, the accused would be free to raise any preplea motions which would have otherwise been waived by a guilty plea.

By virtue of the fact that the accused is making a full judicial confession of guilt, the military judge is required to

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[13] Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (per White, J.) "But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty."

[14] United States v. Caruth, 6 M.J. 184 (C.M.A. 1979); United States v. Wood, 48 C.M.R. 528 (C.M.A. 1974).

[15] R.C.M. 705(e); United States v. Greene, 1 M.J. 453 (C.M.A. 1976); United States v. Wood, 48 C.M.R. 528 (C.M.A. 1974). *But see* United States v. Jopson, 31 M.J. 117 (C.M.A. 1990) (court member's awareness of pretrial agreement does not per se disqualify the member).

[16] United States v. Caruth, 6 M.J. 184, 186 (C.M.A. 1979). "A trial judge's intervention into the plea bargaining process has been severely criticized because his mere presence can exert an improper influence upon the accused decision to plead guilty and we specifically disapprove of the procedure." *See also* United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986) (by entertaining objections to stipulation of fact, the military judge improperly inserted himself into the pretrial negotiations). *But see* United States v. Glacier, 24 M.J. 550 (A.C.M.R. 1987) ("we find that the military judge in this case was required to entertain appellant's motion to delete portions of an agreed-upon stipulation of fact.").

[17] *See infra* para. 18–7; United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984). In *Sharper*, the military judge at trial denied a defense motion to force the Government to enter into a good faith stipulation of fact. In contrasting this case with *Caruth*, the Army court stated:

> While a military judge may not have the authority to directly intervene in the pretrial negotiations between an accused and a convening authority, United States v. Caruth, 6 M.J. 184, 186 (C.M.A. 1979), he does have the responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness.

[18] United States v. Cummings, 38 C.M.R. 174–77 (C.M.A. 1968). Pretrial agreements "should concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions regarding waiver of fundamental rights."

> We reiterate our belief that pretrial agreements are properly limited to the exchange of a plea of guilty for approval of a stated maximum sentence. Attempting to make them into contractual type documents which forbid the trial of collateral issues and eliminate matters which can and should be considered below, as well as on appeal substitutes the agreement for the trial and indeed renders the latter an empty ritual. We suggest, therefore, that these matters should be left for the court-martial and appellate authorities to resolve and not be made the subject of unwarranted pretrial restrictions.

Id. at 178.

[19] United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982). In *Schaffer*, the court noted with approval the trend toward more flexibility in pretrial agreements. In a footnote, the court recognized confessional stipulations and conditional guilty pleas, both of which were incorporated into R.C.M. 705. *Id.* at 428 n.6.

[20] United States v. Cozine, 21 M.J. 581 (A.C.M.R. 1985); *see* United States v. Schaffer, 12 M.J. 425, 428 n.6 (C.M.A. 1982); United States v. Mallett, 14 M.J. 631 (A.C.M.R. 1982).

conduct a guilty plea inquiry in accordance with United States v. Care.[21] Additionally, because there is a pretrial agreement underlying the confessional stipulation, the military judge must inquire into the accused's understanding of the terms and conditions of the agreement.[22]

R.C.M. 705, in conjunction with R.C.M. 910(a)(2), also permits the accused to offer a pretrial agreement which conditions the sentence limitation upon a conditional guilty plea.[23]

c. Promises of the convening authority.[24] The most frequent promise by a convening authority made as part of a pretrial agreement is to use his or her power under article 60, UCMJ, to reduce the adjudged sentence to punishment no greater than that specified in the pretrial agreement. For example, the convening authority may agree to approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.[25] The convening authority is free to mitigate or change punishments to a less severe form. The following examples of convening authority action are taken from decided cases:

Table 18–1
Title Example 1

Pretrial Agreement	Sentence at Court-Martial	CA Action*
Dishonorable discharge. Confinement for 2 years Total Forfeitures. Reduction to E–1.	Confinement for 4 years Forfeiture $86.00 per month for 21 mo.	Confinement for 21 mo.
Pretrail Agreement	Sentence at Court-Martial	CA Action**
Bad Conduct Discharge Confinement for 1 year.	Forfeiture $50 per mo. for 18 mo. Reduction E–3.	Forfeiture $450 per mo. for 1 year. Reduction E–3.

Notes:

* United States v. Bruce, 38 C.M.R. 134 (1967).

** United States v. Monett, 36 C.M.R. 335 (C.M.A. 1966).

Where there is no evidence that the parties intended to limit each divisible portion of the sentence, a pretrial agreement is construed as imposing a limit only on the overall severity of the sentence.[26] Therefore, the following convening authority actions were in conformance with the pretrial agreements.

Table 18–2
Title Example 2

Pretrial Agreement	Sentence at Court-Martial	CA Action*
Bad Conduct Discharge Confinement for 4 months Forfeiture 2/3 pay per mo. for 4 mo.	Bad Conduct Discharge Confinement for 2 mo. Forfeiture 2/3 pay per mo. for 6 mo.	Bad Conduct Discharge Confinement for 2 mo. Forfeiture 2/3 pay per mo. for 6 mo.

Notes:

* United States v. Neal, 12 M.J. 522 (N.M.C.M.R. 1981).

The convening authority is free to approve any sentence less severe than that in the agreement. When the agreement as a whole is examined, however, a suspended discharge is not considered less severe than an approved discharge and

[21] 40 C.M.R. 247 (1969), codified in R.C.M. 910; *see* United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977).

[22] R.C.M. 910(f); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[23] *See infra* para. 27–2e. A conditional guilty plea is one where the accused conditions his or her plea on his or her ability to litigate on appeal a specified motion. *See* United States v. Forbes, 19 M.J. 953 (A.F.C.M.R. 1985). The defense, to preserve the motion for appeal, must raise and litigate it before entering a plea.

[24] Although not part of R.C.M. 705 because they are not pretrial agreements, pretrial diversions, such as a promise by the convening authority to take administration action, will be enforced by the courts. United States v. Koopman, 20 M.J. 106 (C.M.A. 1985)*rev'd on other grounds*; Hollywood v. Yost, 20 M.J. 785 (C.G.C.M.R. 1985). *Cf.* United States v. Cabral, 20 M.J. 269, 272 (C.M.A. 1985) ("We perceive no reason why a convening authority is precluded from obligating himself in a pretrial agreement concerning a court-martial to take prescribed administrative action for the accused['s] benefit, so long as that action is within the convening authorities power.").

[25] The convening authority's action should result in a sentence equal to or less than the bargained for sentence. Although mitigation or changing punishments is permitted, the Court of Military Appeals has stated,"We believe it important, as a matter of public policy, that a pretrial agreement in a criminal case should not be interpreted in such a way that the government will appear to have overreached and used a technicality to deprive the accused of the benefit of the bargain."United States v. Cabral, 20 M.J. 269 (C.M.A. 1985).

[26] United States v. Sparks, 15 M.J. 895 (A.C.M.R. 1983).

as such is not less severe than the agreed limit. Therefore the following was not permitted.

Table 18–3
Title Example 3

Pretrial Agreement	Sentence at Court-Martial	CA Action*
Bad Conduct Discharge Confinement for 6 mo. No forfeitures	Bad Conduct Discharge Confinement for 9 mo. Forfeiture $95 per mo. for 9 mo.	Bad Conduct Discharge (suspended) Confinement for 5 mo. Forfeiture $95 per mo. for 9 mo.

Notes:
* United States v. Williams, 40 C.M.R. 859 (A.B.R. 1969).

Unless the pretrial agreement specifically mentions the possibility of a fine or there is other evidence that the accused is aware that a fine could be imposed, a general court-martial may not include a fine in addition to total forfeitures in a guilty plea case unless the possibility of a fine has been made known to the accused during the providence inquiry.[27]

The convening authority may, as part of a pretrial agreement, promise to refer the case to a certain level of court-martial.[28] Thus, the general court-martial convening authority may refer a case to a BCD special court as part of a pretrial agreement. Failure of the accused to enter a provident plea, or failure to fulfill other terms and conditions of the agreement are good cause sufficient to permit the convening authority to withdraw the charges and refer them to a higher level court-martial. The U.S. Army Court of Military Review has indicated that if the pretrial agreement is to refer the case to a lesser trial forum and any adjudged sentence at that forum may be approved, then the pretrial agreement term should be in the sentence appendix to the agreement.[29]

The convening authority may agree to have the trial counsel present no evidence as to one or more specifications or the convening authority may agree to withdraw one or more offenses from a court-martial and dismiss them if the accused fulfills the promises in the agreement. The important distinction between the two is that jeopardy attaches when the trial counsel presents no evidence. Therefore, charges resulting in a finding of not guilty cannot be reinstituted.[30] Except when jeopardy has attached, such withdrawal and dismissal does not bar later reinstitution of the charges by the same or a different convening authority.[31] Such reinstitution may invalidate the pretrial agreement, however, if the agreement is intended to grant immunity to an accused.[32]

R.C.M. 705 also permits the convening authority to refer a capital case as noncapital as part of a pretrial agreement. Thus, when charged with premeditated murder, the accused may offer to plead guilty and in exchange the convening authority may agree to refer the case as noncapital.[33]

18–3. Terms and conditions of pretrial agreements

a. General. As noted, the Court of Military Appeals formerly expressed its desire that military plea bargaining be limited to pleas and sentence limitations. As military plea bargaining became more inventive, the courts were faced with a wide variety of terms and conditions which went beyond a mere plea/sentence type agreement. Absent guidelines in either the UCMJ or the Manual, the courts were free to develop the permissible extent of plea bargaining in accordance with their own notions of what could or could not be included in an agreement. On one hand, a pretrial agreement could not "transform the trial into an empty ritual,"[34] or otherwise deny the accused"a fair hearing, even if

[27] United States v. Williams, 18 M.J. 186 (C.M.A. 1984); United States v. Edwards, 20 M.J. 439 (C.M.A. 1985); United States v. Morales-Santana, 32 M.J. 557 (A.C.M.R. 1991); United States v. Gibbs, 30 M.J. 1166 (A.C.M.R. 1990).

[28] R.C.M. 705(b)(2)(A); *see, e.g.*, United States v. Koopman, 20 M.J. 106 (C.M.A. 1985). The convening authority agreed to withdraw charges from a special court-martial and refer the charges to a summary court-martial.

[29] United States v. Rondash, 30 M.J. 686 (A.C.M.R. 1990); *contra* United States v. Kelly, 32 M.J. 835 (N.M.C.M.R. 1991).

[30] United States v. Arnold, 8 M.J. 806 (N.C.M.R. 1980). Pursuant to a pretrial agreement the accused pleaded guilty to three of five specifications. After the guilty plea inquiry the trial counsel, acting in accordance with the pretrial agreement, requested that the military judge not announce findings until just before the sentence was announced. This procedure was employed to avoid a situation where, after a finding of not guilty was entered to the remaining offenses, the accused would withdraw his guilty plea to the three offenses and the Government would be foreclosed from prosecuting the accused for the offenses which were the subject of a finding of not guilty. The pretrial agreement was proper; it did not infringe "on the trial proceedings as controlled by the military judge." *See also* United States v. Johnson, 2 M.J. 541 (A.C.M.R. 1976) (finding of not guilty is final and retrial is forbidden regardless of pretrial agreement or failure to plead providently to other offenses).

[31] R.C.M. 705(b)(2)(C) discussion; United States v. Cook, 12 M.J. 448 (C.M.A. 1982). In *Cook*, pursuant to a pretrial agreement, charges of larceny (Charges I and II) were withdrawn after the accused pleaded guilty to Charge III. The Navy Court of Review ruled the plea to Charge III improvident and returned the case to the trial level. At the retrial, the originally withdrawn charges were now added as additional charges. On appeal, the Court of Military Appeals held that jeopardy had not attached and that it was not error to reinstitute the originally withdrawn charges.

[32] *See* R.C.M. 704.

[33] R.C.M. 705(b)(2)(B); United States v. Covington, 19 M.J. 932 (N.M.C.M.R. 1982). Such agreements have been sanctioned by the Federal courts when

the hearing is limited by the plea to matters other than guilt or innocence."[35] On the other hand, more recent trends in case law have permitted and even encouraged more innovative pretrial agreements.[36] As a result, a number of clauses, terms, or conditions of pretrial agreements which concern themselves with other than the plea or sentence limitation have been approved by the courts.

It is important to note that although the accused may not bargain away fundamental rights in a pretrial agreement, the touchstone is not whether or not the right is a "constitutional right." The essence of a pretrial agreement is that the accused waives the constitutional right to a trial to determine his or her guilt. Therefore, R.C.M. 705(c)(1)(B) is intended to ensure that certain fundamental rights of the accused are not bargained away while permitting the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily.

R.C.M. 705(c) sets forth both the prohibited and permissible terms or conditions of pretrial agreements. In large part, the rule codified the existing law on the subject of terms or conditions. Consequently, the following discussion of R.C.M. 705(c) contains substantial reference to prior case law.

b. Who may propose or originate terms and conditions. Military appellate courts were leery of additional terms and conditions that appeared in pretrial agreements. The wariness of the courts stemmed from a desire to ensure that the accused freely and voluntarily agreed to the additional terms and conditions that were increasingly being made a part of pretrial agreements. Although the judicial inquiry required by R.C.M. 910(f) is designed to demonstrate that the entire agreement was freely and voluntarily entered, appellate courts have historically sought to determine the proponent of a particular term or condition. When the term or condition originated with the accused, such a term or condition, no matter how novel, was often upheld.[37] On the other hand, when it appeared that the Government instigated the clause, or where the accused was faced with a contract of adhesion, the appellate courts acted decisively to strike the clause or void the agreement.[38] Thus it appeared that terms or conditions that could be added to the basic pretrial agreement fell into three categories: those that were always prohibited; those that were always permissible and the Government could insist be part of any agreement; and those that were permissible when they originated with the accused.

The notion that some terms and conditions could be permissible only when they originated with the accused raise a number of troubling questions. First, if a term or condition is permissible in one bargain and the Government, as explained earlier, remains free not to enter any pretrial agreement, why then can the Government not insist on a term or condition being part of all agreements? Second and more troubling is, what does it mean to say the defense must originate the term or condition? As the analysis to R.C.M. 705(d)(2) states, "it is of no legal consequence whether the accused's counsel or someone else [such as the trial counsel] conceived the idea for a specific provision as long as the accused, after thorough consultation with counsel, can freely choose whether to submit a proposed agreement and what it will contain." The continued emphasis on provisions originating with the accused results in gamesmanship, where the Government rejects repeated defense offers, as they are free to do, until the defense counsel suddenly "originates" the sought provisions.

The courts and practitioners began to recognize that a term or condition in a pretrial agreement ought to be permissible or impermissible. To approve a term or condition only when it originated with the accused was a vestige of paternalism that was attacked by the appellate courts.[39] In 1991, R.C.M. 705(d)(1) was amended to reflect that "[e]ither the defense or the government may propose any term or condition not prohibited by law or public policy."[40]

c. Prohibited terms or conditions. Initially, this rule codifies the fact that an accused may not be coerced into pleading guilty or offering a pretrial agreement. An accused may not be bound by any term or condition of a pretrial agreement to which he or she did not freely and voluntarily agree.[41]

R.C.M. 705(c)(1)(B) sets forth certain terms or conditions which may not be bargained away by the accused or enforced as part of the quid pro quo of a pretrial agreement. This is because to give up these matters would leave no substantial means to judicially ensure that the accused's plea was provident, that the accused entered the pretrial agreement voluntarily, and that the sentencing proceedings met acceptable standards.[42] The provisions of this subsection are designed to ensure that the accused cannot bargain away and that the Government does not demand abolishing

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challenged by habeas review of the State conviction. Alford v. North Carolina, 400 U.S. 25 (1970); Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984) (court upheld a death penalty imposed after the accused had rejected a pretrial offer of the prosecutor and insisted on his right to trial.) State courts have not viewed such provisions favorably. State v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984) (court rejected scheme whereby accused was offered plea bargain to avoid possible death penalty).

[34] United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957).

[35] United States v. Holland, 1 M.J. 59, 60 (1975).

[36] United States v. Schaffer, 12 M.J. 425, 427 (C.M.A. 1982).

[37] United States v. Jones, 23 M.J. 305 (C.M.A. 1987) (agreement to waive motions); United States v. Zelinski, 24 M.J. 1 (C.M.A. 1987) (agreement to waive trial by members).

[38] *Cf.* United States v. Cross, 19 M.J. 973 (A.C.M.R.) (Wold, J. dissenting), *petition denied*, 21 M.J. 87 (C.M.A. 1985).

[39] United States v. Jones, 23 M.J. 305 (C.M.A. 1987) (Cox, J. concurring in the result); United States v. Sharper, 17 M.J. 803, 806 (A.C.M.R. 1984) ("However, we do not believe that the identity of the party proposing an element of a pretrial agreement is determinative of its enforceability.").

[40] R.C.M. 705(d)(1) (C5, 15 November 1991).

[41] *See* United States v. Mills, 12 M.J. 1 (C.M.A. 1981); United States v. Green, 1 M.J. 453 (C.M.A. 1976); United States v. Holland, 1 M.J. 58 (C.M.A. 1975); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); United States v. Cummings, 38 C.M.R. 174 (C.M.A. 1968); United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957). One of the factors appellate courts consider to determine if the accused freely and voluntarily agreed to the term or condition is the existence of preprinted Government forms that require the term or condition.

[42] R.C.M. 705(c)(1)(A) analysis. *Cf.* United States v. Green, 1 M.J. 453 (C.M.A. 1976); United States v. Care, 40 C.M.R. 247 (1969) (requiring the military judge to inquire into the accused's knowledge and understanding of the agreement).

the fundamental fairness of the proceeding.

(1) The accused may not bargain away the right to counsel. Despite the fact that the accused may waive the right to counsel,[43] it is specifically prohibited to provide for a waiver of counsel as part of a pretrial agreement. This prohibition extends to the type of counsel the accused may choose. Hence an agreement that waived the right to an individually requested counsel would be improper or one that conditioned the pretrial agreement upon not being represented by a civilian defense counsel would be improper.[44] Should such a clause appear in a pretrial agreement, the military judge would be required to strike the clause from the agreement as contrary to public policy.[45] Moreover, should the accused seek to waive counsel at any point in the trial, the military judge should be well advised to ensure on the record that such waiver was not part of any sub rosa agreement. A requirement in a pretrial agreement that the accused waive appellate representation before the Court of Military Review is improper.[46]

(2) Any clause depriving the accused of due process shall not be enforced. Military due process is offended when the agreement attempts to control the order of the proceedings.[47]

In an early pretrial agreement case, the accused was precluded by a pretrial agreement from raising the issues of in personam jurisdiction and whether the accused had been previously discharged from the Army."We believe that in the usual case involving the issue of jurisdiction, neither law nor policy could condone the imposition by a convening authority of such a condition in return for a commitment as to the maximum sentence which would be approved."[48]

Clauses which seek to orchestrate trial proceedings by depriving the accused of complete sentence proceedings similarly are void. A clause prohibiting the defense from presenting any evidence in extenuation and mitigation is void and amounts "to an unwarranted and illegal deprivation of the accused's right to military due process." When the clause concerns the form of the evidence, however, it will be upheld.[49]

(3) The right to complete an effective exercise of post-trial and appellate rights may not be waived pursuant to a pretrial agreement.[50] While provisions in the UCMJ permit the accused to waive his right to appellate review, a requirement that the accused waive appellate review in return for pretrial agreement is improper.[51]

In summary, a term or condition is prohibited if its effect is to limit the review and supervision of the appellate courts. Terms or conditions that have the effect of orchestrating the proceedings, restricting the freedom of action of the military judge, denying evidence, or hampering full representation of the accused are prohibited. Public policy is violated by contractual type documents which forbid the trial of collateral issues and eliminate matters which can and should be considered below, as well as appeal. The evil in such provisions lies in the fact that they impose a halter on the freedom of action of the military judge and hamper the defense counsel's ability to faithfully serve the client. There are many issues which are not waived by a guilty plea but which may be waived if not raised at the trial. Some of those issues, such as speedy trial, are difficult to adjudicate on appeal if the issue is not factually developed at the trial. Accordingly, public policy requires that the defense not be coerced into foregoing any opportunity to litigate jurisdictional or collateral issues at the trial level.[52] The appellate courts cannot police the system of military justice if the Government can systematically prevent pertinent information from reaching the appellate level.

d. Permissible terms and conditions.

(1) The increasing acceptance of plea bargaining in military practice has resulted in greater judicial tolerance of various terms and conditions of pretrial agreements. Moreover, the provisions of R.C.M. 705(c)(2) recognize this greater flexibility. The analysis to that subsection provides, "Since the accused may waive many matters other than jurisdiction, in some cases by failure to object or raise the matter (see R.C.M. 905(e); Mil. R. Evid. 103(a)), or by a plea of guilty (see R.C.M. 910(j) and analysis), there is no reason why the accused should not be able to seek a more favorable agreement by agreeing to waive such matters as part of a pretrial agreement." Subject to the limitations stated above and applicable service directives, certain terms or conditions which waive procedural and other requirements are permissible in pretrial agreements.[53]

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[43] *See* R.C.M. 506(d); Faretta v. California, 422 U.S. 806 (1975).

[44] United States v. Spears, CM 443012 (A.C.M.R. 30 Apr. 1984).

[45] United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[46] United States v. Darring, 9 C.M.A. 651, 26 C.M.R. 431 (1958); *see also* Hollywood v. Yost, 20 M.J. 785 (C.G.C.M.R. 1985), where an agreement wherein the accused agreed to waive accrued pay in exchange for administrative processing of his case on resentencing was invalidated where the accused was denied representation of counsel for the sentence rehearing.

[47] United States v. Holland, 1 M.J. 58, 59 (C.M.A. 1975); United States v. Peterson, 44 C.M.R. 528 (A.C.M.R. 1971).

[48] United States v. Banner, 22 C.M.R. 510 (A.B.R. 1956). In any event, the issue of jurisdiction is never waived and hence such a waiver in a pretrial agreement is void.

[49] United States v. Callahan, 22 C.M.R. 443 (A.B.R. 1956). *See* R.C.M. 705(c)(2)(E) concerning waiver of the accused's right to obtain personal appearance of witnesses at sentencing proceedings.

[50] United States v. Mills, 1 M.J. 12 (C.M.A. 1981).

[51] R.C.M. 705 (c)(1)(B); Letter, DAJA–CL, subject; Inclusion of Waivers of Appellate Rights in Pretrial Agreements, 11 July 1984; *cf.* United States v. Schaller, 9 M.J. 939 (N.C.M.R. 1980) (pretrial agreement that stated accused would submit a request for appellate leave if a punitive discharge was adjudged was allowed despite "appearance of evil"); United States v. Darring, 26 C.M.R. 431 (C.M.A. 1958) (provision that accused waive representation by counsel before the Board of Review held improper). The issue may be moot because the convening authority is now empowered to place the accused on involuntary appellate leave.

[52] United States v. Morales, 12 M.J. 888 (A.C.M.R. 1982).

[53] *See* United States v. Gibson, 29 M.J. 379 (C.M.A. 1990) (an otherwise valid guilty plea will rarely, if ever, be invalidated on the basis of a plea agreement proposed by the defense).

(2) The accused may promise to enter into a stipulation of fact. R.C.M. 705(c)(2)(A) provides that an accused may promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered. The Government has the right to demand as part of a pretrial agreement that an accused stipulate to the aggravating circumstances surrounding the offenses to which he or she pleads guilty.[54] Such clauses requiring stipulations of fact in pretrial agreements are not repugnant to public policy.[55] The agreement to stipulate is normally viewed as an agreement to the form of the evidence. It relieves the Government of proving by other means the facts and circumstances surrounding the offense and matters in aggravation. The defense is free to challenge the admissibility of the matters in the stipulation,[56] and the military judge should rule which portions of the stipulation are admissible evidence.[57] In addition, if the stipulation is unequivocal and expressly states that counsel and the accused agree not only to the truth of the stipulated matters, but that such matters are admissible against the accused, then such evidence, even if otherwise inadmissible, can come before the court.[58] Of course the stipulation is "[s]ubject to limitations which might be imposed by the military judge in the interest of justice|"[59]

While the defense is free to object to the admissibility of portions of the stipulation and the military judge can rule on those objections, a close reading of Glazier indicates that if the defense objection is sustained, the Government is free to withdraw from the pretrial agreement.[60] In his concurring opinion, Chief Judge Everett expressly rejected the notion that a successful objection entitles the Government to abrogate a pretrial agreement.[61] The majority does not appear to agree with that view, however.[62]

Who drafts the stipulation to be used as part of the pretrial agreement? Generally, one of the parties drafts the stipulation; it is not error for the trial counsel to do so.[63] The side which submits the first draft of the stipulation and its timing effect the ultimate product and counsel are advised to be aggressive in this area.

(3) R.C.M. 705(c)(2)(B) permits the accused to promise to testify as a witness in the trial of another person. A witness is not rendered incompetent merely because he or she testifies pursuant to a grant of immunity or pretrial agreement.[64]

Permissible clauses are ones that require the accused to testify truthfully in future named proceedings[65] and require the accused to cooperate in future cases brought by the Government.[66]

Impermissible clauses are ones that require a witness' testimony conform to that given in a written statement,[67] reduce the sentence of the accused by one year each time the accused testifies against each of his or her accomplices,[68] and require the accused to render testimony in certain cases that would establish conspiracy and premeditation.[69]

(4) R.C.M. 705(c)(2)(C) provides that an accused may promise to provide restitution as part of a pretrial agreement. Restitution clauses are permitted when offered as part of a pretrial agreement by the accused and made knowingly and voluntarily with the advice of competent counsel.[70]

Restitution clauses are not repugnant to public policy where only a good faith effort at restitution is required.[71]

(5) R.C.M. 705(c)(2)(D) approves post-trial misconduct clauses which are explicit and which provide the same protections as a revocation of a suspended sentence require.[72] As noted in the analysis to R.C.M. 705(c)(2)(D), "Given

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[54] United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).

[55] United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978). A "confessional stipulation" clause is permitted. United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977).

[56] *Cf.* United States v. Smith, 9 M.J. 537 (A.C.M.R. 1980); United States v. McDonach, 10 M.J. 698, 710 N. 27 (A.C.M.R. 1981).

[57] United States v. Glazier, 26 M.J. 268, 270 (C.M.A. 1988) (Court of Military Appeals specifically rejected the view of one panel of A.C.M.R. expressed in United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986) that the judge cannot act on objections to matters in the stipulation).

[58] *Id.; see* United States v. Mullens, 29 M.J. 398 (C.M.A. 1990); United States v. Jackson, 30 M.J. 565 (A.C.M.R. 1990) (military judge has no *sua sponte* duty to strike uncharged misconduct from the stipulation unless there is evidence of Government overreaching); United States v. Vargas, 29 M.J. 968 (A.C.M.R. 1990).

[59] Glazier, at 270.

[60] *Id.*

[61] *Id.* at 271 (Chief Judge Everett concurring).

[62] *Id.* at 270.

[63] United States v. Terrell, 7 M.J. 511 (A.C.M.R. 1979).

[64] United States v. Moffet, 27 C.M.R. 243 (C.M.A. 1959).

[65] United States v. Scott, 6 M.J. 608 (A.C.M.R. 1978); United States v. Reynolds, 2 M.J. 887 (A.C.M.R. 1976).

[66] United States v. Tyson, 2 M.J. 583 (N.C.M.R. 1976).

[67] United States v. Conroy, 42 C.M.R. 291 (C.M.A. 1970); United States v. Stoltz, 34 C.M.R. 241 (C.M.A. 1964).

[68] United States v. Scoles, 33 C.M.R. 226 (C.M.A. 1963). The court found that such a clause is "contrary to public policy" because it "offers an almost irresistible temptation to a confessedly guilty party to testify falsely in order to escape the consequences of his own misconduct." *Id.* at 232.

[69] United States v. Gilliam, 48 C.M.R. 260 (C.M.A. 1974).

[70] United States v. Callahan, 8 M.J. 804 (N.C.M.R. 1980); *accord* United States v. Evans, 49 C.M.R. 86 (N.C.M.R. 1974).

[71] United States v. Brown, 4 M.J. 654 (A.C.M.R. 1977). United States v. Rodgers, 49 C.M.R. 268 (A.C.M.R. 1974). It is perhaps wiser for the convening authority to establish restitution as a condition precedent to acceptance of a pretrial agreement. *See* R.C.M. 705(c)(2)(C) analysis.

[72] R.C.M. 1109.

such protections, there is no reason why an accused who has bargained for sentence relief such as a suspended sentence should enjoy immunity from revocation of the agreement before action but not afterward."[73]

(6) Other terms and conditions.

(a) Although R.C.M. 705(c) encompasses a variety of terms and conditions, both permissible and impermissible, it does not appear that the rule contemplates its listings to be exhaustive. In fact, the analysis to R.C.M. 705(c) notes that if the accused can waive particular matters simply by failing to raise such matters, coupled with the requirement that all terms of a pretrial agreement be in writing, the accused should be able to expressly waive such matters in order to obtain a more beneficial agreement. Some additional terms or clauses which have been litigated are discussed below.

(b) Waiver of the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.[74]

United States v. Mills.[75] The court found nothing to prevent an accused from stipulating to testimony in return for a reduction in sentence so long as the judge determined that the accused's entry into the stipulation was provident.

United States v. Rodriquez.[76] A provision calling for the accused to enter into reasonable stipulations of the expected testimony of Government witnesses was not prejudicial.

United States v. Krautheim.[77] A pretrial agreement providing for the waiver of the personal appearance of character witnesses located outside Japan (the situs at the trial) "in return for a limitation on the sentence" was not "void as against public policy."[78]

United States v. McDonagh.[79] Pretrial agreement provision that waived "a request for the personal appearance of witnesses whose appearance possibly could be compelled in favor of presenting stipulations of expected testimony" was not contrary to public policy. The case was tried in Germany and concerned five potential witnesses who were then located in the United States.

These clauses are permissible because they concern the form of the evidence and do not restrict the presentation of any facts by the defense.

(c) Clauses waiving defenses.

Statute of limitations. The statute of limitations"is a matter in defense that may be taken advantage of as a plea in bar of trial or punishment and that may be the subject of an informed waiver."[80] The waiver of a statute of limitations claim is not against public policy and may be incorporated into a pretrial agreement.[81]

Former jeopardy. The accused may knowingly and intelligently waive the claim of former jeopardy in a pretrial agreement. Because the accused was not informed of a "gentlemen's agreement" between his defense counsel and the Government to waive the defense of former jeopardy, however, the finding of guilty could not be sustained in United States v. Troglin.[82]

(d) Promise to recommend retention. Pretrial agreement provision calling for the convening authority to recommend accused's retention in the Navy at any administrative discharge proceeding based on the charged offenses was not contrary to public policy.[83]

e. Permissible terms and conditions--when they originate with the accused.

(1) Waiver of procedural requirements. R.C.M. 705(c)(2)(E) provides authority for an accused to offer to waive certain procedural requirements as part of a pretrial agreement. The case law, which predates R.C.M. 705, generally requires such waivers to originate with the accused. The inclusion of these waivers in R.C.M. 705 may eliminate this requirement. The following is a list of procedural matters that may be waived under the rule. This list is not intended to

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[73] This subsection is based on United States v. Dawson, 10 M.J. 152 (C.M.A. 1982). Although the post-trial misconduct provision in *Dawson* was rejected, a majority of the court was apparently willing to permit such provisions if adequate protections against arbitrary revocation of the agreement are provided.*But see* United States v. Connell, 13 M.J. 156 (C.M.A. 1982) in which a post-trial misconduct provision was held unenforceable without detailed analysis. Other decisions have suggested the validity of post-trial misconduct provisions. *See* United States v. Goode, 1 M.J. 3 (C.M.A. 1975); United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978); United States v. French, 5 M.J. 655 (N.C.M.R. 1978); United States v. Rawkin, 3 M.J. 1043 (N.C.M.R. 1977); *cf.* United States v. Lallande, 46 C.M.R. 170 (C.M.A.1973).

A suggested format for such a clause is as follows:
I understand the convening authority's obligation to approve a sentence no greater than that provided in Appendix A to this agreement may be cancelled after a hearing following the guidelines in R.C.M. 1109(c)(4) if I (commit any offense chargeable under the UCMJ between the announcement of sentence and the convening authority's approval of any sentence) (fail to refrain from _____ between the announcement of sentence and the convening authority's approval of any sentence).

[74] United States v. Hanna, 4 M.J. 938, 940 (N.C.M.R. 1978) ("If an accused can give up his complete right to a trial of the facts on the merits, including the calling of witnessses, I do not see why he cannot give up the ancillary right to the personal appearance of certain witnessses during the presentence stage in return for a favorable sentence guarantee.").

[75] 12 M.J. 1 (C.M.A. 1981).

[76] 12 M.J. 632 (N.M.C.M.R. 1981).

[77] 10 M.J. 763, 764 (N.C.M.R. 1981).

[78] *Id.; See also* United States v. Callaway, 21 M.J. 770 (A.C.M.R. 1986); United States v. Bradley, 11 M.J. 598 (A.F.C.M.R. 1981).

[79] 10 M.J. 698, 710 (A.C.M.R. 1981).

[80] United States v. Clemens, 4 M.J. 791 (N.C.M.R. 1978).

[81] United States v. Wesley, 19 M.J. 534 (N.M.C.M.R. 1985).

[82] 44 C.M.R. 237 (C.M.A. 1972).

[83] United States v. Stack, 11 M.J. 868 (N.C.M.R. 1981).

be exhaustive.[84]

(a) Waiver of the article 32 investigation. As part of a pretrial agreement, the accused may voluntarily offer to waive the right to an article 32 investigation. In United States v. Schaffer,[85] the court found that the fact that the offer originated with the accused undercut the court's previous criticism of complex pretrial agreements. Although wary of such a waiver initially, the appellate courts have come to accept such waivers and the Manual specifically lists waiver of the article 32 investigation as a permissible term or condition.[86]

(b) Waiver of the right to trial composed of members or the right to request trial by military judge alone. In United States v. Schmeltz,[87] the pretrial agreement provided that trial would be by judge alone. The clause came solely from the accused to encourage acceptance of the agreement. The convening authority "made it perfectly clear that … there was no obligation by the defense to enter into an agreement; there's no requirement that it be by judge alone." Because the provision was a freely conceived defense product and "it did not concern the waiver of a constitutional right or a fundamental principle, but only the accused's agreement to elect one of the two sentencing agencies open to him under the applicable statute," the conviction was affirmed.[88]

In United States v. Boyd,[89] the pretrial agreement provided that the accused waived his right to a trial with members. The requirement that the accused:

> waive his right to a trial with members originated with the Government… [I]t is improper in a negotiated plea to lead the accused to believe his judicial confession of guilt requires him to forego his statutory right to trial by a court-martial with members … This constitutes extra-judicial infringement upon the trial and its procedures.

Also invalid was an understanding that defense counsel believed and advised the accused that the SJA required trial by military judge alone as a matter of policy. In such a situation, reversal was required.[90]

R.C.M. 705 does not distinguish between waivers of court members for sentencing that originate from the Government or the accused.[91] But in United States v. Zelenski,[92] the Court of Military Appeals declined to fully accept this provision in all guilty plea cases without regard to its point of origin.

(2) Clause that does not limit adjudged confinement permitted if no punitive discharge adjudged. In case the accused is not sentenced to a punitive discharge, this clause operates to release the convening authority from other sentence limitations. For example, an accused with a pretrial agreement limiting confinement to one month may still argue to the sentencing authority that he or she be given lengthy confinement but no discharge.[93] If such a sentence is announced, the accused in effect has his or her cake and eats it too. He or she is not punitively discharged and the convening authority must limit the confinement. If such a pretrial agreement had the clause mentioned above, the failure to adjudge a punitive discharge would free the convening authority from any limits and he or she could approve the lengthy confinement adjudged.

The use of the above term in a pretrial agreement has caused considerable controversy in the courts. Different panels of the Army Court of Review have alternatively condemned and approved the use of the clause. In United States v. Castleberry,[94] then Chief Judge Suter, after surveying the decisions of the other ACMR panels, concluded the term was a permissible means of ensuring the accused received an appropriate punishment. Senior Judge Wold, in a forceful dissent in United States v. Cross,[95] came to an opposite conclusion and sharply focused the debate on the use of the clause.

Chief Judge Everett, while concurring in the Court of Military Appeals order denying Cross's petition for review, joined the debate on the side of Judge Wold, condemning the use of the clause unless it was clearly demonstrated on the record that the clause originated with the accused.[96] The problem with the clause, in the eyes of Judge Everett and

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[84] R.C.M. 705(c)(2)(E) analysis.

[85] 12 M.J. 425 (C.M.A. 1982).

[86] R.C.M. 705c(2)(E); United States v. Walls, 8 M.J. 666 (A.C.M.R. 1979); United States v. Chinn, 2 M.J. 962 (A.C.M.R. 1976).

[87] 1 M.J. 8 (C.M.A. 1975), *rev'd on other grounds*, 1 M.J. 273 (C.M.A. 1976). On initial review, the Court of Military Appeals ruled on the pretrial agreement in *Schmeltz*. Its review, however, only examined the waiver of members which was held to be permissible. After the decision in United States v. Holland, 1 M.J. 59 (C.M.A. 1975), Schmeltz appealed by writ of error *coram nobis* and his pretrial agreement was invalidated on the same grounds as *Holland*.

[88] 1 M.J. at 9; *see also* United States v. Martin, 4 M.J. 852 (A.C.M.R. 1978).

[89] 2 M.J. 1014 (A.C.M.R. 1976).

[90] United States v. Cordova, 4 M.J. 604 (A.C.M.R. 1977); *see* United States v. Ralston, 24 M.J. 709 (A.C.M.R. 1987) (unexplained inclusion of waiver of trial by members in majority of pretrial agreements in a given jurisdiction for a significant period may give rise to inference that local command policy requires such a provision.

[91] *See supra* para. 18–3b and R.C.M. 705(d)(2) analysis for criticism of the requirement that some provisions, such as agreement to trial by military judge alone, are permissible only when they originate with the accused.

[92] 24 M.J. 1 (C.M.A. 1987).

[93] It is permissible for a defense counsel to make an argument for lengthy confinement but no discharge, when in fact the pretrial agreement precludes the convening authority from approving such a sentence. United States v. Rivera, 49 C.M.R. 838 (A.C.M.R. 1975).

[94] 18 M.J. 826 (A.C.M.R. 1984), *petition denied*, 19 M.J. 315 (C.M.A. 1985).

[95] 19 M.J. 978 (A.C.M.R.), *petition denied*, 21 M.J. 87 (C.M.A. 1985); *see also* United States v. Sanders, 19 M.J. 979 (A.C.M.R. 1985) (Wold, J., dissenting); United States v. Wordlow, 19 M.J. 981 (A.C.M.R. 1985) (Wold, J., dissenting).

[96] United States v. Cross, 19 M.J. 978 (A.C.M.R.),*petition denied*, 21 M.J. 87, 88 (C.M.A. 1985) (Everett, C.J., concurring in the result).

Judge Wold, was that it inhibited the presentation of extenuation and rehabilitation evidence. An accused may have supervisors who feel that he or she has rehabilitative potential and yet be reluctant to present such evidence for fear it will increase the chances of lengthy confinement. In addition, it appears that the clause has become a contract of adhesion, being preprinted on the standard form used to request a pretrial agreement, and not a result of a meeting of the minds between the parties. This was not clear in Cross as the military judge failed to make any inquiry into the clause. Of course, nothing prohibits the defense counsel from drafting and submitting a separate agreement rather than using the preprinted form.

The Government's purpose in including such a term seems clear: to eliminate game playing by the defense counsel who bargains for one deal and argues for another. No appellate case has "bitten the bullet" and criticized such argument by the defense counsel. If the Government wants to keep the clause, one possibility might be to state in the pretrial agreement that the clause will not be triggered unless the defense counsel specifically argues for no discharge. That eliminates the problem of a defense counsel playing both ends against the middle, but it is uncertain what an appellate court would do with the amended clause. Faced with the clause in these terms, the military judge should inquire into the clause and at the conclusion of the case determine on the record if the clause will be operative.

In light of these decisions, use of a punitive discharge clause should be limited to those situations where its inclusion results from actual bargaining between the parties. The Government counsel should ensure that the military judge determines, on the record, that the accused freely and voluntarily entered into the clause.[97] In any case, it should be removed from the standard preprinted pretrial agreement to prevent appellate argument that it is a contract of adhesion.

Government counsel should keep in mind that administrative discharge action under the provisions of Army Regulation 635-200 is available in those situations where the court-martial sentence does not include a punitive discharge. The same misconduct may be the basis for the administrative discharge action.[98]

The defense counsel who is faced with the above clause as a contract of adhesion should enter the agreement, and then raise the issue with the military judge at trial. The defense should be prepared to demonstrate that the clause is a prerequisite to a pretrial agreement, rather than the result of bargaining. The military judge has the power to strike from a pretrial agreement any provisions he or she finds offensive to public policy.[99]

(3) Waiver of motions. A pretrial agreement requiring that the plea be entered prior to presentation of motions is void. Such a clause is akin to extrajudicial infringement or interference with the trial and its procedures and is forbidden.

> Even though well-intentioned, the limitation on the timing of certain motions controlled the proceedings. By orchestrating this procedure, there was an undisclosed halter on the freedom of action of the military judge who is charged with the responsibility of conducting the trial. It also might have hampered defense counsel in his function of faithfully serving his client. Being contrary to the demands inherent in a fair trial, this restrictive clause renders the agreement null and void.[100]

A pretrial agreement to waive all motions is against public policy and void.[101]

In United States v. Jones,[102] a provision which clearly stated the accused would waive his pretrial motions was upheld. The court placed considerable emphasis on the fact that the provision originated with the accused and that it

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[97] The following inquiry by the military judge is suggested:

—Do you believe you could have achieved a pretrial agreement without this clause?
—Do you have favorable evidence to present on extenuation and mitigation that you will now not present due to this clause?
—Do you intend to request from the court that a punitive discharge be part of your sentence?
—Do you intend to argue to the court that lengthy confinement rather than a punitive discharge is an appropriate punishment?

[98] AR 635–200, para. 1–19*c* (5 July 1984).

[99] United States v. Partin, 7 M.J. 409 (C.M.A. 1979); United States v. Lanzer, 3 M.J. 60 (C.M.A. 1977); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).

[100] United States v. Holland, 1 M.J. 59 (1975). See discussion of such a clause, which appeared in pretrial agreements as a result of an article in *The Army Lawyer, supra* note 5. United States v. Brumdidge, 1 M.J. 152 (C.M.A. 1975). The discussion to R.C.M. 705c(1) states "A pretrial agreement provision which prohibits the accused from making certain motions (R.C.M. 905–907) may be improper." The language of this sentence—may be improper—is especially troublesome. It implies waiver of some motions may be included in a pretrial agreement. R.C.M. 705c(1) is not intended to codify United States v. Holland. A clause in a pretrial agreement that the accused waive motions is proper in civilian courts. *See* People v. Esajerre, 35 N.Y. 2nd 463, 363 N.Y.S.2d 931 (1974);*cf.*, McMann v. Richardson, 397 U.S. 759 (Brennen J. dissenting).

[101] United States v. Schaffer, 46 C.M.R. 1089 (A.C.M.R. 1973). A blanket motions waiver clause was determined to be harmless when detected by the military judge and ordered stricken, United States v. Kelley, 6 M.J. 532 (A.C.M.R. 1978), or where the record demonstrated that it did not influence the conduct of the defense, United States v. Brooks, 2 M.J. 1257 (A.C.M.R. 1976). Prior to the effective date of the Military Rules of Evidence (1 September 1980), the military judge had broad discretion in determining whether to entertain evidentiary motions, including motions to suppress, prior to the entry of the plea. United States v. Hartzell, 3 M.J. 549 (A.C.M.R. 1977); United States v. Mirabal, 48 C.M.R. 803 (A.C.M.R. 1974). Military Rules of Evidence 304, 311, and 321, however, require that motions to suppress must be made prior to the entry of the plea. The military judge must rule on such motions prior to entry of the plea unless he or she defers this ruling for good cause. He or she may not defer the ruling if the right to appeal the ruling would be affected adversely.

[102] 20 M.J. 853 (A.C.M.R. 1985), *aff'd*, 23 M.J. 305 (C.M.A. 1987).

was an unsolicited inducement by the accused to the convening authority to enter into the agreement. The motions in Jones (legality of apprehension and line-up) were the type of motion that would be waived if not raised. The court concluded,"we do not believe the justice system is impugned when an accused seeks concessions from a convening authority by offering the inducement to waive motions concerning issues which would be waived in any case by the acceptance of his guilty plea."[103]

18–4. Pretrial procedure for obtaining a pretrial agreement

a. General. R.C.M. 705(d) sets forth requirements for the negotiation and securing of pretrial agreements. Until 1991, R.C.M. 705(d) required the offer to plead guilty or to enter into a confessional stipulation to originate with the accused and counsel. Although the government may originate pretrial agreement negotiations and the individual terms of the agreement, R.C.M. 705(c)(1)'s prohibition against terms not freely and voluntarily agreed to by the accused and the requirement in R.C.M. 910 for an inquiry into the agreement, should prevent prosecutorial pressure or improper inducements to the accused to plead guilty or to waive rights against the accused's wish or interest.[104]

b. Negotiation. Once the defense has opened negotiations on a pretrial agreement, local practice will dictate which Government representative will negotiate for the Government. Counsel should be aware that negotiations are nonbinding in that only the convening authority may bind the Government to a pretrial agreement. It is of no legal consequence whether the accused's counsel or someone else conceived the idea for a specific provision as long as the accused, after thorough consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain.[105]

c. Formal submission. After negotiation, the defense submits a written offer if the accused elects to propose a pretrial agreement. All terms, conditions, and promises between the parties shall be written. The proposed agreement is signed by the accused and defense counsel.

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

If the agreement contains any specified action on the adjudged sentence, such actions are set forth on a page separate from the other portions of the agreement.[106]

Note that the rule does not require the convening authority to personally sign the agreement. Although the convening authority must personally approve the agreement, and has sole discretion whether to do so, the convening authority need not personally sign the agreement. In some circumstances, it may not be practicable or even possible to physically present the written agreement to the convening authority for approval. The rule allows flexibility in this regard. The staff judge advocate, trial counsel, or other person authorized by the convening authority to sign may do so. Authority to sign may be granted orally.[107]

The offer may contain a signature block for the convening authority to indicate acceptance or rejection of the agreement. Although not required, the agreement may contain a portion upon which the staff judge advocate or legal advisor to the convening authority may recommend acceptance or rejection of the tendered offer.[108]

18–5. Withdrawal from a pretrial agreement

Acceptance of a plea bargain does not create a constitutional right to have the bargain specifically enforced.[109] Prior to R.C.M. 705, pretrial agreements usually contained a number of cancellation provisions which provided escape mechanisms for the parties to the agreement in the event of certain circumstances. In large part, R.C.M. 705(d)(5) has codified these cancellation provisions and rendered them unnecessary in the written document.[110]

An accused may withdraw from a pretrial agreement at any time. Once the accused's guilty plea is accepted or a confessional stipulation admitted into evidence, however, it may not be withdrawn unless permitted by R.C.M. 910(h) or 811(d).[111]

The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement.[112]

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[103] *Id.* at 855.
[104] R.C.M. 705(d) analysis.
[105] *Id.*
[106] R.C.M. 705(d)(3) discussion; United States v. Walters, 5 M.J. 829 (A.C.M.R. 1978), *aff'd*, 8 M.J. 95 (C.M.A. 1979).
[107] R.C.M. 705(d)(4) and R.C.M. 705(d)(4) analysis.
[108] R.C.M. 705(d)(4) discussion. United States v. Kennedy, 8 M.J. 577 (A.C.M.R. 1979) ("It is common knowledge that as a matter of course convening authorities obtain the recommendation of their legal advisors before executing pretrial agreements with the accused.").
[109] Mabry v. Johnson, 104 S. Ct. 2543 (1984).
[110] *Cf.* United States v. Lanzer, 3 M.J. 60 (C.M.A. 1977); United States v. Scott, 6 M.J. 608 (A.C.M.R. 1978).
[111] R.C.M. 705(d)(5)(A). *See infra*, para. 21–4c.
[112] R.C.M. 705(d)(5)(B).

Generally, the beginning of performance by the accused is the entry of a plea. Other terms or conditions of the agreement, however, may reflect an earlier beginning point. For example, the accused may have made restitution, testified in a companion case, or given information to Government officials. Moreover, if the accused took action in detrimental reliance on an executed agreement which made it substantially more difficult for him or her to contest guilt or innocence on a plea of not guilty, the Government may be bound by that detrimental reliance.

In Shepardson v. Roberts,[113] the court stated that the convening authority may be bound by a pretrial agreement before entry of a plea of guilty if the accused has detrimentally relied on the agreement. The court indicated, however, that not all forms of reliance by the accused rise to the level of detrimental reliance as it used that term. Thus the court held in Shepardson that exclusion of statements allegedly made by the accused as a result of the agreement (but not necessarily pursuant to it) was an adequate remedy, and enforcement of the agreement was not required when the convening authority withdrew from it before trial. Similarly, the court opined that the fact that an accused made arrangements to secure employment or took similar actions in reliance on an agreement would not require enforcement of a pretrial agreement. The new Manual provision is consistent with this approach, but uses beginning of performance by the accused to provide a clearer point at which the right of the convening authority to withdraw terminates.[114]

In United States v. Koopman,[115] the Government was permitted to withdraw from a pretrial agreement after the accused had made three payments in partial restitution. Although Koopman had both begun performance and "detrimentally relied," Judge Everett found the Government was no longer bound to the original agreement when the accused's AWOL prevented complete restitution in a reasonable period of time. Judge Cox proposed a much simpler rule; any pretrial agreement between the accused and the Government is breached by subsequent misconduct that gives rise to additional charges.[116]

18–6. Nondisclosure of terms of pretrial agreement or plea negotiations

R.C.M. 705(e) precludes disclosure of the terms, conditions, or existence of a pretrial agreement to the members of a court-martial. The members are to reach a sentence without consideration of any potential relief from the convening authority.[117]

Additionally, in accordance with Military Rule of Evidence 410, plea negotiations, offers, or statements made in conjunction therewith may not be revealed to the members except in a subsequent prosecution for perjury or false statement.[118]

When trial is by military judge alone, the proper procedure is to include the sentence limitation portion of the agreement on a separate sheet of paper. This"quantum portion" as it is called is not disclosed to the military judge until after he or she announces the sentence in open court. The military judge then compares the promised action by the convening authority and announces his or her interpretation of the effect, if any, of the quantum portion. If these procedures are not followed and the military judge as sentencing authority is exposed to the quantum portion, the result is not automatic mistrial. Rather, the test is one for prejudice. If the judge can continue while ignoring the knowledge of the convening authority's promises, the trial continues. Of course, either side may voir dire and then challenge the judge.[119]

18–7. Judicial inquiry

a. Duties of the military judge. R.C.M. 910(f). The military judge must inquire into the existence of a pretrial agreement. The military judge should ask if a pretrial agreement exists and require disclosure of the entire agreement.[120] Even if the military judge fails to so inquire or the accused answers incorrectly, counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge.[121] When both the accused and counsel assure the military judge that the written agreement is the full agreement and no sub rosa agreements exist, the appellate courts will refuse to hear post-trial assertions to the contrary.[122]

The purposes of this on the record inquiry by the military judge are: to enhance public confidence in the plea bargaining process; to assist appellate courts in uncovering unlawful secret agreements; to clarify ambiguities on the

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[113] 14 M.J. 354 (C.M.A. 1983).

[114] R.C.M. 705(d)(5) analysis; *see also* United States v. Penister, 25 M.J. 148 (C.M.A. 1987) (if the military judge rejects a provident guilty plea because of a misapplication or misunderstanding of the law, this can hardly be deemed "failure by the accused;" thus, the convening authority may not withdraw from the agreement).

[115] United States v. Koopman, 20 M.J. 106 (C.M.A. 1985).

[116] *See also* United States v. Troublefield, 17 M.J. 696 (A.C.M.R. 1983).

[117] *See* United States v. Massie, 45 C.M.R. 717 (A.C.M.R. 1972); *see also* United States v. Green, 1 M.J. 453 (C.M.A. 1976); United States v. Wood, 48 C.M.R. 528 (C.M.A. 1974). *But see* United States v. Jopson, 31 M.J. 117 (C.M.A. 1990) (court member's awareness of pretrial agreement does not per se disqualify the member).

[118] *See* Mil. R. Evid. 410.

[119] R.C.M. 910(f)(3); *see also* United States v. Green, 1 M.J. 453 (C.M.A. 1976); United States v. Diaz, 30 M.J. 957 (C.G.C.M.R. 1990); United States v. Phillipson, 30 M.J. 1019 (A.F.C.M.R. 1990).

[120] R.C.M. 910(f).

[121] United States v. Cooke, 11 M.J. 257 (C.M.A. 1981).

[122] United States v. Muller, 21 M.J. 205 (C.M.A. 1986); *but see* United States v. Corriere, 20 M.J. 905 (A.C.M.R. 1985).

record at the trial level; to ensure accuracy of providence determinations required by article 45, UCMJ; and to police terms of the agreement and ensure compliance with law and fundamental fairness.[123]

The military judge should inquire to ensure that the accused understands the agreement and that the parties agree to the terms of the agreement. In addition, the military judge should obtain clarification of any unclear or ambiguous terms and explain any terms which may not be clear to the accused.

The military judge's responsibilities in pretrial agreement inquiries were explained in United States v. Williamson.[124] While the Williamson guidelines were created well before the effective date of the 1984 Manual, they remain a good guide to a complete inquiry into a pretrial agreement. Failure to follow these guidelines does not result in automatic reversal; however, a systematic procedure does protect the record and the accused.

The Williamson guidelines are as follows:

The military judge should conduct each pretrial agreement inquiry in accordance with the following procedures:

(1) Ask the accused and counsel if there is a pretrial agreement.

(2) If there is an agreement, then view it in its entirety before findings when trial is before a court composed of members; otherwise, reserve inquiry into the sentence provisions until after imposition of sentence.

(3) Go over each provision of the agreement with the accused (including, at the appropriate point in the proceedings, the sentence terms),[125] paraphrase each in the judge's own words, and explain in the judge's own words the ramifications of each provision.[126]

(4) Obtain from the accused either a statement of concurrence with the judge's explanation, or the accused's own understanding, followed by a resolution on the record of any differences.

(5) Strike all provisions, with the consent of the parties, that violate either appellate case law, public policy, or the judge's own notions of fundamental fairness; further, make a statement on the record that the judge considers all remaining provisions to be in accord with appellate case law, not against public policy, and not contrary to the judge's own notions of fundamental fairness.

(6) Ask trial and defense counsel if the written agreement encompasses all of the understandings of the parties, and conduct further inquiry into any additional understandings that are revealed.[127]

(7) Ask trial and defense counsel if the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain, and resolve on the record any differences.[128]

b. Administrative consequences of pretrial agreements. The divorce of administrative discharge proceedings from the military justice system does not inevitably require that a guilty plea be upheld as provident despite the accused's misapprehension of the possibility or the likelihood that he or she will be administratively discharged. When collateral consequences of a court-martial conviction--such as administrative discharge, loss of a license or a security clearance, removal from a military program, failure to obtain promotion, deportation, or public derision and humiliation--are relied upon as the basis for contesting the providence of a guilty plea, however, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences: (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain the accused's willingness to accept those consequences. While the military judge may appropriately ask during the providence hearing whether appellant and his or her counsel have discussed any possible collateral results of a conviction on the charges to which a guilty plea is being entered, the judge need not undertake on his or her own motion to ascertain and explain what those results may be.[129]

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[123] United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[124] 4 M.J. 708 (N.C.M.R. 1977).

[125] United States v. Craig, 17 M.J. 540 (A.C.M.R. 1983). The military judge should, after the sentence is announced, on the record, compare the adjudged sentence with the pretrial agreement and explain the effects to the accused.

[126] Inquiry into each clause seriatim is recommended but not required. United States v. Smith, 5 M.J. 857 (A.C.M.R. 1978); United States v. Winkler, 5 M.J. 835 (A.C.M.R. 1978). *But see* United States v. Cabral, 20 M.J. 269, 273 (C.M.A. 1985) ("In reviewing the pretrial agreement with the accused, the military judge is not obligated to explain administrative consequences of a conviction or of a particular sentence or to inquire about the accused's understanding of those consequences … However, there certainly 'is nothing amiss' in the judge's undertaking such explanation or inquiry."). Failure to inquire into a clause authorizing administrative discharge after trial rendered the plea improvident. United States v. Miller, 7 M.J. 535 (N.C.M.R. 1979). Where not disclosed by the agreement or by counsel, however, the military judge is not obligated to discover the collateral effects of a plea.

[127] Failure to inquire into existence of secret agreements is prejudicial. United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Cain, 5 M.J. 698 (N.C.M.R. 1978); United States v. Seberg, 5 M.J. 589 (A.F.C.M.R. 1978); United States v. Goode, 3 M.J. 532 (A.C.M.R. 1977). Where the military judge is assured by counsel that there is no pretrial agreement, the judge may rely on counsel's assurances. Counsel are duty bound to disclose agreements. United States v. Cooke, 11 M.J. 257 (C.M.A. 1981); United States v. Bilbo, 12 M.J. 706 (N.M.C.M.R. 1982).

[128] Where all trial personnel have evidenced their understanding of the agreement, the accused is entitled to have that bargain complied with according to that understanding or enter another plea. United States v. Cifuentes, 11 M.J. 385 (C.M.A. 1981). The convening authority will be strictly bound to the terms of the pretrial agreement as understood at trial. United States v. Santos, 4 M.J. 610 (N.C.M.R. 1977); United States v. Harris, 50 C.M.R. 225 (A.C.M.R. 1975).

Chapter 19
Discovery

19–1. Disclosure and discovery generally

There are legal and ethical requirements regarding the disclosure of evidence (see table 19-1). Trial counsel have a duty to disclose certain evidence or information favorable to the defense to the defense. Military law provides a generally broader means of discovery by the defense and the accused than is normally available in civilian criminal cases.[1] The Rules for Courts- Martial, particularly R.C.M. 701, clarify and expand the military's liberal discovery practice.

The Rules of Professional Conduct for Lawyers[2] apply to all Army lawyers and, pursuant to The Judge Advocate General's authority under Rule for Courts-Martial 109,[3] to any lawyers who practice in military courts-martial proceedings. The Code of Judicial Conduct of the American Bar Association applies to judges involved in court-martial proceedings in the Army.[4] Unless clearly inconsistent with the Uniform Code of Military Justice, the Manual for Courts-Martial, or applicable departmental regulations, the American Bar Association Standards of Criminal Justice also apply to military judges, counsel, and support personnel of Army courts- martial.[5]

19–2. Constitutionally required disclosure

Due process requires that certain prosecutorial disclosures be made in criminal cases. When the prosecution fails to disclose information to the defense and thereby deprives the accused of the right to a fair trial, appellate relief will be granted. The constitutional requirements are contained in three leading cases, United States v. Brady,[6] United States v. Agurs,[7] and United States v. Bagley.[8]

In Brady, the Supreme Court held that the prosecutor's suppression of evidence favorable to the defense, after a specific defense request, violated due process and required reversal where the evidence suppressed was material to guilt or punishment. The good or bad faith of the prosecutor in withholding the evidence was not relevant.[9] Brady required the disclosure of favorable information only, and not the disclosure of all information.[10] The Government must possess the information requested, and disclosure is not required if the defense already possesses the requested information.[11] The duty to disclose evidence which affects the credibility of a Government witness may also be included within the duty imposed on prosecutors by Brady. Military courts have held that the trial counsel must disclose knowledge of the mental condition of the Government's key witness[12] and a psychiatric report concerning a Government witness.[13] A trial counsel must also disclose the fact that a Government witness is testifying pursuant to a grant of immunity, even if the defense does not request such information.[14]

In Agurs, the Supreme Court held that even in the absence of a defense discovery request, constitutional error has been committed if the prosecution fails to disclose evidence which would create a reasonable doubt as to guilt which did not otherwise exist.[15] Failure to disclose such information violates the accused's fundamental right to a fair trial.

When documentary evidence is sought by the accused, it must be shown that the material requested is relevant to the subject matter of the inquiry and that the request itself is reasonable.[16] Where the evidence calls into serious question the competence of a witness and that information comes to the attention of the trial counsel, at the very least trial

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[129] United States v. Hannan, 17 M.J. 115 (C.M.A. 1984); United States v. Miles, 12 M.J. 377 (C.M.A. 1982) (not error where military judge failed to discuss possible eligibility for parole); United States v. Bedania, 12 M.J. 373 (C.M.A. 1982); United States v. Berumen, 24 M.J. 737 (A.C.M.R. 1987).

[1] United States v. Trimper, 26 M.J. 534, 536 (A.F.C.M.R. 1988).

[2] DA Pam 27–26, (31 Dec. 1987) [hereinafter DA Pam 27–26 or Army Rules of Professional Conduct].

[3] R.C.M. 109.

[4] AR 27–10, para. 5–8.

[5] AR 27–10, para. 5–8.

[6] 373 U.S. 83 (1963).

[7] 427 U.S. 97 (1976).

[8] 473 U.S. 667 (1985).

[9] 373 U.S. 83 (1963). Defense counsel sought any statements by Brady's companion in a murder. The prosecutor withheld the companion's statements that he had pulled the trigger, not Brady.

[10] United States v. Horsey, 6 M.J. 112 (C.M.A. 1979).*Cf.* United States v. Alford, 8 M.J. 516 (A.C.M.R. 1979).

[11] United States v. Lucas, 5 M.J. 167 (C.M.A. 1978).

[12] United States v. Brickey, 16 M.J. 258 (C.M.A. 1983).

[13] United States v. Brakefield, 43 C.M.R. 828 (A.C.M.R. 1971).

[14] United States v. Webster, 1 M.J. 216 (C.M.A. 1975); Mil. R. Evid. 301(c)(2) provides:

> *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 shall be reduced to writing and shall 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.

[15] The opinion also prescribed a standard which applies when the prosecution knows or should know that its case contains perjured testimony. That standard is"any reasonable likelihood" that the evidence affected the court's judgment. 427 U.S. at 103.

[16] United States v. Toledo, 15 M.J. 255 (C.M.A. 1983).

counsel must make that information known to the defense. Where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and the prosecution knew or should have known of the perjury, the evidence will be presumed to be material unless the prosecution can show failure to disclose is harmless beyond a reasonable doubt.[17]

In Bagley, the Supreme Court addressed the prosecution's withholding of impeachment evidence specifically requested by the defense.[18] The Court treated impeachment evidence no differently than exculpatory evidence, and defined evidence as material if there is a reasonable probability that had the requested information been disclosed, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome.[19]

The Court of Military Appeals applied Bagley to the military in United States v. Eshalomi[20] and recognized the broader disclosure requirements in the military. "Although Bagley may prescribe the minimal constitutional requirements of disclosure, it does not prevent Congress or the President from prescribing higher standards for courts-martial."[21] The court relied on Bagley and held that there was a reasonable probability that the withheld evidence affected the result and undermined confidence in the outcome. Because reversal was required on those grounds the court did not reverse based upon the broader statutory and Manual provisions for discovery, but seemed inclined to do so had the issue presented itself.[22]

In Pennsylvania v. Ritchie,[23] the Supreme Court addressed the use of the sixth amendment's confrontation clause and compulsory process clause as discovery tools.[24] The Court concluded that the confrontation clause is not a constitutionally-compelled rule of pretrial discovery and that the compulsory process clause affords no greater rights to discover witnesses or to require the Government to produce evidence than does the due process clause. Consequently, the Court relied on the broader protections of the due process clause and its Brady, Agurs, and Bagley decisions as the proper framework for analysis.

Ritchie has practical significance to counsel because it provides a mechanism for resolving discovery disputes when the defense requests evidence which trial counsel possesses but does not feel compelled to disclose. The Court recognized that an accused's right to discover exculpatory evidence does not include the unsupervised authority to search through the Government's files.[25] But if an accused is aware of specific information contained in a file, the accused is free to request an in camera review by the judge to determine whether the requested information is material and must be disclosed.[26]

The Court of Military Appeals applied Ritchie and reinforced its view of liberal discovery in the military in United States v. Reece.[27] The only restrictions placed upon liberal discovery of documentary evidence by the accused are that the evidence must be relevant and necessary and the request must be reasonable.[28] The Court noted that determination of the relevance and necessity of defense-requested evidence should be made by the court--not ex parte by the prosecutor.[29] Whether inspection and argument are to be made available to defense counsel in every case is for the military judge to determine.[30]

What happens if the defense requests evidence and the Government no longer has it? In California v. Trombetta,[31] the Court held that for destroyed evidence to be material, defense must show both exculpatory value that was apparent before destruction, and that comparable evidence is unavailable by other reasonable means. However, in Arizona v. Youngblood, the Court distinguished Trombetta and held that the failure to preserve "potentially useful evidence" does not violate the accused's due process rights absent bad faith by the police.[32] In the military, the defense is entitled to

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[17] United States v. Hart, 29 M.J. 407 (C.M.A. 1990).

[18] 473 U.S. 667 (1985). The prosecution concealed the existence of informant contacts with two key Government witnesses despite a specific defense request for any promises or inducements made to prosecution witnesses.

[19] 473 U.S. 667 (1985). The dissent criticized this standard for being "an incentive for prosecutors to gamble, to play the odds, to withhold evidence and take a chance that it will later be viewed as not affecting the outcome." 473 U.S. at 701 (Marshall, J., dissenting). *Compare* Strickland v. Washington, 466 U.S. 668 (1984) (a similar outcome determinative test was used to gauge ineffective assistance of counsel).

[20] 23 M.J. 12 (C.M.A. 1986). Conviction set aside because trial counsel withheld medical and psychiatric treatment records and an inconsistent statement by the victim, the key witness in a rape, when defense had specifically requested these items for impeachment purposes.

[21] *Eshalomi*, 23 M.J. at 24.

[22] *Eshalomi*, 23 M.J. at 24.*See also* art. 46, UCMJ and R.C.M. 701.

[23] 107 S. Ct. 989 (1987). Accused requested child welfare agency's records concerning his daughter's reports of indecent acts.

[24] "In all criminal prosecutions, the accused shall enjoy the right … to be confronted by witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

[25] 107 S. Ct. at 1003.

[26] 107 S. Ct. at 1003.*See also* R.C.M. 701(g) (procedure for requesting an in camera review of requested discovery evidence by the military judge).

[27] 25 M.J. 93 (C.M.A. 1987). Defense requested social service and mental health records for two victims in a carnal knowledge case. Trial counsel denied the requests and the military judge improperly denied defense's motion for in camera inspection of the requested materials.

[28] *Reece*, 25 M.J. at 95. Mil. R. Evid. 401 establishes a low threshold of relevance. Evidence is necessary when it would contribute to a party's presentation of the case in some positive way to a matter in issue. R.C.M. 703(f)(1), discussion.

[29] *Reece*, 25 M.J. at 94 n.4.

[30] *Reece*, 25 M.J. at 95 n.6.

[31] 467 U.S. 479 (1984) (breathalyzer samples discarded by police prior to trial).

[32] 109 S. Ct. 333 (1988) (the Government did not preserve semen samples or perform laboratory tests on the samples taken from a child victim who was sodomized and sexually assaulted).

equal access to all evidence, whether or not it is apparently exculpatory.[33] Therefore, the better practice in the military is to inform the accused when testing may consume the only available evidence samples and permit the defense an opportunity to have a representative present.[34]

19–3. Ethically required disclosure

The Army Rules of Professional Conduct for Lawyers provide that trial counsel must make timely disclosure to the defense counsel of the existence of evidence known to the lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.[35] In fairness to opposing counsel, a lawyer must not make a frivolous discovery request, or fail to make a reasonably diligent effort to comply with a legally proper discovery request by opposing counsel.[36] This rule encourages the client to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging information.[37] The rule applies not only to matters communicated in confidence by the client, but to all information relating to the representation, whatever its source.[38] There are, however, certain recognized exceptions which permit disclosure by the lawyer:

a. Where the client consents after consultation with the lawyer;[39]

b. Disclosure impliedly authorized to carry out the representation (for example, disclosure to supervisory lawyers within the office and to paralegals);[40]

c. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

d. To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; and

e. To respond to allegations in any proceedings concerning the lawyer's representation of the client.[41] There are also recognized exceptions which require disclosure. A lawyer is required to disclose information:

(1) To the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system;[42]

(2) As required by Rule 3.3 to avoid assisting a criminal or fraudulent act by the client and to otherwise comply with the duty of candor to the court;[43]

(3) To the extent required by other lawful order, regulation, or statute.[44] In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.[45]

19–4. Disclosure required by the Military Rules of Evidence

The military rules of evidence impose some broad disclosure rules upon the trial counsel in addition to the other discovery requirements in military practice. Certain evidence must be disclosed to the defense prior to arraignment. Evidence offered under Section III of the Military Rules of Evidence must be disclosed if it falls within requirements of Rules 304, 311, or 321.

Confessions, admissions, and statements of the accused, oral or written, which are relevant to the case, must be disclosed to the defense by the trial counsel as long as they are known to the trial counsel and within the control of the Armed Forces. This rule applies even when the trial counsel does not intend to offer the statements at trial.[46]

Evidence which is seized from the person or property of the accused or believed to be owned by the accused must be disclosed prior to arraignment, if the trial counsel intends to offer the evidence against the accused at trial.[47] Similarly, the prosecution must disclose the evidence of a prior identification of the accused at a lineup or other identification process if the prosecution intends to use such evidence against the accused at trial.[48]

If the prosecution intends to offer evidence that was not disclosed prior to arraignment, where disclosure is required under the Military Rules of Evidence, the prosecution must provide timely notice to the military judge and to defense

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[33] Art. 46, UCMJ. United States v. Kern, 22 M.J. 49 (C.M.A. 1986) (stolen Government property was returned to the supply system).
[34] United States v. Garries, 22 M.J. 288 (C.M.A. 1986) (blood stain samples destroyed in testing).
[35] Army Rules of Professional Conduct 3.8(d).
[36] Army Rules of Professional Conduct 3.4(d); doubts should normally be resolved in favor of disclosure. Army Rules of Professional Conduct 1.6(a). A defense counsel is prohibited from disclosing information relating to representation of a client.
[37] Army Rule 1.6 comment.
[38] *Id.*
[39] Army Rule 1.6(a).
[40] *Id.*
[41] Army Rule 1.6(c) and comment.
[42] Army Rule 1.6(b).
[43] *See* Army Rule 3.3.
[44] Army Rule 1.6 comment.
[45] *Id.*
[46] Mil. R. Evid. 304(d)(1).*See* United States v. Callara, 21 M.J. 259 (C.M.A. 1986) for a discussion of relevant statements. *See also* United States v. Trimper, 28 M.M. 460 (C.M.A. 1989), *cert denied*, 110 S.Ct. 409 (1989).
[47] Mil. R. Evid. 311(d)(1).
[48] Mil. R. Evid. 321(c)(1).

counsel. If the defense objects to the lack of notice, the military judge may make such order as is required in the interest of justice.[49] Failure to give the required notice does not make the evidence inadmissible per se.[50] A recess or continuance may be sufficient remedy for failure to give the required notice, but the military judge has the power to make any order required in the interest of justice, including exclusion of the evidence. Exclusion of the evidence may be a proper remedy where the prosecution failed to disclose in bad faith, or in order to gain an unfair tactical advantage.[51]

The defense counsel is required to disclose, in enumerated sex offense cases, evidence of the victim's past sexual behavior which the defense intends to offer at trial.[52] Other Military Rules of Evidence contain particular disclosure and discovery provisions concerning grants of immunity, classified information, privileged Government information, informants, and facts underlying opinions.[53]

19–5. The Rules for Courts-Martial

a. Disclosure by the trial counsel. The trial counsel is required to disclose certain information to the defense even in the absence of a defense request for discovery. The trial counsel must, as soon as practicable after service of charges, disclose to the defense any papers which accompanied the charges when referred, the convening orders, and any signed or sworn statements relating to an offense charged which are in the possession of the trial counsel.[54] Before arraignment, the trial counsel must notify the defense of any records of prior civilian or court-martial convictions of the accused which the trial counsel may offer on the merits for any purpose, including impeachment if the accused should testify.[55] The trial counsel is also required to furnish the defense with the names and addresses of the witnesses that the Government intends to call in its case in chief, or to rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when the prosecution knows such defense will be raised.[56] Listing an individual as a witness does not obligate the trial counsel to call that witness at the trial.[57] Trial counsel must also disclose any evidence favorable to the defense.[58]

b. Upon defense request. After service of charges, and upon request of the defense counsel, the trial counsel must allow the defense to inspect any books, papers, documents, photographs, tangible objects, etc., which are in the possession, custody, or control of military authorities, and which are material to the preparation of the defense or will be used by the Government in its case in chief, or which were obtained from or belong to the accused.[59] Similarly, upon request, the trial counsel must allow the defense counsel access to any results or reports of scientific tests or physical or mental exams which are within the control of military authorities, the existence of which is known, or would with due diligence be known, to the trial counsel, and which are material to the preparation of the defense case, or are intended for use in the Government's case in chief.[60] The trial counsel must permit the defense counsel to inspect any written material which the Government will offer at presentencing proceedings, and notify the defense of the names and addresses of the witnesses that the trial counsel intends to call at the presentencing proceedings.[61]

c. Disclosure by the defense. The defense must notify the trial counsel, before the beginning of trial on the merits, of the 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.[62] In the case of the alibi defense the notice must include the specific place at which the accused is claimed to have been at the time of the alleged offense. In the case of the innocent ingestion defense, the notice must include the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question. In regards to both the alibi and innocent ingestion defense, the notice must include the names and addresses of the witnesses that the defense intends to call.[63]

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[49] Mil. R. Evid. 304(d)(2)(B), Mil. R. Evid. 311(d)(2)(B); Mil. R. Evid. 321(c)(2)(B).

[50] United States v. Trimper, 28 M.J. at 460 (continuance was appropriate remedy); United States v. Williams, 20 M.J. 686 (A.C.M.R. 1985) (failure to disclose is not a shield for an accused who intends to commit perjury; continuance adequate remedy); United States v. Walker, 12 M.J. 983 (A.F.C.M.R. 1982) (Section III rules are principally procedural notice rules, not substantive rules governing admissibility; mistrial not warranted because no prejudice to defense shown).

[51] United States v. Reynolds, 15 M.J. 1021 (A.F.C.M.R. 1983) (inadvertent failure to disclose; no prejudice to defense; recess appropriate). Chief Judge of the Army Court of Military Review in United States v. Lawrence, 19 M.J. 609, 614 (A.C.M.R. 1985), denouncing gamesmanship and encouraging compliance with the spirit of the discovery rules. *See also* United States v. Callara, 21 M.J. 259 (C.M.A. 1986) (undisclosed statement used in rebuttal; no suppression; disclosure rules not designed to give comfort to an accused who plans to lie).

[52] Mil. R. Evid. 412. *See* United States v. Whitaker, 34 M.J. 822 (A.F.C.M.R. 1992) (the absense of some specified minimum notice period results in the notice requirement serving only to "flag" the issue and channel it into the protective procedure set out in Mil. R. Evid. 412).

[53] Mil. R. Evid. 301, 505, 506, 507, 705.

[54] R.C.M. 701(a)(1).

[55] R.C.M. 701(a)(4).

[56] R.C.M. 701(a)(3). This excludes rebuttal witnesses. See United States v. Yarborough, 18 M.J. 452 (C.M.A. 1984).

[57] United States v. Fuentes, 18 M.J. 41 (C.M.A. 1984).

[58] R.C.M. 701(a)(6). This restates the due process requirements of Brady v. Maryland, *supra*, and Army Rule of Professional Conduct 3.8(d), *supra.*

[59] R.C.M.701(a)(2)(A).

[60] R.C.M. 701(a)(2)(B).*See* United States v. Trimper, 28 M.J. 460 (C.M.A. 1989), *cert. denied*, 110 S. Ct. 409 (1989).

[61] R.C.M. 701(a)(5).

[62] R.C.M. 701(b)(2). United States v. Townsend, 3 M.J. 848 (A.F.C.M.R. 1987) *rev. denied*, 25 M.J. 369 (C.M.A. 1987) (exclusion of alibi evidence improper absent knowing failure to give notice coupled with substantial prejudice to opposition's case); United States v. Walker, 25 M.J. 713 (A.C.M.R. 1987) (R.C.M. requires notice to use psychiatric testimony "before trial on the merits" not "at the time of normal motions").

[63] R.C.M. 701(b)(1).

Further, when the defense has requested disclosure of either books, papers and reports under R.C.M. 701(a)(2)(A), or reports of tests or examinations under R.C.M. 701(a)(2)(B) and the trial counsel complies with such request, trial counsel may request similar material from the defense. Defense counsel must then permit the trial counsel to inspect those materials within the possession, custody, or control of the defense and which the defense intends to offer on the defense case at trial.[64]

The defense counsel must notify the trial counsel before the beginning of the trial on the merits of the names and addresses of all witnesses whom the defense intends to call during the defense case-in-chief and provide all sworn or signed statements made by such witnesses.[65] Upon request of the trial counsel, the defense must provide the names and addresses of any witnesses whom the defense intends to call at the presentencing proceeding and permit inspection of any written material that will be presented by the defense at the presentencing proceeding.[66]

d. Enforcing the rules. The military judge has authority to enforce the disclosure rules. The judge has authority to order a party to permit discovery, to grant a continuance, to prohibit a party from introducing evidence or raising a defense that was not disclosed, or to enter any such other order as is just under the circumstances.[67] The military judge may not, however, limit the right of the accused to testify in one's own behalf.[68] There is a continuing duty to disclose both mandatory and requested items when new or additional evidence comes to light during trial.[69]

An accused is entitled to judicial enforcement of the right to proper pretrial investigation and discovery, regardless of whether such will ultimately be of benefit at trial.[70] Failure to make a timely objection, however, waives the error.[71] A guilty plea also waives any enforcement of discovery rights, even if the motion is made at trial and improperly denied by the military judge.[72] Each party must have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. Neither party may unreasonably impede the access of another party to a witness or to evidence.[73] Any party to a court-martial may bring matters to the attention of the convening authority before trial.[74] This includes issues concerning discovery and disclosure. The same matters may later be renewed on motion before the military judge if the convening authority denies the requested relief.[75] Any order issued by the convening authority must be given judicial effect.[76]

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[64] R.C.M. 701(b)(3), (4).
[65] R.C.M. 701(b)(1).
[66] R.C.M. 701(b)(1)(B)(i) and (ii).
[67] R.C.M. 701(g)(2), (3).
[68] *Id.* (Even if the defense is precluded from calling alibi witnesses for failure to comply with these disclosure requirements, the accused may testify that he or she was somewhere else at the time the offense was committed).
[69] United States v. Eshalomi, 24 M.J. 12 (C.M.A. 1986) (failure to disclose statement made to police during trial).
[70] United States v. Maness, 48 C.M.R. 512 (C.M.A. 1974).
[71] United States v. Donaldson, 49 C.M.R. 542 (C.M.A. 1975); R.C.M. 905(b)(4).
[72] United States v. Henry, 50 C.M.R. 685 (A.F.C.M.R. 1975); *see also* Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985).
[73] United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980); R.C.M. 701(e).
[74] R.C.M. 905(j).
[75] *Id.*
[76] United States v. Nix, 36 C.M.R. 76 (C.M.A. 1965).

Chapter 20
Depositions and Interrogatories[1]

20–1. Generally

Article 49, UCMJ, expressly authorizes any party to take "oral or written depositions" unless prohibited from doing so by the military judge or other proper authority[2] and Military Rule of Evidence 804 permits the use in evidence of depositions under certain conditions. It is apparent that the intent of article 49 was to use depositions in lieu of live testimony.[3] According to the terms of article 49(d), a deposition may be used only when "the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court … is ordered to sit, or beyond 100 miles from the place of trial or hearing"[4] or when the witness is actually unavailable[5] or cannot be located.[6] The Government has the burden of demonstrating that a witness is unavailable when it seeks to introduce deposition testimony. The test is whether the witness is unavailable despite good faith efforts to produce by the Government.[7]

The Court of Military Appeals has held that the geographic justifications for use of depositions are invalid insofar as they relate to soldiers[8] and has strongly suggested that constitutional standards dictate the same result insofar as civilian witnesses are concerned.[9] Thus, actual unavailability is necessary. Whatever the article's original intent, the primary use of depositions is now clearly limited to preservation of testimony.[10] It was the intent of Congress that no deposition take place unless the accused is given the opportunity to attend[11] and military law gives the accused the right to attend the deposition with counsel.[12] Under these circumstances, the accused's confrontation right is protected as the accused is both present at a prosecution deposition and has the right through counsel to cross-examine the witness to be deposed. What the accused loses is the ability to conduct the cross-examination before the court members. In a particular case, this loss of demeanor evidence may be harmful, but if the witness is actually unavailable for trial, the accused would seem to have no cognizable constitutional complaint.[13] A similar result follows from a compulsory process examination. Of course, should the witness not be actually unavailable, as when the witness has been rendered unavailable due to reassignment to a military duty that another soldier could perform as well, substantial

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[1] UCMJ art. 49 uses the expression "written deposition" to refer to what R.C.M. 702(g)(2)(C) and customary civilian practice refer to as written interrogatories.

[2] UCMJ art. 49(a). *See generally*McGovern, *The Military Oral Deposition and Modern Communications*, 45 Mil. L. Rev. 43 (1969); Everett, *The Role of the Deposition in Military Justice*, 7 Mil. L. Rev. 131 (1960). The codal provision permits the taking of depositions unless the proper officer "forbids it for good cause." UCMJ art. 49(a). R.C.M. 702 provides that any party may request to take oral depositions or, with approval of the other party, written depositions. Written depositions may not be ordered without consent of the opposing party except when the deposition is ordered solely in lieu of producing a sentencing witness and if it is determined that the interests of the parties and the court-martial can be adequately served by a written deposition. R.C.M. 702(c)(3)(B). The request may be granted before or after referral by the convening authority or after referral by the military judge. R.C.M. 702(b). A request may be denied only for good cause. R.C.M. 702(c)(3). If the case is being tried as a capital case, only the defense may utilize depositions. UCMJ art. 49(d)–(f).

[3] It is probable that depositions were initially used to obtain the testimony of military witnesses stationed far from the situs of trial. *See*, *e.g.*, W. Winthrop, Military Law and Precedents 352-53 (2d ed. 1896, 1920 reprint). It is also probable that depositions were used to obtain the testimony of civilians who were not subject to compulsory process as no general statute providing for such process existed. *Id.* at 352 n.55, 353 n.58. The accused apparently had no right to attend the deposition, at least not at Government expense. *Id.* at 355–57.

[4] UCMJ art. 49(d)(1).*See infra* note 11.

[5] UCMJ art 49(d)(2) (permits depositions when the witness "by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause is unable or refuses to appear"). The current approach of the Court of Military Appeals in determining witness unavailability due to "military necessity" suggests that, absent a declared war, it is improbable that depositions will be admissible at trial because of military necessity. *See*, *e.g.*, United States v. Davis, 41 C.M.R. 217 (C.M.A. 1970). Once a witness is found to be material, military necessity has a bearing only as to when and in what form the testimony will be presented, not whether it will be presented at all. United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976); United States v. Combs, 20 M.J. 441 (C.M.A. 1985). *See also infra* chap. 21.

[6] UCMJ art. 49(d)(3).

[7] United States v. Cokeley, 22 M.J. 225 (C.M.A. 1985). The trial judge may delay a trial where the witness is ill but may recover. The trial judge must weigh all the facts keeping in mind the preference for live testimony. Factors to be considered: (1) importance of the testimony; (2) amount of delay; (3) trustworthiness of alternatives; (4) nature and extent of earlier cross-examination; and (5) the need for prompt trial and any special circumstances militating for or against delay. *Id.* at 229.*See also* United States v. Burns, 27 M.J. 92, 97 (C.M.A. 1988), United States v. Barror, 23 M.J. 370, 373 (C.M.A. 1987) (a witness is not "unavailable" unless the Government has exhausted every reasonable means to secure the witness' live testimony).

[8] Although UCMJ art. 49(d)(1), permits the use of depositions when the witness is outside the civil jurisdiction in which trial takes place or is more than 100 miles from the location of trial, the Court of Military Appeals has limited the article to civilian witnesses. United States v. Davis, 41 C.M.R. 217 (C.M.A. 1970); United States v. Ciarletta, 23 C.M.R. 70, 78 (C.M.A. 1957). The court's reasoning in *Davis*, to the extent that the jury must weigh the demeanor of the witness, 41 C.M.R. at 220 (quoting Barber v. Page, 390 U.S. 719, 725 (1968)), suggests that the article may be invalid as to civilians as well. *See also*United States v. Chatmon, 41 C.M.R. 807 (N.C.M.R. 1970).

[9] *See supra* note 8. Although Mil. R. Evid. 804(a) is illustrative rather than limiting, its express enumeration of UCMJ art. 49(d)(2) and silence as to article 49(d)(1), suggests that a deposition obtained under article 49(d)(1) may be inadmissible under the Military Rules of Evidence.

[10] R.C.M. 702(a) states"[a] deposition may be ordered whenever … it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Art. 32 or a court-martial." *But see* United States v. Killebrew, 9 M.J. 154, 161 (C.M.A. 1980) (deposition may be used to discover testimony of witness who refuses to be interviewed by counsel).

[11] *Uniform Code of Military Justice, Hearings Before a Subcomm. of the House Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 696 (1949) (statement of Rep. Elston).

[12] United States v. Crockett, 21 M.J. 423 (C.M.A. 1986); United States v. Jacoby, 29 C.M.R. 244, 249 (C.M.A. 1960); R.C.M. 702(d)(2).

[13] The Supreme Court has ruled that although there is a preference for a witness' physical confrontation with the fact finders, depositions will be admissible if actual unavailability is shown. Barber v. Page, 390 U.S. 719 (1963). *See also* Mattox v. United States, 156 U.S. 237 (1895); United States v. Gaines, 43 C.M.R. 397 (C.M.A. 1971).

confrontation and compulsory process problems may result.[14]

20–2. Procedure

Procedurally, the UCMJ requires that reasonable written notice of the time and place of the deposition be given to those parties who have not requested the deposition[15] and that "depositions may be taken before and authenticated by any military or civil officer authorized … to administer oaths."[16] The Manual requires that oral depositions be recorded verbatim and authenticated by the officer taking the deposition.[17] Appropriate objections should be made during the deposition, but the deposing officer is not to rule upon them; they are merely to be recorded for later resolution.[18] Although, absent actual unavailability, the defense generally has the right to prohibit the receipt into evidence of a deposition, trial tactics are often such that the defense has no particular reason to object to the use of depositions provided that the testimony of the witness can carry sufficient persuasive effect. Given the widespread availability of videotape recorders in modern society and the Armed Forces, both trial and defense counsel should make increasing use of videotaped depositions.[19] Such depositions can save substantial amounts of trial time, may be edited following the military judge's ruling on objections, and will convey the demeanor of the witness to the fact finder. Indeed, given mutual consent, whole portions of trial can be presented in this fashion.[20] If videotaped depositions are admitted into evidence at trial, the videotape should be attached as an exhibit to the record of trial.[21]

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[14] Although an accused cannot normally be forced to present testimony of a material witness by way of deposition, the military judge has the discretion to determine whether justice can be served by allowing the testimony of a material witness in an alternative form such as a deposition. United States v. Combs, 20 M.J. 441 (C.M.A. 1985); United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978); United States v. Jones, 20 M.J. 919 (N.M.C.M.R. 1985).

[15] UCMJ art. 49(b); R.C.M. 702(e). This notice must also include the name and address of each witness to be examined. *Id.* On motion of a party, the deposition officer may for cause extend or shorten the time or change the place for taking the deposition. *Id.*

[16] UCMJ art. 49(c); R.C.M. 702(d)(1).

[17] R.C.M. 702(f)(6), (8).

[18] R.C.M. 702(f)(7).

[19] *See*, *e.g.*, United States v. Crockett, 21 M.J. 423 (C.M.A. 1986) where the court endorsed the use of videotaped depositions. Videotapes and audiotapes are now specifically allowed. UCMJ art. 49(f); R.C.M. 702(g)(3); United States v. Dempsey, 2 M.J. 242 (A.F.C.M.R.) *petition denied*, 2 M.J. 149 (C.M.A. 1976).*See also* McGovern, *The Military Oral Deposition and Modern Communications*, 45 Mil. L. Rev. 43, 59–75 (1969).

[20] Because of the ability to present edited videotapes to juries, substantial amounts of juror and trial time have been saved. United States v. Dempsey, 2 M.J. 242 (A.F.C.M.R.) *petition denied*, 2 M.J. 149 (C.M.A. 1976); *see also* United States v. Hays, 20 M.J. 71 (C.M.A. 1985).

[21] United States v. Kelsey, 14 M.J. 545 (A.C.M.R. 1982); Mil. R. Evid. 1001(2).

Chapter 21
Production of Witnesses and Evidence

21–1. General

Congress has declared:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue.[1]

In response, the President has, through the Manual, directed that process be issued by the trial counsel on behalf of both the defense and prosecution[2] and that defense requests for witnesses be submitted to the trial counsel with any disagreements between defense and trial counsel about calling the witnesses to be resolved by the military judge.[3] The present system necessarily raises two distinct questions: when will the trial counsel attempt to obtain evidence, and what means are available to the trial counsel to do so?

21–2. General procedures

Insofar as witnesses are concerned,[4] the Manual vests in the trial counsel the decision and authority to obtain witnesses whose testimony is relevant and necessary for the prosecution.[5]

The defense counsel must submit a written list of witnesses to the trial counsel.[6] The defense request must also contain the telephone number, if known, address or location of the witness, and a synopsis of the expected testimony sufficient to show its relevance and necessity.[7] If the trial counsel contends production is not required under the rule, the matter is submitted to the military judge. If the parties stipulate to a fact then it is not in issue and a witness is probably not required.[8]

Under R.C.M. 703, the individual trial counsel's decision to obtain a witness is not subject to review. In actual practice, the prosecution's decision is subject to the review of the trial counsel's superiors, usually the staff judge advocate and convening authority, who may direct the trial counsel not to subpoena or otherwise obtain a witness for a variety of reasons, including financial ones.[9] The defense attempt to obtain witnesses is, however, subject to definite review. Although, pragmatically, the defense may obtain its own witnesses and call them at trial, it lacks the power to subpoena them or to pay witness fees or travel costs unless it complies with R.C.M. 703. Consequently, if the defense desires to escape the constraints of R.C.M. 703, it is in practice limited in most cases to local volunteer witnesses. Even then, a failure to comply with R.C.M. 703 means that the trial counsel is legally blameless if the witness fails to appear, depriving the defense of a potentially useful weapon at trial.[10]

Subject to the availability of extraordinary relief,[11] the decision of the military judge as to the production of a witness is not subject to interlocutory review. The Court of Military Appeals has held that, once the judge orders the Government to produce the witness, the Government must either produce the witness or abate the proceedings.[12] Thus, military operations, expense, or inconvenience can only delay the trial rather than justify proceeding without an

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[1] UCMJ art. 46. Article 46 implements the accused's sixth amendment right to compulsory process. United States v. Davison, 4 M.J. 702, 704 (A.C.M.R. 1977).

[2] R.C.M. 703(c)(2).

[3] R.C.M. 703(c)(2)(D). The trial counsel should inform the convening authority, however, when significant or unusual costs would be involved in otaining a witness so the convening authority can elect to dispose of the matter by other means. R.C.M. 703(c)(2) discussion. *See* United States v. Hudson, 20 M.J. 607, 609 (A.F.C.M.R. 1985).

[4] Documentary and other evidence is generally dealt with in the same manner as witnesses. *See generally* R.C.M. 703(f).

[5] R.C.M. 703 (c)(1).

[6] R.C.M.703(c)(2)(A).

[7] R.C.M. 703(c)(2)(B). For witnesses on sentencing, the defense must make an additional showing why the witness' personal appearance is necessary under R.C.M. 1001(e). R.C.M. 703(c)(2)(B)(ii).

[8] R.C.M. 703b)1) discussion.

[9] Such reasons could include a desire not to interfere with the activities of the witness, particularly likely when the witness is a highly placed civilian or military officer, a possibility of revealing classified information, or simply a desire to avoid delaying the trial.

[10] In a highly unusual case, the defense might be able to show that it has a substantial interest outweighing the Government's interest in knowing the identity of the defense witnesses. Under these circumstances, the defense should make an *ex parte*application to the military judge with the record of the application remaining sealed until trial. If the prosecution has failed to obtain a defense witness without cause, the military judge may take corrective action to include granting a continuance or giving special instructions to the members. *Cf.* United States v. Kilby, 3 M.J. 938, 944–45 (N.C.M.R. 1977). Such a result is less likely if the defense fails to comply with R.C.M. 703.

[11] *Cf.* Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979); United States v. Mitchell, 15 M.J. 937, 941 (N.M.C.M.R. 1983).

[12] United States v. Jefferson, 13 M.J. 1 (C.M.A. 1982); United States v. Carpenter, 1 M.J. 384, 385–86 (C.M.A. 1976). *Accord* United States v. Willis, 3 M.J. 94 (C.M.A. 1977). The quoted language has been disclaimed by Judge Cook as being overbroad. *Id.* at 96–100 (Cook, J., dissenting). The court in *Willis*found that during a sentencing rehearing the accused could not be deprived, on the ground of military convenience, of a relevant and material witness. The court has, however, held that there is no right to cumulative evidence. United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977). *See generally infra* text accompanying notes 59–65. *See also* R.C.M. 703(b)(3).

otherwise relevant and necessary witness.[13] A witness who cannot be located, however, obviously cannot be produced and trial need not be affected. If a witness' location is known but the witness is unavailable, the remedy may be a continuance or abatement of the proceedings unless the unavailability was the fault of or could have been prevented by the requesting party.[14]

21–3. Experts

Because many trials are dependent upon the use of expert testimony, procurement of expert witnesses may clearly be critical to a case. Consequently, expert witnesses are treated specially in the Manual. Presumably, because of availability and lack of funds,[15] most defense and trial counsel use Government-employed experts. The Manual for Courts- Martial does contemplate, however, the possible employment of other experts:

> When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.[16]

Request for employment of experts under R.C.M. 703(d) are often litigated,[17] and the denial of any specific request for an expert may raise significant questions of the rights to compulsory process and fair trial under the Constitution.[18] It is important to note, however, that nothing in the UCMJ or the Manual requires payment of special fees to obtain the testimony of an expert who happens to be a witness. Thus, a medical doctor who has previously treated the accused could be subpoenaed and paid normal witness fees if he or she were to be questioned about that treatment. The Manual would appear to require some form of expert fee if the expert were to be asked to make special preparations for testimony.[19] While a defense request is required for most experts, The Court of Military Appeals has created an exception for experts who perform subjective evaluations. If the Government intends to introduce into evidence the results of a subjective evaluation (for example, latent fingerprint analysis, handwriting analysis), the Government must provide notice to the defense and must produce the expert if requested by the defense.[20]

21–4. Form of the R.C.M. 703 request for witnesses

The Manual requires that a request for a defense witness be in writing and contain a synopsis of the expected testimony sufficient to show its relevance and necessity.[21] In certain circumstances, however, the Government will be held

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[13] United States v. Combs, 20 M.J. 441 (C.M.A. 1985); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976). Substitutes for live testimony, such as stipulations, may be acceptable. *See generally infra* text accompanying notes 66–79.

[14] R.C.M. 703(b)(3).

[15] The prosecution will be concerned with expenditure of Government funds while the defense will be limited to the funds available to the accused unless the Government can be required to pay an expert's fee under R.C.M. 703(d).

[16] *Id.*The fees authorized are dependent upon service regulations. In the Navy, for example: "The convening authority ... will fix the limit of compensation ... on the basis of the normal compensation paid by United States attorneys for attendance of a witness of such standing in the United States courts in the area involved." Navy JAGMAN § 0138k(1). For Army procedures, see UCMJ art. 47; R.C.M. 405(g)(2)(c)(3); Department of Defense Joint Travel Regulations, vol. 2, para. C3054, C6000.

[17] *See*,*e.g.*, United States v. Johnson, 47 C.M.R. 402, 404–06 (C.M.A. 1973) (holding that the defense failed to demonstrate necessity for employment of a civilian psychiatrist). *See also* United States v. Garries, 22 M.J. 288 (C.M.A. 1986) (where a defense request for an investigator was denied); United States v. Kinsler, 24 M.J. 855 (A.C.M.R. 1987) (where a fishing expedition by the defense counsel did not require the employment of an expert); United States v. Dibb, 26 M.J. 830 (A.C.M.R. 1988) (theory was too creative to be believable); United States v. Hagan, 25 M.J. 78 (C.M.A. 1987), *cert. denied*, 108 S. Ct. 1015 (1988) (not guaranteed expert of choice).

[18] See Ake v. Oklahoma, 470 U.S. 68 (1985) (where sanity was important issue, accused had a constitutional right for expert assistance in the preparation, presentation, and evaluation of the defense case). For a thorough analysis of the scope and adequacy of R.C.M. 703(d),*see* Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial*, 106 Mil. L. Rev. 77 (1984) [hereinafter cited as Hahn].*See*, *e.g.*, United States v. Van Horn, 26 M.J. 434 (C.M.A. 1988).

[19] R.C.M. 703(d) speaks of "employment of expert witnesses." Accordingly, requiring an expert to perform tests in advance of trial or to make other pretrial preparation would require an expert fee. The weight of nonmilitary authority would not, however, require payment of expert fees if preparation by the expert was not required. *See generally*Hahn, *supra* note 18, at 98–102. Government employees or individuals under contract to the Government to provide expert services under R.C.M. 703(e) are *not* entitled to expert fees. R.C.M. 703(d) analysis.

[20] United States v. Broadnax, 23 M.J. 389 (C.M.. 1987).

[21] R.C.M. 703(c)(2)(B)(i). *See, e.g.*, United States v. Wagner, 5 M.J. 461, 469 (C.M.A. 1978); United States v. Lucas, 5 M.J. 167, 172 (C.M.A. 1978). The procedures are recounted in numerous cases. *e.g.*, United States v. Jovan, 3 M.J. 136 (C.M.A. 1977); United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975); United States v. Manos, 37 C.M.R. 274, 280–81 (C.M.A. 1967) (Quinn, C.J., concurring in part, dissenting in part) (request should include synopsis of expected testimony, logical and legal relevance of evidence); United States v. Powell, 4 M.J. 551 (A.F.C.M.R. 1977); United States v. Courts, 4 M.J. 518 (C.G.C.M.R. 1977), *aff'd*, 9 M.J. 285 (C.M.A. 1980); United States v. Green, 2 M.J. 823 (A.C.M.R. 1976); United States v. Corley, 1 M.J. 584 (A.C.M.R. 1975). A diminished standard of materiality appears to apply to experts who have prepared Government laboratory reports offered against the accused at trial. United States v. Vietor, 10 M.J. 69 (C.M.A. 1980). The synopsis of the expected testimony required by the Manual must be favorable to the accused. *See, e.g.*, United States v. Menoken, 14 M.J. 10 (C.M.A. 1982); United States v. Rappaport, 19 M.J. 708 (A.F.C.M.R. 1984).

responsible for knowledge within its possession so that an otherwise deficient R.C.M. 703 request will be held sufficient.[22] R.C.M. 703 necessarily presumes that the defense will be able to interview[23] the witness in order to set forth an adequate synopsis and the courts may be expected to be particularly hostile to a witness request made without any contact with the given witness.[24] Although the Government cannot require a witness to talk with defense counsel,[25] the Government may not interfere with defense access to a witness.[26] Chief Judge Everett has recognized that, in some cases, such as those in which the witness is a hostile one, the synopsis requirement cannot be met and "a rigid application of these requirements would produce a conflict with an accused's statutory and constitutional right to compulsory process."[27] Consequently, when defense counsel cannot contact a witness who is believed to have material testimony, that fact should be set forth with an explanation.[28] When a defense request for a witness is heard by the military judge, the judge must determine the issue "on the basis of the matters presented to the judge … not just that contained in the written request."[29]

21–5. Timeliness

The Manual does not prescribe exact requirements for witness requests. R.C.M. 703(c)(2)(C), however, provides that witness lists shall be submitted in a reasonable time. Also, the military judge may set a specific date by which witness lists must be produced.[30] Members of the Court of Military Appeals have clearly indicated their willingness to consider the timeliness of a defense request[31] and the Courts of Military Review have considered untimeliness in holding that the defense lacked a right to witnesses.[32] While authority is slight, untimeliness has been defined as "whether the request is delayed unnecessarily until such a time as to interfere with the orderly prosecution of the case."[33] The Court of Military Appeals has stated in dicta, however, that "while a defense counsel, for tactical reasons, may properly delay a request for witnesses until after the charges are referred to trial, he thereby assumes the risk that … in the interval the witness may become unavailable to testify at trial." [34] Thus, by awaiting referral of charges, counsel may not have an untimely submission but may be unable to obtain the requested witness. An unnecessary delay in filing a request risks having the request treated as untimely especially when the delay results in the transfer of a witness known to the defense to be pending reassignment.[35] In most cases, given the brevity of most courts-martial, a request for the procurement of a witness made at trial, untimely or otherwise, effectively constitutes a motion for a continuance. When

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[22] *E.g.*, United States v. Lucas, 5 M.J. 167, 172 (C.M.A. 1978) (staff judge advocate charged with knowledge of the content of a pretrial statement made by the witness at the pretrial investigation).

[23] Chief Judge Everett appears to believe that some form of contact is generally necessary, but that the contact need not be an in person interview. United States v. Vietor, 10 M.J. 69, 78 (C.M.A. 1980) (Everett, C.J., concurring in the result). *Cf.* United States v. Jefferson, 13 M.J. 1, 7–8 (C.M.A. 1982) (Everett, C.J., dissenting) (failure to interview witness was ineffective assistance). The drafters of the Military Rules of Evidence, on the other hand, concluded that the defense counsel must be afforded the right to an in-person interview of potential witnesses before counsel could be required to raise a suppression motion with specificity. Mil. R. Evid. 304 analysis. Inasmuch as the procurement of a witness on the merits may be more essential to due process than the procurement of a witness for a suppression motion, the Military Rules of Evidence necessarily suggest that the defense be afforded the right to an in-person interview before a request for a witness under R.C.M. 703 can be held insufficiently justified. While the defense right to *access* to the witness is clear, a witness does not have to cooperate with and talk to counsel. United States v. Killebrew, 9 M.J. 154, 161 (C.M.A. 1980); United States v. Doyle, 17 C.M.R. 615, 640 (A.F.B.R. 1954). *Cf.* United States v. Enloe, 35 C.M.R. 228 (C.M.A. 1965) (regulation requiring third party to be present for defense counsel interview of Office of Special Investigation agents invalid).

[24] *See, e.g.*, United States v. Corley, 1 M.J. 584, 586 (A.C.M.R. 1975) (counsel's representations that two witnesses would give alibi testimony held insufficient when "not corroborated or verified in any way"); United States v. Carey, 1 M.J. 761, 766–67 (A.F.C.M.R. 1975).

[25] United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980) (witness may refuse to answer questions during interview so long as the Government has not induced that refusal).

[26] *Id.* at 160 (Government improperly denied defense access by secretly transferring the witness). United States v. Carrigan, 804 F.2d 599 (10th Cir. 1986) (Government improperly took steps to chill a potential witness from discussing the facts with defense counsel); *but see* United States v. Morris, 24 M.J. 93 (C.M.A. 1987) (the Government, in order to assist defense preparation, detailed a judge advocate not involved in the case to be present during an interview of a defense investigator).

[27] United States v. Vietor, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in the result).

[28] *Cf.* United States v. Carey, 1 M.J. 761, 767 (A.F.C.M.R. 1975).

[29] United States v. Corley, 1 M.J. 584, 586 (A.C.M.R. 1975) (citing United States v. Jones, 44 C.M.R. 269 (C.M.A. 1972)); United States v. Bright, 9 M.J. 789, 790 (A.C.M.R. 1980). *See* United States v. Courts, 4 M.J. 518, 525–26 (C.G.C.M.R. 1977) (Lynch, J., concurring in part, dissenting in part); United States v. Green, 2 M.J. 823, 826 (A.C.M.R. 1976). *Jones*, however, does not necessarily stand for this proposition as the court in *Jones* determined the propriety of the trial judge's ruling on the basis of all the information given to the judge because he"presumably … considered it in his ruling." 44 C.M.R. at 271.

[30] R.C.M.703(c)(2)(C).

[31] *See, e.g.*, United States v. Vietor, 10 M.J. 69, 72, 78 (C.M.A. 1980) (Cook, J. and Everett, C.J., individually concurring in the result with separate opinions); United States v. Stocker, 7 M.J. 373, 374 (C.M.A. 1979) (summary disposition) (Cook, J., dissenting on the grounds that defense request for witness was untimely).

[32] *See, e.g.*, United States v. Onstad, 4 M.J. 661, 664 (A.C.M.R. 1977) (dicta). A theory of waiver may be applicable. *Cf.* United States v. Briers, 7 M.J. 776 (A.C.M.R. 1979) (failure to request lab analyst when judge gave defense right to do so constituted waiver); United States v. Mackey, 7 M.J. 649, 654 (A.C.M.R. 1979) (same).

[33] United States v. Hawkins, 19 C.M.R. 261, 268 (C.M.A. 1955) (error to fail to produce witness located in stockade at trial situs where request made day before trial). *Cf.* United States v. Mitchell, 11 M.J. 907, 910 (A.C.M.R. 1981) (proper to deny request for material witness where defense knew of witness before trial but delayed request until Government rested its case).

[34] United States v. Cottle, 14 M.J. 26, 263 (C.M.A. 1982). The lack of a *pretrial* request is not conclusive. *See, e.g.*, United States v. Johnson, 3 M.J. 772, 773 (A.C.M.R. 1977); United States v. Phillippy, 2 M.J. 297, 300 (A.F.C.M.R. 1976). *See also*United States v. Bennett, 12 M.J. 463, 464 (C.M.A. 1982).

[35] *E.g.*, United States v. Onstad, 4 M.J. 661, 664 (A.C.M.R. 1977) (dicta) (overseas witness). *See also*,United States v. Credit, 2 M.J. 631, 646 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977), *aff'd on remand*, 6 M.J. 719 (A.F.C.M.R. 1978),*aff'd*, 8 M.J. 190 (C.M.A. 1980) (defense request reviewed during trial implicitly held to be untimely when request had been withdrawn and lab technician discharged in interim).

the request is untimely, the decision is discretionary with the military judge.[36] Nonetheless, if the defense shows that the witness is relevant and necessary, the judge should, in the interests of justice, grant the request.[37] To do otherwise would penalize the accused for the counsel's conduct and would raise a strong probability of ultimate reversal for inadequacy of counsel.[38]

21–6. Materiality

The 1969 Manual had required that a defense request for a witness give "full reasons which necessitate the personal appearance of the witness, and … any other matter showing that the expected testimony is necessary to the ends of justice."[39] Perhaps, because the prosecution was not required to procure a prosecution witness on its own motion unless "satisfied that the testimony of the witness is material and necessary,"[40] the courts had consistently viewed paragraph 115 as requiring that the defense demonstrate the "materiality" of its requested witnesses.[41] The exact meaning of "materiality" has been unclear. In its evidentiary sense, "materiality" requires at least that the evidence involved be relevant.[42] It also may mean in any given case that, considering all of the factors unique to the case,[43] the evidence is important,[44] a determination which might include the availability of substitute forms of evidence.[45] Recently, the Court of Military Appeals has attempted to clarify the issue:

> The word "material" appears misused. Obviously a witness' testimony must be material to be admissible … However, the terms may have been confused in earlier cases, the true test is essentiality. If a witness is essential for the presentation of the prosecution's case, he will be present or the case will fail. The defense has a similar right.[46]

The use of the word, "essential," can hardly be considered as resolving this question for the term is itself subject to ambiguity. What degree of probative value is necessary before a prospective witness' testimony will be "essential"? In past cases, witnesses who established affirmative defenses such as lack of jurisdiction or self-defense have usually been considered to be material witnesses[47] as have defense character witnesses[48] when the accused's character has been in

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[36] *See, e.g.*, United States v. Stocker, 7 M.J. 373, 374 (C.M.A. 1979) (summary disposition) (Cook, J., dissenting); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979) (Cook, J., concurring in part and dissenting in part).

[37] *See, e.g.*, United States v. Jouan, 3 M.J. 136, 137 (C.M.A. 1977); United States v. Brown, 28 M.J. 644 (A.C.M.R. 1989); United States v. Onstad, 4 M.J. 661, 664 (A.C.M.R. 1977); United States v. Green, 2 M.J. 823, 826 (A.C.M.R. 1976).

[38] United States v. Williams, 23 M.J. 362 C.M.A. 1987) improper to deny accused right to make a motion to suppress evidence where counsel failed to follow a procedural rule). *See also* United States v. Ortiz, 24 M.J. 323 (C.M.A. 1987) counsel failed to follow filing deadlines).

[39] MCM, 1969, para. 115a.

[40] *Id.*

[41] *See, e.g.*, United States v. Narine, 14 M.J. 55, 56 (C.M.A. 1982); United States v. Hampton, 7 M.J. 284, 285 (C.M.A. 1979); United States v. Wagner, 5 M.J. 461 (C.M.A. 1978); United States v. Lucas, 5 M.J. 167 (C.M.A. 1978); United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975); United States v. Marshall, 3 M.J. 1047 (A.F.C.M.R. 1977). *Cf.* United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (noting, however, that the Court expressed "no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance … of witnesses within the United States." *Id.* at 873 n.9.

[42] *See, e.g.*, United States v. Courts, 4 M.J. 518, 522–23 (C.G.C.M.R. 1977). Mil. R. Evid. 401 defines what is often termed, "logical relevance" or the requirement that the evidence involved have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Phrased differently, in the case of determining witness availability, the evidence must tend to negate the prosecution's case or to support the defense's. United States v. Iturralde-Aponte, 1 M.J. 196, 197–98 (C.M.A. 1975). "Relevance" has additional scope, however, inasmuch as evidentiary rules which exclude evidence because of doubt of its probative value, prejudicial impact on the members, or for other reasons for social policy are often termed rules of"legal relevance." *See, e.g.*, I. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, Criminal Evidence 62–65 (1979). Mil. R. Evid. 403–05 and 407–12 are rules of legal relevance as are the rules of privilege, Mil. R. Evid. 501–09, and testimony which would be inadmissible under them should not ordinarily be"material" for purposes of obtaining witnesses. *But see* Chambers v. Mississippi, 410 U.S. 24 (1973).

[43] United States v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978).

[44] At common law,"materiality" had been given two alternative meanings: that the evidence is of consequence to the case and that the evidence is of particular probative value. The paragraph 115 standard included this latter meaning. *See supra* note 42.

[45] A true materiality standard should not include this factor. To the extent that it plays a role in the question of making a witness available, *see infra* text accompanying notes 54–67, it is because of the phrasing of paragraph 115a, which does not as such specify"materiality" as the prerequisite for obtaining a witness.

[46] United States v. Bennett, 12 M.J. 463, 465 n.4 (C.M.A. 1982); United States v. Cottle, 14 M.J. 260, 265 (C.M.A. 1982). In the past, the court, in determining whether a failure to obtain a requested defense witness necessitated reversal, stated:"materiality … must embrace the 'reasonable likelihood' that the evidence could have affected the judgment of the military judge or court members."United States v. Hampton, 7 M.J. 284, 285 (C.M.A. 1979) (citing Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Lucas, 5 M.J. 167, 172–73 (C.M.A. 1978)); United States v. Tippit, 7 M.J. 908 (A.F.C.M.R. 1979); United States v. Morales, 16 M.J. 501, 502 (A.F.C.M.R. 1983). *See* Westen,*CompulsoryProcess II*, 74 Mich. L. Rev. 191, 222–23 and n.108 (1975).

[47] *See, e.g.*, United States v. Hampton, 7 M.J. 284 (C.M.A. 1979) (lack of jurisdiction; witness immaterial when defense counsel had not interviewed him); United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975) (self-defense); United States v. Dawkins, 10 M.J. 620 (A.F.C.M.R. 1980) (insanity defense; witness immaterial when psychiatric interview with defendant needed and witness did not interview defendant); United States v. Jones, 6 M.J. 770 (A.C.M.R. 1978) (insanity defense; witness material when no indication they would retract earlier sanity board opinions); United States v. Christian, 6 M.J. 624 (A.C.M.R. 1978) (suppression motion; witness immaterial if no adequate showing that witness remembered incident); United States v. Onstad, 4 M.J. 661 (A.C.M.R. 1977) (informant's perjury at art. 32 investigation, but inadequate showing of materiality on facts); United States v. Green, 2 M.J. 823 (A.C.M.R. 1976) (alibi); United States v. Staton, 48 C.M.R. 250 (A.C.M.R. 1974) (no intent to desert); United States v. Snead, 45 C.M.R. 382 (A.C.M.R. 1972) (entrapment).

[48] United States v. Williams, 3 M.J. 239 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976); United States v. Giermek, 3 M.J. 1013 (C.G.C.M.R. 1977); United States v. Ambalada, 1 M.J. 1132 (N.C.M.R. 1977). *See generally* Mil. R. Evid. 404(a)(1), 405(a), (b). When the defendant's character for truthfulness is in issue, polygraph evidence may be material. Because such evidence has traditionally been viewed as being logically and

issue.[49] While these cases may deal with "essential" evidence, it is unlikely that the defense could or should be restricted to witnesses presenting evidence of such ultimately critical value.[50] Interestingly, R.C.M. 703(b)(1) created a potentially more useful standard: "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary." The discussion to the rule states:"Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." The Rule is qualified in R.C.M. 703(b)(3), which provides that, notwithstanding R.C.M. 703(b)(1), a party is not entitled to production of a witness who would be unavailable under Military Rule of Evidence 804(a) unless the witness' testimony "is of such central importance to an issue that it is essential to a fair trial." The rule's caveat is not likely to be of importance except insofar as it incorporates, through Military Rule of Evidence 804(a)(6), article 49(d)(2) of the UCMJ which, in relevant part, makes a witness unavailable "by reason of … military necessity, … or other reasonable cause." Unless this exception is used in an improbably broad fashion, the Rule appears both more useful and more likely to comply with an accused's constitutional and statutory rights to obtain and present evidence than does the court's "essentiality" standard.

21–7. Cumulative testimony

Inherent in the right to compulsory process is the limitation of relevancy.[51] Military Rule of Evidence 403 allows evidence to be excluded, even if logically relevant,[52] "if its probative value is substantially outweighed … by considerations … of needless presentation of cumulative evidence." If evidence is cumulative under Rule 403, it is "legally irrelevant" and there is no right to introduce it.[53]

The issue of cumulative testimony often arises when character evidence is sought to be introduced.[54] To establish an adequate record for appeal, the defense should furnish to the judge the name and location of each character witness, how long each witness has known the defendant, the capacity in which the witness knew the defendant, and the characteristics to which the witness will testify.[55] The standard used in determining cumulativeness is not merely whether the evidence is repetitive. Instead, the military judge must "in his sound discretion decide whether, under the circumstances of the given case, there is anything to be gained from an additional witness saying the same thing other witnesses have said." [56] If testimony is declared to be cumulative, the judge should indicate how many of such witnesses will be subpoenaed at Government expense. Only the defense, though, can decide which witnesses will be called to testify.[57]

21–8. Alternatives to personal attendance at trial of a witness

The Court of Military Appeals has stated that, even though a witness is material, personal attendance at trial may be obviated by other effective alternatives,[58] including depositions, interrogatories, and stipulation to the expected testimony of the witness.[59] If the Government is willing to stipulate to the witness' expected testimony, there may be no need for the witness, especially inasmuch as the defense may have obtained more through the stipulation than it would

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legally irrelevant, however, no compulsory process right to introduce such evidence has been recognize. United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1981). *But see* United States v. Gipson, 24 M.J. 246 (C.M.A. 1987). A witness who is more credible and articulate is material even though another witness has already testified to the events. United States v. Jouan, 3 M.J. 136 (C.M.A. 1977).

[49] Mil. R. Evid. 404(a) strictly limits use of character evidence restricting it in most cases to"[e]vidence of a pertinent trait of the character of the accused." Mil. R. Evid. 404(a)(1). The analysis of Rule 404 declares that the rule makes evidence of good general character inadmissible although it would allow "evidence of good military character when that specific trait is pertinent ... for example in a prosecution for disobedience of orders." Mil. R. Evid. 404(a) analysis.

[50] Whether Bennett's "essentiality" test was meant to apply to trial level determinations is questionable. It may be that "essentiality" is only a test for prejudice to be applied to a witness for whom process should have issued but who was unavailable. *See generally* R.C.M. 703(b)(3) analysis.

[51] *See supra* note 38.

[52] *Id.*

[53] United States v. Williams, 3 M.J. 239, 242 (C.M.A. 1977). *See* United States v. Staton, 48 C.M.R. 251, 254 (A.C.M.R. 1974); Mil. R. Evid. 402. *See supra* note 38 for the definition of "legal relevance." Clearly irrelevant evidence cannot be considered "essential"evidence under United States v. Bennett, 12 M.J. 463, 465 n.4 (C.M.A. 1982). *See also* United States v. Hudson, 20 M.J. 607, 609 (A.F.C.M.R. 1985).

[54] *E.g.*, United States v. Credit, 8 M.J. 190 (C.M.A. 1980); United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978); United States v. Williams, 3 M.J. 239 (C.M.A. 1977); United States v. Stephens, 17 M.J. 67 (A.C.M.R. 1983); United States v. Courts, 4 M.J. 518 (C.G.C.M.R. 1977), *aff'd*, 9 M.J. 285 (C.M.A. 1980); United States v. Elliott, 3 M.J. 1080 (A.C.M.R. 1977); United States v. Scott, 3 M.J. 1111 (N.C.M.R. 1977). Note that paragraph 115 of the Manual for Courts-Martial was amended in 1981 so as to generally eliminate live witness testimony on sentencing. These provisions were continued in the 1984 Manual. R.C.M. 703(c)(2)(B)(ii).

[55] *See*United States v. Manos, 37 C.M.R. 274, 280–81 (C.M.A. 1967) (Quinn, C.J., concurring in part, dissenting in part). Note that the trial counsel need not be concerned with this procedure as the Government determines whether to make witnesses available.

[56] United States v. Williams, 3 M.J. 239, 243 n.9 (C.M.A. 1977). *Accord* United States v. Scott, 3 M.J. 1111, 1113 (N.C.M.R. 1977). *See also* United States v. Jefferson, 13 M.J. 1, 3 (C.M.A. 1982).

[57] United States v. Williams, 3 M.J. 239, 243 n.9 (C.M.A. 1977) (Perry, J., Fletcher, C.J., concurring; Cook, J., dissenting). In an appropriate case, the judge would clearly be able to make that determination. In the usual situation, however, the decision is for the defense.

[58] United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978); United States v. Willis, 3 M.J. 94, 98 (C.M.A. 1977) (Cook, J., dissenting). *See also* United States v. Courts, 9 M.J. 285, 292–93 (C.M.A. 1980); United States v. Meadow, 14 M.J. 1002 (A.C.M.R. 1982).

[59] *E.g.*, United States v. Bennett, 12 M.J. 463, 467 (C.M.A. 1982). *See also* R.C.M. 703(b)(3). United States v. Snead, 45 C.M.R. 382, 386 (A.C.M.R. 1972) (listing alternatives).

have through live testimony even though the Government has not technically lost the opportunity of rebuttal.[60] The decision to admit alternatives lies in the discretion of the judge.[61] The fundamental issue is whether "the effect of the form of the testimony under the particular facts and circumstances of the case will … diminish the fairness of the proceedings." [62] Because the circumstances of each individual case are extremely important, the judge should explicitly state reasons for allowing alternative forms of testimony to ensure adequate review of the decision.[63]

Older cases allowed the judge to use a balancing test in deciding whether to allow alternatives to the witness' personal appearance.[64] A presumption existed, however, that the defense request was to be granted if it would be "done without manifest injury to the service,"[65] with military necessity or convenience often being cited as reasons for refusing to require the personal appearance of the witness.[66] The Court of Military Appeals, in United States v. Carpenter[67] and United States v. Willis,[68] has overruled that approach. The current standard requires that the witness' personal appearance turn only on the materiality of the testimony;[69] military necessity only affects when the witness can testify.[70] Even though obtaining witnesses for the defense may be inconvenient and costly to the Government, the defendant cannot be compelled to accept a substitute for those reasons alone.[71]

21–9. Defense objections to R.C.M. 703

Applying as it does to virtually all defense witnesses, R.C.M. 703 produces two primary complaints: that the defense must "submit its request to a partisan advocate for a determination,"[72] and that, in doing so, it necessarily reveals defense strategy and testimony to the Government.[73] Because the trial counsel is exempt from any similar situation, equal protection complaints have also been raised.[74]

a. The recipient of the request. As a matter of practice, the prosecution's decision to procure a witness is subject only to the review of the military judge and the convening authority.[75] The law requires these officers to be neutral and detached. Experience suggests that most make great efforts to carry out their legal duty. Common sense and experience also suggest that an inherent conflict of interest exists when the defense requests that a given witness be obtained.[76] Any given witness potentially represents the expenditure of funds[77] for a purpose contrary to what may be viewed as the best interest of the given officer or service. A number of commentators have recognized, for example, that the staff judge advocate is in effect the chief prosecutor for the convening authority[78] and R.C.M. 703 asks a great deal of such a person. Furthermore, as a matter of law, R.C.M. 703(c)(2)(D) declares that the trial counsel will take action to

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[60] This may be particularly true of some character witnesses. While character evidence given by the defendant's commanding officer "occupies a unique and favored position in military judicial proceedings," United States v. Carpenter, 1 M.J. 384, 386 (C.M.A. 1976), performance ratings, fitness reports, and efficiency reports may be acceptable substitutes. United States v. Tangpuz, 5 M.J. 426, 430 (C.M.A. 1978). For sentencing witnesses, however, the Government may be required to stipulate to the facts to which the witness was expected to testify. United States v. Gonzalez, 16 M.J. 58 (C.M.A. 1983). R.C.M. 811(e) gives the Government the right to attack, contradict or explain information contained in the stipulation.

[61] United States v. Courts, 9 M.J. 285, 292 (C.M.A. 1980); United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978). It should be noted that most of the cases in which substitutes for live testimony were urged by the Government were cases in which the testimony was offered for sentencing purposes by the defense. With the revision of the Manual for Courts-Martial to generally eliminate live testimony for sentencing, *see* MCM, 1969, para. 75 (now R.C.M. 1001(e)), the number of appellate cases involving a use of substitutes for live testimony should diminish.

[62] United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978). Thus, if a witness' credibility is important, live testimony should be required. United States v. Meadow, 14 M.J. 1002 (A.C.M.R. 1982) (reversible error to force stipulation of expected trustworthiness opinion testimony of highly successful medical doctor on the merits in a close larceny case).

[63] United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978).

[64] United States v. Sweeney, 34 C.M.R. 379 (C.M.A. 1974); United States v. Manos, 37 C.M.R. 274, 279 (C.M.A. 1967).

[65] United States v. Manos, 37 C.M.R. 274, 279 (C.M.A. 1967).

[66] *See, e.g.*, United States v. Sweeney, 34 C.M.R. 379, 386 (C.M.A. 1964).

[67] 1 M.J. 384 (C.M.A. 1976).

[68] 3 M.J. 94 (C.M.A. 1977).

[69] United States v. Carpenter, 1 M.J. 384, 386 (C.M.A. 1976).

[70] *Id.*

[71] United States v. Willis, 3 M.J. 94, 96 (C.M.A. 1977).

[72] United States v. Carpenter, 1 M.. 384, 386 n.8 (C.M.A. 1976).

[73] Disclosure results not only from notice of *who* the defense wishes to call, but, more importantly, from the requirement that the defense must show relevance and necessity in order to obtain the witness, a requirement that which necessarily reveals defense strategy. See *infra* text accompanying notes 78–84. The defense must give notice of its intent to offer the defenses of alibi, innocent injestion, or lack of mental responsibility defense. R.C.M. 701(b)(2).

[74] The trial counsel must, however, disclose all witnesses the Government will call in its case-in-chief and any sworn or signed statement relating to the charged offense which is in the trial counsel's possession. R.C.M. 701(a)(1)(C), (3)(A). Also, the trial counsel must give notice of rebuttal witnesses to the defenses of alibi, innocent ingestion, or lack of mental responsibility. R.C.M. 701(a)(3)(B).

[75] R.C.M. 703.

[76] *See infra* note 77.

[77] Budgeting for courts-martial varies within the Armed Forces with not all services budgeting specifically for trials. When witness expenses come out of a ship's operating budget, for example, one can expect the ship's captain who is the convening authority to be particularly resistant to any expense.

[78] *See, e.g.*, Hodson, *The Manual for Courts-Martial—1984*, 57 Mil. L. Rev. 1, 15 (1972), in which General Hodson, formerly The Judge Advocate General of the Army and then Chief Judge of the Army Court of Military Review, said: "I would favor recognizing the staff judge advocate and the commander for what they are. They are the Government." Indeed, he proposed reorganizing the military criminal legal system so that the "staff judge advocates … would resemble United States Attorneys." *Id.* at 8.

provide a witness requested by the defense unless the trial counsel contends that production of the witness is not required by the rule. In effect, the trial counsel has a substantial amount of leverage over the defense.[79] The Court of Military Appeals has noted this objection to R.C.M. 703 and has stated in dicta that "the requirement appears to be inconsistent with Article 46." [80] More recently, Chief Judge Everett appears to have implicitly rejected this view by stating that "the Government is entitled to prescribe reasonable rules whereunder it will have adequate opportunity either to arrange for the presence of the witness or to explore any legally permissible alternative to the presence of the witness."[81]

The defense may be able to escape the need to advise the prosecution of its requested witnesses by directly requesting the witness from the military judge. Under present law, this solution would appear appropriate only when the defense has a substantial interest in not advising the Government of the identity of the witnesses, an interest which clearly outweighs the Government's interest in knowing their identity. This procedure would of necessity require the judge to use novel procedures to ensure that necessary witness fees could be paid and that subpoenas were properly served in the event of noncooperative witnesses. The most probable circumstance justifying this procedure would be a defense showing that a prosecution member would likely tamper with the witness. In such a unique circumstance, the military judge should seal the record of the witness request until the conclusion of the witness' testimony.

b. Defense disclosure of tactics and strategy. The defense objection that R.C.M. 703 necessarily reveals defense tactics and strategy can be divided into two components: the disclosure itself and the lack of reciprocity. Proper compliance with R.C.M. 703 will result in a disclosure to the Government of all defense witnesses and a synopsis of their individual testimony. Although counsel may well believe that they are required to disclose more than the law actually requires,[82] there is no doubt but that the quantum actually required, as well as the quantum occasionally demanded by prosecutors, is enough to be very revealing. The prosecution has no equivalent requirement[83] and the broad discovery available to the defense as a matter of practice can hardly be equated with the template of the defense case required under R.C.M. 703. Any fifth amendment objection[84] to R.C.M. 703 appears to be foreclosed by the Supreme Court's decision in Williams v. Florida.[85] In Williams, the Court sustained Florida's notice of alibi rule against constitutional self-incrimination objections on the grounds that the defense was only divulging information which it would have to reveal at trial.[86] Although Williams appears to require a reciprocal duty on the part of the Government,[87] that requirement is met simply by making discovery of the prosecution case available to the defense;[88] response in kind is not apparently required.

c. Lack of reciprocity in general. Defense counsel have contended that R.C.M. 703 "improperly discriminates against an accused because it imposes burdens in the procurement of a defense witness that are not imposed upon the Government." [89] In effect, this is a claimed violation of article 46, which guarantees defense counsel equal opportunity to obtain witnesses, and a denial of equal protection. Chief Judge Everett may have addressed this when he stated that paragraph 115 (now R.C.M. 703) not only provides the Government with an opportunity to explore any permissible alternative to the witness,[90] but also ensures that defense counsel, who might be spurred as advocates to request witnesses in the hope that the delay and expense would result in dismissal or an attractive plea bargain, have a good faith belief that the testimony will benefit the accused.[91] The Courts of Military Review have justified paragraph 115 (now R.C.M. 703) as permitting the trial court to avoid cumulative testimony[92] and ensuring "that Government funds are not wasted in producing witnesses who are not absolutely necessary and material."[93] Although these purposes are praiseworthy, the present procedural mechanism can be misused such that these purposes are not well served.

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[79] The Court of Military Appeals has said that its application of paragraph 115 (now R.C.M. 703) leaves "no doubt that an accused's right to secure the attendance of a material witness is free from substantive control by trial counsel." United States v. Arias, 3 M.J. 436, 439 (C.M.A. 1977). *But see* United States v. Cottle, 14 M.J. 260, 261 (C.M.A. 1982) (trial counsel denied the witness request). Trial counsels can and have rejected paragraph 115 (now R.C.M. 703) requests as being procedurally deficient, however, using the rejection as a tactical ploy to either discourage the defense from requesting the witness or the judge from granting the request due to the lateness of the final request or to encourage the defense counsel to plea bargain is improper.

[80] United States v. Carpenter, 1 M.J. 384, 386 n.8 (C.M.A. 1976). *Accord* United States v. Williams, 3 M.J. 239, 240 n.2 (C.M.A. 1977).

[81] United States v. Vietor, 10 M.J. 69, 77–78 (C.M.A. 1980). Chief Judge Everett concurred in the result of *Vietor* only, while Judge Fletcher, also concurring in the result alone, found Judge Everett's "analysis ... unacceptable." *Id.* at 78. *See also* United States v. Arias, 3 M.J. 436 (C.M.A. 1977).

[82] *See, e.g.*, United States v. Dixon, 8 M.J. 858, 865 (N.C.M.R. 1980).

[83] R.C.M. 701(a)(3)(A) requires the prosecution without defense request to notify the defense of witnesses it intends to call in its case in chief. R.C.M. 701(a)(1)(C) requires the prosecution without defense request to provide the defense with any sworn or signed statement relating to the offense which is in the trial counsel's possession.

[84] Although the Supreme Court's decisions may resolve the fifth amendment question, they leave untouched the parallel article 31 question concerning the military's statutory right against self-incrimination. The article 31 argument now seems foreclosed by the Court of Military Appeals position that article 31 merely parallels the fifth amendment and does not provide additional protection. *See, e.g.*, United States v. Harden, 18 M.J. 81, 82 (C.M.A. 1984).

[85] 399 U.S. 78 (1970).

[86] *See id.*

[87] Wardius v. Oregon, 412 U.S. 470 (197).

[88] *Id. See also* United States v. Dixon, 8 M.J. 858, 865 (N.C.M.R. 1980), *petition granted* 14 M.J. 449, *rev'd on other grounds*, 18 M.J. 310 (C.M.A. 1984) (discovery afforded defense via article 32 proceedings more than balances Government's discovery from paragraph 115).

[89] United States v. Arias, 3 M.J. 436, 438 (C.M.A. 1977).

[90] United States v. Vietor, 10 M.J. 69, 77–78 (C.M.A. 1980).

[91] *Id.* at 78. *See also* United States v. Kilby, 3 M.J. 938, 944-45 (N.C.M.R. 1977).

[92] United States v. Dixon, 8 M.J. 858, 865 (N.C.M.R. 1980); United States v. Phillips, 15 M.J. 671, 673 (A.F.C.M.R. 1983); United States v. Christian, 6 M.J. 624, 626 (A.C.M.R. 1978).

[93] United States v. Christian, 6 M.J. 624, 627 (A.C.M.R. 1978) (DeFord, J., concurring). *Accord* United States v. Williams, 3 M.J. 239 (C.M.A. 1977).

21–10. The power to obtain evidence in military custody or control

The 1984 Manual provides a comprehensive body of discovery rules in R.C.M. 701[94] and also fully treats production of evidence in R.C.M. 703(f). Production of evidence under R.C.M. 703(f) parallels production of witnesses under R.C.M. 703(a)-(e) as to entitlement to evidence,[95] requesting procedures,[96] and remedies if important evidence is lost, destroyed, or is not subject to compulsory process.[97] Evidence under control of the military is obtained by notifying the custodian of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.[98] In the event of noncompliance with the trial counsel's request for evidence under R.C.M. 703(f) or a military judge's request for evidence,[99] the only meaningful sanction may be to abate the proceedings[100] and perhaps prefer criminal charges against those refusing to comply.[101] When witnesses are involved, the Manual states that the attendance of a witness stationed near the trial location can usually be obtained through informal coordination with the witness and his or her commander. If informal coordination is inadequate or attendance would involve travel at Government expense,[102] the appropriate commander should be requested to issue the necessary orders.[103] Notwithstanding its phrasing, the Manual does not appear to intend that the commanding officer of the accused have any discretion to reject the request in general. The decisions of the Court of Military Appeals treat the Government in a unitary fashion and when a material defense witness is not made available, trial must be abated until the witness is available.[104] The court has implicitly recognized that witnesses may not be instantly available and that, in normal practice, reasonable needs of the individual or the service are accommodated.

21–11. The power to obtain evidence not in military control

Although most civilian evidence is obtained through the voluntary cooperation of the appropriate individuals, recourse to process is occasionally necessary, and Congress has provided that:

> Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the territories, Commonwealths, and possessions.[105]

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[94] R.C.M. 01(g)(3) also provides an express remedy when efforts at voluntary cooperation fail. The Rule states:

> [T]he Military judge may take one or more of the following actions;
> (A) Order the party to permit discovery;
> (B) Grant a continuance;
> (C) Prohibit the party from introducing evidence or raising a defense not disclosed; and
> (D) Enter such order as is just under the circumstances.

Although the Rule further provides that it "shall not limit the right of the accused to testify in the accused's behalf," its provision permitting the judge to prohibit the defense from raising an undisclosed defense raises troubling constitutional questions which the Supreme Court expressly chose not to explore in Williams v. Florida, 399 U.S. 78, 83 n.14 (1970). Although the Court declared in Wardius v. Oregon, 412 U.S. 470, 472 (1973) that "the Due Process Clause ... forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants," it did not reach the question of how, if at all, Oregon's notice of alibi rule could be enforced. 412 U.S. 472 n.4. *See also* Alicia v. Gagnon, 675 F.2d 913 (7th Cir. 1982) (error to preclude defendant from testifying about alibi where counsel failed to give notice). *See generally* Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 Yale L.J. 1342 (1972).

[95] Under R.C.M. 703(f)(1), parties are entitled to relevant and necessary evidence. Unlike the standards for witness production, however, the standards for production of evidence on the merits and in sentencing are the same.

[96] R.C.M. 703(f)(3) requires the defense to submit a written list to the trial counsel with a description sufficient to show the evidence is relevant and necessary and the location of the evidence.*See also supra* notes 35-46 and accompanying text.

[97] R.C.M. 703(f)(2).

[98] R.C.M.703(f)(4)(A).

[99] R.C.M. 703(e)(2)(C) gives the trial counsel subpoena power over civilians. Although the provision could be read as limiting the trial counsel's power to subpoena to civilians, it seems more likely that the Manual's drafters took for granted Government compliance with R.C.M. 703 and simply granted express power to deal with the case of civilians. To the extent that the Manual fails to grant subpoena power to compel military production of evidence, however, it seems clear that the Manual necessarily grants such power to the military judge. In United States v. Toledo, 15 M.J. 255, 256 (C.M.A. 1983), the court held that the trial judge erred by refusing to order the prosecution to obtain a transcript of a prosecution witness' prior Federal district court testimony for impeachment use. Further support for the authority of the military judge to compel military production of evidence can be derived from the military judge's broad powers to call witnesses (Mil. R. Evid. 614), require additional evidence (R.C.M. 801(c)), regulate discovery (R.C.M. 701(g)(3)), and direct that evidence be submitted for an in-camera inspection (R.C.M. 703(f)(4)(C)).

[100] United States v. Willis, 3 M.J. 94 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976); United States v. Humphrey, 4 M.J. 560 (A.C.M.R. 1977).*See also supra* note 12.

[101] A refusal to supply evidence pursuant to either R.C.M. 703 or a court order may constitute a violation of articles 98 or 134. *Cf.* United States v. Perry, 2 M.J. 113, 116 (C.M.A. 1977) (Fletcher, C.J., concurring) (violation of speedy trial right); United States v. Powell, 2 M.J. 6, 8 (C.M.A. 1976) (unnecessary delay in completing article 32 proceedings). Refusal to obey a court order may also constitute a disobedience under articles 90 and 92.

[102] R.C.M. 703(e)(1) discussion.

[103] *Id.* R.C.M. 703(e)(1).

[104] *See supra* notes 97 and 98. In an appropriate case, dismissal of the charges may be necessary.

[105] UCMJ art. 46.

At the outset, it is apparent that process is unavailable if it would reach abroad, except for the"territories, Commonwealths, and possessions." [106] The Manual states: "In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence thereof, within the principles of international laws."[107] Further, courts-martial lack the power to compel the attendance abroad of witnesses who could be compelled to attend courts-martial tried within the United States.[108]

Compulsory process is available in two forms: subpoena and warrant of attachment. The subpoena compels the attendance of a witness by the coercion of law while a warrant of attachment results in the apprehension of the witness and his or her coerced physical transportation to trial.

a. Subpoenas. Pursuant to article 46 of the Uniform Code of Military Justice, the Manual for Courts-Martial provides for the issuance of subpoenas by the trial counsel to compel the attendance of civilian witnesses.[109] The Manual provides a model subpoena form[110] and states that service should generally be made by mail unless voluntary attendance is unlikely and then personal service should be used.[111]

The trial counsel is directed "to assure timely and appropriate service"[112] when formal service is necessary. A subpoena may be served by the person issuing it, a United States Marshal, or any person not less than age 18.[113] According to the Manual, personal service "should ordinarily be made by a person subject to the code." [114] In the event of noncompliance with the subpoena, the witness is subject to criminal prosecution in a United States district court under the provisions of article 47 of the Uniform Code of Military Justice.[115] Such a sanction is not particularly useful insofar as obtaining the testimony of the witness is concerned. Given a witness who refuses to comply, the trial counsel may request a United States district court to direct the attendance of the witness or, more directly, may issue a warrant of attachment.

b. The warrant of attachment. [116]

(1) *In general.* The warrant of attachment, usually known as a bench warrant in civilian practice, directs the seizure of a witness who has refused to appear before a court-martial and orders the production of the witness[117] before the tribunal from which the process has been disobeyed. The attachment prerogative has existed almost as long as the power of compulsory process[118] and may be regarded as inherent to compulsory process.[119] The express authority of courts-martial to attach civilian witnesses first appeared in Army general orders in 1868[120] and, virtually unchanged since that date, was incorporated into the modern Manual for Courts- Martial.[121] The power to attach is not found

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[106] Presumably, a court-martial could constitutionally be given the power to subpoena United States citizens outside the United States to trials taking place within the United States. Civilian Federal courts have such power. 28 U.S.C. 1783; Fed. R. Crim. P. 17(e)(2). The applicability of 28 U.S.C. 1783 to courts-martials has not been judicially determined. *See* United States v. Bennett, 12 M.J. 463, 470 (C.M.A. 1982). Alternatively, a Federal district court may be empowered under 29 U.S.C. § 1783 to order a U.S. citizen outside the United States to testify in a court-martial within the United States. The statute allows a district court to order a witness to appear before it or "before a person or body designated by it." The court-martial could be the "person or body" designated by the district court. *See* United States v. Daneza, 528 F.2d 390 (2d Cir. 1975) (statute applied to grand jury); United States v. Daniels, 48 C.M.R. 655, 657 (C.M.A. 1974) (Quinn, J., concurring). *See generally* Annotation, 32 A.L.R. Fed. 894 (1977); Wright, Federal Practice and Procedure: Criminal 2d § 277 (1982).

[107] R.C.M. 703(e)(2)(E)(ii). The Manual also states:"[i]n occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory."R.C.M. 703(e)(2)(E)(iii).

[108] United States v. Bennett, 12 M.J. 463, 471 (C.M.A. 1982) (courts-martial lack the statutory power to require a United States citizen to testify *abroad*before a court-martial); United States v. Daniels, 48 C.M.R. 655, 657-58 (C.M.A. 1974) (courts-martial lacked power to compel testimony of U.S. citizen military dependent residing in the same nation in which the court-martial took place); United States v. Potter, 1 M.J. 897, 899 (A.F.C.M.R. 1976) (court-martial could not compel American witness to testify in Germany); United States v. Boone, 49 C.M.R. 709, 711 (A.C.M.R. 1975) (American witness could not be compelled to testify in Germany). *But see* United States v. Roberts, 10 M.J. 308, 314 n.7 (C.M.A. 1981).

[109] A subpoena may also be issued by a summary court-martial or by a deposing officer. R.C.M. 703(e)(2)(c).

[110] MCM, 1984, A7–1.

[111] R.C.M. 703(e)(2)(D) discussion.*See* United States v. Burns, 27 M.J. 92 (C.M.A. 1988).

[112] *Id.*

[113] R.C.M.703(e)(2)(D).

[114] R.C.M. 703(e)(2)(D) discussion.

[115] Article 47 penalizes an individual, not subject to court-martial jurisdiction, who having been properly subpoenaed "willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce," UCMJ art. 47(a)(3), and provides a maximum punishment of "a fine of not more than $500, or imprisonment for not more than six months, or both." *Id.* at art. 47(b). A prerequisite condition for an article 47 prosecution is that the witness has been "duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States." *Id.* at art. 47(a)(2). Interestingly, the Code appears to deprive the civilian prosecutor of any prosecutorial discretion as article 47(c) states: "The United States attorney ... shall, upon the certification of the facts to him by the military court ... file an information against and prosecute any person violating this article." This is not to say that the prosecution would necessarily comply with article 47.

[116] Much of the following text and accompanying footnotes are taken from Lederer, *Warrants of Attachment—Forcibly Compelling the Attendance of Witnesses*, 98 Mil. L. Rev. (1983) [hereinafter cited as Lederer].

[117] The 1984 Manual also specifically authorizes using the warrant of attachment to compel production of documents. R.C.M. 703(e)(2)(G)(i).

[118] *See, e.g.*, 12 Op. Att'y Gen. 501 (1868).

[119] *See, e.g.*, Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929); United States v. Caldwell, 2 U.S. (2 Dall.) 333 (1795). *See also* 9 Op. Att'y Gen. 266 (1859).

[120] General Orders No. 93, Headquarters of the Army (Nov. 9, 1868). *See also* J. Winthrop, Military Law and Precedents 202 n.46 (1886, 1920 reprint); Digest of Opinions, The Judge Advocate General 490 (1880).

[121] R.C.M. 703(e)(2)(G).

expressly in the Uniform Code of Military Justice, but attachment is authorized by the Manual for Courts- Martial, which provides:

> R.C.M. 703(e)(2)(G) Neglect or refusal to appear.
>
> (i) Issuance of warrant of attachment. The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.
>
> (ii) Requirements. A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear.
>
> (iii) Form. A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.
>
> (iv) Execution. A warrant of attachment may be executed by a United States marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such nondeadly force as may be necessary to bring the witness before the court-martial or other proceeding may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify as soon as practicable and be released.

The 1984 Manual places the full discretion and responsibility for issuance of a warrant of attachment with the military judge.[122] In the absence of a military judge authority rests with the convening authority.[123] By placing authority in the military judge to issue the warrant the Manual obviously contemplates that the warrant can only issue after referral of charges. The Manual authorizes issuance any time thereafter, even before the court actually convenes. It is clear that reversible error will result if the military judge does not issue a warrant of attachment to compel attendance of a material defense witness who refused to comply with a validly issued subpoena.[124]

The Manual states a warrant should issue only when the witness is material,[125] when there is probable cause to believe a properly issued subpoena was duly served, and that the witness without valid excuse refused or willfully neglected to appear.[126] The Manual's criterion appears to be actual necessity--the witness must actually fail to appear at the time and place specified on the subpoena.[127] Although this may well be desirable both for reasons of policy related to military-civilian relations and to forestall raising serious constitutional questions, it should be clear that R.C.M. 703(e)(2)(G) will foreclose a possible avenue for obtaining evidence before courts- martial.

Procedurally, the Manual does not prescribe the form of the warrant[128] and, although the Manual directs the warrant to be accompanied with supporting documents,[129] that requirement is intended to support the Government's position in the event of a habeas corpus petition[130] and does not appear to be a formal condition to be met before the warrant may issue.

(2) *Execution of the warrant.* The warrant may be executed by a United States Marshal[131] or any person not less than the age of 18.[132] Discretion as to who executes the warrant lies with the issuing authority.[133] The Manual contemplates that force may be necessary for the successful execution of the warrant,[134] although no statute or other

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[122] R.C.M. 703(e)(2)(G)(i), United States v. Hinton, 21 M.J. 267, 270 (C.M.A. 1986). In previous Manuals, the trial counsel had discretion to issue the warrant. The military judge was given the authority in the 1984 Manual to resolve fourth amendment issues regarding the neutrality and detachment of the issuing official. *See generally* Lederer, *supra* note 116, at 38-41.

[123] The drafters contemplated the convening authority would issue the warrant only when there was a special court-martial without a military judge or a summary court-martial. R.C.M. 703(e)(2)(G) analysis.

[124] United States v. Ortiz, 35 M.J. 391 (C.M.A. 1992). United States v. Hinton, 21 M.J. 267 (C.M.A. 1985); United States v. Williams, 23 M.J. 724 (A.F.C.M.R. 1986).

[125] *See supra* note 42 and accompanying text.

[126] R.C.M. 703(e)(2)(G)(ii).

[127] Some civilian courts however use material witness statutes to order arrest of witnesses who *may* not appear. Noncompliance with a subpoena is not a condition precedent for issuance of an arrest warrant. *See e.g.* Bacon v. United States 449 F.2d 933 (9th Cir. 1971).

[128] The Manual prescribes no specific form for the warrant although earlier Manuals did so. *See, e.g.,*MCM, 1921 at 655; MCM, 1928 at 88. The present form, DD Form 454, is prescribed by the Department of Defense.

[129] R.C.M. 703(e)(2)(G)(iii).

[130] *See generally* R.C.M. 703.

[131] R.C.M. 703(e)(2)(G)(iv). The 1969 Manual had expressed a preference that a United States Marshal execute the warrant "when practicable." MCM, 1969, para. 115(d)(3). DA Pam 27–2, Analysis of Contents Manual for Courts-Martial, United States 1969, Revised Edition 23–2 (1970). In 1980, the Director of the Federal Marshal Service was directed by the Department of Justice to assist the Armed Forces with the execution of warrants of attachment.

[132] R.C.M. 703(e)(2)(G)(iv). United States v. Hinton, 21 MJ. 267, 270 (C.M.A. 1986).

[133] R.C.M. 703(e)(2)(G)(iv). United States v. Hinton, 21 M.J. 267, 270 (C.M.A. 1986).

[134] Only such nondeadly force as may be necessary to bring the witness before the court-martial or proceeding may be used to execute the warrant. R.C.M. 703(e)(2)(G)(iv).

executive order expressly allows the use of force on or permits the deprivation of liberty of a civilian by military authority.[135]

(3) *Constitutionality of the military authority.* Clearly, the apprehension by military authorities of a civilian witness who is not the subject of criminal charges is troubling and raises a number of constitutional questions, among the most important of which are the following:

(a) Whether any innocent citizen may be arrested to obtain testimony?

(b) Whether military authorities may apprehend a civilian to obtain testimony at a court-martial?

(c) What quantum of proof is necessary before a warrant of attachment may issue?

(d) Who may issue a warrant of attachment?

The first of these questions must be considered resolved; 27 states expressly use variations of the warrant of attachment[136] and all states subscribe to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[137] The fundamental concept of the arrest of material witnesses is also accepted throughout the American judicial system.[138] Although it could be said that warrants of attachment directing the attachment of civilians might better be placed in the hands of civilian judicial authorities, courts considering this issue[139] have clearly rejected that position.[140] Although the Supreme Court has held that "a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense,"[141] it is apparent that the actual apprehension of an individual and his or her involuntary physical removal to testify[142] at a court-martial necessarily constitutes such a seizure.[143] Except for a limited number of exceptions, the fourth amendment commands that seizures be based upon probable cause and at least one court has held that a seizure of a material witness must be based upon probable cause.[144] This conclusion seems correct and fully applicable to the military warrant of attachment. What is less clear, however, is what probable cause must establish. In the normal attachment case, the absence of the subpoenaed witness at trial is apparent and is more than enough to support the issuance of a warrant insofar as it is necessary to procure that person's attendance.[145] Yet, the Manual for Courts-Martial contemplates only the attachment of a witness who will give "material" testimony.[146] Accordingly, it would seem reasonable to require that the materiality of the witness be demonstrated prior to the issuance of the warrant, although it might be argued that a subpoena need not be based on probable cause[147] and will be considered valid until properly voided by the court.[148] Accordingly, lack of materiality may only be raised by the prospective witness via a motion to quash the subpoena. Although the issue is a close one, as a matter of policy, the better course is to demonstrate materiality of the witness on a preponderance basis when seeking a warrant of attachment. It should be simple for counsel to demonstrate materiality in view of the fact that the Manual presently requires the defense to demonstrate, and the Government to only call, relevant and necessary witnesses[149] and because

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[135] Despite the introduction of several bills over a period of years, Congress has declined to enact legislation specifically giving military personnel arrest power over civilians by statute. The most recent bill of this kind was S. 727, 97th Cong., 1st Sess. (1981) which would have authorized the Secretary of Defense "to invest officers … of the Department of Defense … with the power to arrest individuals on military facilities and installations."

[136] Lederer, *supra* note 11, at 12–13, n.49.

[137] Uniform Act To Secure The Attendance Of Witnesses From Without A State In Criminal Proceedings § 1, 11 U.L.A. 5 (1974). The Act provides that a host state must honor an order from another state directing that a given witness be taken into custody. *See also* Uniform Rules Of Criminal Procedure § 731, 10 U.L.A. 339 (1974).

[138] *See sura* note 116. *See also* Bacon v United States, 449 F.2d 933 (9th Cir. 1971).

[139] United States v. Shibley, 112 F. Supp. 734 (S.D. Cal. 1953); *see also* United States v. Hintan, 21 M.J. 270 (C.M.A. 1986).

[140] *United States v. Shibley* addressed the issue of whether a Marine Court of Inquiry had the same power to compel attendance as did a court-martial. In resolving that issue, it also addressed the issue of the warrant of attachment as Shibley had been apprehended and brought before the court of inquiry. The court stated:

> If the only method of making this provision [authorizing the summoning of witnesses] effective were resort to prosecution under [Article 47], the result would be ineffective and illusory. Punishment of an offense cannot compel disclosure to make an inquiry effective. And if boards of inquiry are to perform their functions..., they can do so only if means exist to bring summarily recalcitrant witnesses before them. And the warrant of attachment traditionally provides such means. The suggestion has been made that only civil courts can compel appearance … after a civilian witness' refusal… . This remedy, if it existed, would be equally visionary. It would tie the military tribunals to the civil courts contrary to the spirit of military law. Moreover, there is not in the [Uniform Code of Military Justice] a provision similar to [other statutes unrelated to the military which require resort to federal judges to enforce agency subpoenas]. Its absence indicates that the means to compel attendance must exist in the court of inquiry itself. Otherwise, the courts are given the naked power to summon, but no power to use a summary method to compel attendance.

Shibley, 112 F. Supp. at 743 n.19. The last two questions, however, raise issues of substantially greater legal import.

[141] United States v. Dionisio, 410 U.S. 1, 9 (1973).

[142] In order to secure the necessary testimony, the witness may be required to travel and may necessarily be held in custody for at least a few days.

[143] *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 8-12 (1973) (distinguishing the subpoena situation, in which the coercion is the force of law, from detentions of the individual effected by the police); Bacon v. United States, 449 F.2d 933, 942 (9th Cir. 1971).

[144] *Bacon,* 449 F.2d at 943.

[145] *See, e.g.*, United States v. Evans, 574 F.2d 352, 355 (6th Cir. 1978).

[146] R.C.M. 703(e)(2)(G)(ii).*See supra* note 121.

[147] United States v. Dionisio, 410 U.S. 1 (1973). *See also* United States v. Hardison, 17 M.J. 701, 704 (N.M.C.M.R. 1983); *In re* Sealed Case, 754 F.2d 395 (1985).

[148] *Cf.* Dolman v. United States, 439 U.S. 1395, 1395 (Rehnquist, Circuit Justice 1978) ("invalidity of an injunction may not ordinarily be raised as a defense in contempt proceedings for its violation"); Walker v. City of Birmingham, 388 U.S. 305, 315-20 (1967); United States v. Mine Workers, 330 U.S. 258, 293-94 (1947).

[149] *See supra* notes 35-46 and accompanying text.

of both the dislocation to the witness and the nature of the military intrusion into civil matters caused by the warrant.

The final question to be resolved is who should grant the warrant of attachment. The Supreme Court[150] and Court of Military Appeals[151] have declared that issuing officers for search warrants must be neutral and detached. The 1984 Manual resolved most of the problems inherent in the 1969 Manual that had made the trial counsel the authorizing official. Under the 1984 Manual the military judge, or if there is no military judge, the convening authority, will issue the warrant.[152] Under normal circumstances the disqualification rules for military judges and convening authorities will assure the requisite neutrality and detachment.[153] Only in the relatively rare situation where the summary court-martial convening authority is also the accuser might the convening authority not be sufficiently neutral and detached.[154] Should this problem be foreseen before referral, however, the summary court-martial convening authority can forward the charges to a superior competent authority with a recommendation to convene a summary court-martial.[155] Should the problem arise after referral, it may be possible to withdraw the charges without prejudice and forward them to a superior competent authority with a recommendation for referral to another summary court-martial. The superior competent authority then, as convening authority, could issue the warrant.[156]

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[150] Coolidge v. New Hampshire, 403 U.S. 443 (1971) (State attorney general could not issue search warrant notwithstanding State statute authorizing him to issue warrants as a justice of the peace).

[151] United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

[152] R.C.M. 703(e)(2)(G)(i).

[153] *See generally* R.C.M. 902, 504(c).

[154] An accuser is one who signs or swears to charges, directs that charges be nominally signed or sworn by another, or any person who has other than an official interest in the accused's prosecution. UCMJ art. 1(9). The latter type of accuser will not normally be neutral and detached.

[155] R.C.M. 604(a).

[156] R.C.M. 604(b) provides that charges may be withdrawn after introduction of evidence on the general issue of guilt only if necessitated by urgent and unforeseen military necessity.

Chapter 22
Mental Capacity

22–1. General

Mental capacity relates to the accused's present ability to stand trial[1] or participate in post-trial proceedings.[2] The conviction of a legally incompetent accused violates due process.[3]

22–2. Substantive standards

a. Trial level. No court-martial may try an accused if the accused is mentally incompetent such that one is unable to understand the nature of the proceedings or is unable to conduct or cooperate intelligently in the accused's own defense.[4] A"mental disease or defect" must be the cause of the mental incompetence.[5] The United States Supreme Court has defined the capacity test as whether an accused has sufficient present ability to consult with one's lawyer with a reasonable degree of rational understanding and whether one has rational as well as factual understanding of the proceedings against oneself.[6] Amnesia, standing alone, does not constitute a lack of mental capacity.[7]

b. Prior to sentence approval. After an accused is convicted by court-martial, the convening authority may not approve the sentence if the accused lacks the mental capacity to understand and to conduct or cooperate intelligently in the accused's post-trial proceedings.[8]

c. Appellate proceedings. If an accused lacks the mental capacity to understand and to conduct or cooperate intelligently in the accused's appellate proceedings, a court of military review may not affirm the proceedings.[9]

22–3. Procedure

a. Raising the issue. If at any time it appears to a commander who considers disposition of the charges, an investigating officer, a trial counsel, a defense counsel, a military judge, a court member,[10] the convening authority,[11] or the appellate authority,[12] that a substantial question exists concerning the accused's capacity to stand trial or participate in post-trial proceedings, that person should transmit that fact and its basis to the officer authorized to order an inquiry into the mental condition of the accused.

b. Officers authorized to order. Before referral of charges, the convening authority before whom the charges are pending may order the inquiry.[13] After referral of the charges, the military judge may order an inquiry into the accused's capacity to stand trial.[14] When a military judge is not reasonably available, the convening authority may order the capacity inquiry after referral but before the first court-martial session.[15]

After findings and sentencing, the convening authority again has the authority to order an inquiry into the accused's capacity.[16] At this stage, the issue may be limited to whether the accused has the requisite capacity to understand and cooperate in the post-trial proceedings.[17] If a capacity issue arises after action but before appellate review is complete, a court of military review may direct that the record be "forwarded to an appropriate authority" with instructions concerning permissible actions.[18]

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[1] R.C.M. 909.

[2] R.C.M. 1107(b)(5); R.C.M. 1203(c)(5).*See also*United States v. Bledsoe, 16 M.J. 977 (A.F.C.M.R. 1983).

[3] *See*, *e.g.*, United States v. Martinez, 12 M.J. 801, 808 (N.M.C.M.R. 1981); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956).

[4] R.C.M. 909(a).

[5] *Id.* Note that prior to the Military Justice Amendments of 1986, Title VIII, 802, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3905-6 (1986) (codified at Uniform Code of Military Justice article 50A, 10 U.S.C. § 850A) the standard for lack of mental responsibility included a requirement for a "mental disease or defect." The new standard, article 50A, requires a "severe mental disease or defect." The prior standard has provided case law which defines "mental disease or defect." See*generally* United States v. Cortes-Crespo, 13 M.J. 420 (C.M.A. 1982).

[6] The current R.C.M. 909 was written to conform to 18 U.S.C. § 4241. As such, the test for mental capacity as explained in Dusky v. United States, 362 U.S. 402 (1960), is useful in analyzing R.C.M. 909. *See also*Spikes v. United States, 633 F.2d 144 (C.A. Cal. 1980),*cert. denied*, 450 U.S. 934 (1981).

[7] United States v. Olvera, 15 C.M.R. 134 (C.M.A. 1954); United States v. Lopez-Malave, 15 C.M.R. 341 (C.M.A. 1954); United States v. Dunaway, 39 C.M.R. 909 (A.F.B.R. 1968).

[8] R.C.M. 1107(b)(5).

[9] R.C.M. 1203(c)(5); *see also* United States v. Korzeniewski, 22 C.M.R. 104 (C.M.A. 1956); United States v. Bledsoe, 16 M.J. 977 (A.F.C.M.R. 1983). These cases hold that, because the courts of military review have fact-finding powers, the accused must be mentally competent to assist the appellate defense counsel in preparing the case for review. The same rationale does not apply to appellate review by the Court of Military Appeals, because only issues of law are litigated before that court. If the accused becomes mentally incompetent after the court of military review completes its review, but before service of the review on the accused, the court may still promulgate its decision. United States v. Phillips, 13 M.J. 858 (N.M.C.M.R. 1982).

[10] R.C.M. 706(a).

[11] R.C.M. 1107(b)(5).

[12] R.C.M. 1203(c)(5).

[13] R.C.M. 706(b)(1).

[14] R.C.M. 706(b)(2); *see also* United States v. Frederick, 3 M.J. 230 (C.M.A. 1977) (question whether another examination was necessary was a matter within discretion of military judge).

[15] R.C.M. 706(b)(2).

[16] R.C.M. 1107(b)(5).

[17] *Id.*

[18] R.C.M. 1203(c)(5). This "appropriate authority" would presumably be the convening authority with current jurisdiction over the accused. The inquiry should be limited in scope.

c. Compelled inquiry. The accused can be compelled to cooperate in a capacity inquiry.[19] The accused's rights against self-incrimination are generally inapplicable at the capacity examination.[20] The accused is protected instead by an evidentiary privilege that prohibits the Government from using the accused's statements, or any evidence derived from those statements, against the accused on the issue of guilt or innocence or during sentencing proceedings.[21] Although the prosecution initially receives a report of ultimate conclusions only,[22] the defense can open the door to increased discovery and admissibility by placing the accused's capacity in issue or introducing statements into evidence made by an accused during a compelled capacity inquiry.[23]

A board will normally include at least one psychiatrist or clinical psychologist.[24] Under limited circumstances, a substitute for a board is permitted.[25] The Manual specifically authorizes multiple mental examinations when necessary.[26] The time required to conduct sanity boards is generally not charged to the Government for speedy trial purposes.[27]

d. Litigating mental capacity. Prior to the court-martial, the accused is presumed to have the capacity to stand trial.[28] The issue of the accused's mental capacity is an interlocutory question of fact decided by the military judge at an article 39(a) session.[29] The trial should proceed if the accused's lack the capacity to stand trial is not established by a preponderance of the evidence.[30]

After findings but prior to approval of the sentence, the accused is presumed to have the mental capacity to participate in post-trial proceedings in the absence of substantial evidence to the contrary.[31] If a substantial question is raised, the convening authority may direct a capacity inquiry.[32] The convening authority may take action unless the accused's lack of mental capacity is established by a preponderance of the evidence.[33]

The accused is likewise presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings before the court of review.[34] Unless a substantial question is raised as to capacity, the appellate court may affirm the proceedings.[35]

e. Effect of determination that the accused lacks capacity. A finding at the trial court level that the accused lacks mental capacity does not require dismissal of the charges.[36] Ordinarily, the military judge should continue court until the accused gains the capacity to stand trial.[37] Withdrawal or dismissal of the charges may be appropriate in unusual situations, when the accused's mental condition is expected to be permanent or of long duration.[38]

After findings and sentencing, if the accused is found to lack the required capacity by a preponderance of the

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[19] Mil. R. Evid. 302;*see also* United States v. Parker, 15 M.J. 146 (C.M.A. 1983); United States v. Frederick, 3 M.J. 230 (C.M.A. 1977); United States v. Babbidge, 40 C.M.R. 39 (C.M.A. 1969); United States v. Littlehales, 19 M.J. 512 (A.F.C.M.R. 1984).

[20] Mil. R. Evid. 302(a) and analysis; *but see* Estelle v. Smith, 451 U.S. 454 (1981) (psychiatrist's testimony at the sentencing phase violated the accused's fifth amendment privilege against self-incrimination because the psychiatrist did not advise the accused prior to the interview of the accused's right to remain silent and that any statement made could be used against him); United States v. Parker, 15 M.J. 146 (C.M.A. 1983) (accused's statements made to psychiatrists after receiving article 31/*Miranda-Tempia* rights warnings were admissible for a limited purpose with curative instructions).

[21] Mil. R. Evid. 302(a); *but see* United States v. Toledo, 25 M.J. 270 (C.M.A. 1987) (the privilege concerning the mental examination of the accused does preclude disclosure of statements made by accused during clinical psychologist's confidential evaluation when the psychologist had not been ordered to evaluate the accused).

[22] R.C.M.706(c)(3)(A).

[23] Mil. R. Evid. 302(c) and analysis.

[24] R.C.M. 706(c)(1).

[25] United States v. Jancarek, 22 M.J. 600 (A.C.M.R. 1986) (an examination by a physician who had completed her psychiatric residency training and was assigned as the chief of the community mental health service at the local hospital was an adequate substitute for a sanity board).

[26] R.C.M. 706(c)(4).

[27] *See generally* United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983) (reasonable time necessary to conduct psychiatric evaluations is not chargeable to the Government for the purpose of calculating time under the "90-day rule" of United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971)); R.C.M. 707(c)(1)(A) (periods of delay resulting from *any* examination into the mental capacity or mental responsibility of the accused are excluded from calculating Government time under the 1984 Manual's 120-day speedy trial rule); *see also*United States v. McDowell, 19 M.J. 937 (A.C.M.R. 1985). (The defense requested a sanity board on 5 April. The board issued its results on 9 September. The court held that although time required for a sanity board is normally defense delay, the entire time would not be excluded from Government accountability in this case because the Government had breached its "obligation to proceed with dispatch." The court specifically noted that the psychiatric report was not lengthy or complicated and was based mainly on interviews conducted with the accused in April. The Government had "relegated it to the backwaters of the mental hygiene clinic's in-box." Oppressive Government delay (from June to October) warranted reversal of the case.

[28] R.C.M. 909(b); *see also* United States v. McMahon, 4 M.J. 648 (A.F.C.M.R. 1977) (Government may rely on common sense experience that most people are sane).

[29] R.C.M. 909(c)(1).

[30] R.C.M. 909(c)(2) and discussion. This rule is generally consistent with 18 U.S.C. § 4241 (1982). Although the R.C.M. 909 does not clearly state who has the burden of proof, the discussion states that it is on the accused. The constitutionality of this shifting of burden has not yet been litigated in military courts. *But see* Phillips v. Lanes, 787 F.2d 208 (7th Cir.), *cert. denied*, 107 S. Ct. 249 (1986) (due process clause of the fourteenth amendment requires the State to prove defendant's competence to stand trial).

[31] R.C.M. 1107(b)(5).

[32] R.C.M. 1107(b)(5), 706.

[33] R.C.M. 1107(b)(5).

[34] R.C.M. 1203(c)(5).

[35] *Id.*

[36] R.C.M. 909(b)(2) discussion.

[37] *Id.*

[38] *See*, *e.g.*, United States v. Lopez-Malave, 15 C.M.R. 341 (C.M.A. 1954).

evidence, the convening authority should delay taking action until capacity returns.[39]

If the accused lacks capacity such that one cannot assist in appellate proceedings, the appellate authority shall stay the proceedings until the accused regains his or her capacity or "take other appropriate action."[40]

[39] R.C.M. 1107(c)(5).

[40] R.C.M. 1203(c)(5) (an example of "other appropriate action" might be ordering a hearing pursuant to United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967), for a determination of prognosis).

Part Four
Trial Procedure

Chapter 23
Article 39(a) Sessions/Conferences

23–1. General

The article 39(a) session, added to court-martial procedure by the Military Justice Act of 1968, is designed as a formal gathering of a court-martial for the consideration of any matters not requiring the presence of the court members.[1] Far more than merely authorizing pretrial conferences, article 39(a), UCMJ, is of continual application throughout the trial proceedings. Even post-conviction relief may be sought through article 39(a) sessions. This change in military practice was designed to afford the widest possible latitude to the military judge in conserving the resources of the court, expediting the proceedings, and ensuring fairness and due process of law to the accused.

23–2. Relation of the article 39(a) session to trial

The status of the article 39(a) session as an integral and continuing part of the military trial[2] is reflected in the choice of the term "Article 39(a) session" instead of "pretrial hearing." The language of the statute is quite broad, and the examples of its function provided by the Manual for Courts-Martial are not restrictive.[3] Accordingly, article 39(a) sessions may be held as often as desired, and at any stage of the proceedings when ordered by proper authority. The military judge engaged in an article 39(a) session has the same powers as are inherent in his or her office in other parts of the trial.[4]

23–3. Purposes

Article 39(a), UCMJ, empowers the military judge to call the court into session without its members for the following general purposes:

a. Hearing and determining motions raising defenses or objections that are capable of determination without trial of the issues raised by a plea of not guilty.

b. Hearing and ruling upon any of the following matters under the UCMJ even though the matter may be appropriate for later consideration by the members:

(1) Unlawful command influence;[5]

(2) Verification and qualification of counsel;[6]

(3) Continuances;[7]

(4) Challenges[8] or disqualification of counsel;

(5) Statute of limitations;[9]

(6) Former jeopardy;[10]

(7) Correction or reconsideration of pleas;[11]

(8) Issuing process for witnesses or evidence;[12]

(9) Contempts;[13]

(10) Authorizing depositions.[14]

c. Holding arraignments and receiving pleas of the accused, where permitted by regulations of the Secretary concerned.[15]

d. Performing any other procedural function of the military judge not requiring the presence of the court members, to include, particularly, resolution of questions of trial procedure, the accused's choice of counsel and forum, admissibility of evidence, and motions for appropriate relief (both pretrial and post-trial).[16]

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[1] UCMJ art. 39(a).
[2] United States v. Marell, 49 C.M.R. 373 (C.M.A. 1974); R.C.M. 803.
[3] UCMJ art. 9(a); R.C.M. 803 discussion.
[4] UCMJ art. 9(a); R.C.M. 803 discussion.
[5] UCMJ art. 37.
[6] UCMJ art. 38.
[7] UCMJ art. 40.
[8] UCMJ art. 41.
[9] UCMJ art. 43.
[10] UCMJ art. 44.
[11] UCMJ art. 45.
[12] UCMJ art. 46.
[13] UCMJ art. 48.
[14] UCMJ art. 49.
[15] Such permission has been given by the Secretary of the Army. *See* AR 27–10, para. 5–22.
[16] R.C.M. 803 discussion.

23–4. Necessary parties at an article 39(a) session

Ordinarily the accused, accused's counsel, the trial counsel, and the military judge must be present at all times during the article 39(a) session. It is, of course, possible that upon the accused's voluntary and unauthorized absence after arraignment, the accused would be on trial in absentia and thus not present during an article 39(a) session. When the proceedings must be recorded, the presence of a court reporter is also required.[17]

23–5. Request for and notice of an article 39(a) session

The article 39(a) session is called by order of the military judge. Either trial or defense counsel may request a session, giving notice both to the judge and opposing counsel of matters to be raised. If appropriate, briefs of law should be submitted prior to the hearing. The requirement of notice, however, does not prevent the disposition of other matters at the same session.[18] Rule 32b, Rules of Practice Before Army Courts-Martial, requires all motions and notices be served in writing at least 5 working days before trial.[19]

23–6. Procedures

Appendix 8 of the Manual for Courts-Martial, 1984, provides the suggested procedure for the conduct of an article 39(a) session.

Following the suggested procedure ensures that the necessary formalities are covered and included in the record. Those included are:

a. The announcement of convening orders and referral of charges;

b. Accounting for persons present and absent at the session;

c. Noting the presence of a court reporter;

d. The statement of the legal qualifications of the prosecution and any prior involvement in the case;

e. The statement of the legal qualifications of defense counsel and any prior involvement in the case;

f. An explanation of the accused's right to counsel;

g. The excusing of counsel when disqualified or not desired;

h. The administration of oaths to parties required to be sworn;

i. The statement of the general nature of the charge or charges;

j. An inquiry as to any possible grounds for challenge of the military judge;

k. An inquiry as to the request for trial by military judge alone;

l. An inquiry into a request for enlisted membership on the court;

m. The arraignment, with reading of charges unless the reading is waived by the accused;

n. Motions to dismiss charges, motions for appropriate relief, and motions raising defenses or other objections;

o. Introduction of pleas (with explanation, voluntariness inquiry, and examination of any pretrial agreements by military judge if a plea of guilty is entered).

p. Entry of findings on acceptance of guilty plea;

q. Recess or adjournment as appropriate to assemble the court.

23–7. Vital functions of the article 39(a) session

Among the procedural steps outlined above, seven stand out as traditionally significant functions of the article 39(a) session:

a. Explanation of the accused's right to counsel. The central issue here is whether the accused fully understands the right to legal representation, civilian or military, under the provisions of article 38(b), UCMJ. The colloquy on this point appearing in the Manual's procedural guide is designed to meet the requirements of the Manual[20] and the Court of Military Appeals, and it must be strictly followed. These requirements are:

(1) That the accused be asked questions directly incorporating "each of the elements of Article 38(b), as well as his understanding of his entitlement thereunder;"[21]

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[17] R.C.M. 804(b) discussion; R.C.M. 910(c)(2) discussion cautions that a guilty plea should not be accepted at a general or special court-martial if the accused is not represented by counsel.

[18] AR 27–10, para. 5–18*b*(2).

[19] Benchbook, app. H, Rules of Practice Before Army Courts-Martial, Rule 32b. These rules are set out as a guide only. AR 27–10, para. 8–8, permits delegation of authority to prescribe rules of court to chief circuit judges.

[20] R.C.M. 901(d)(4).

[21] United States v. Donohew, 39 C.M.R. 149 (C.M.A. 1969); *but see* United States v. Johnson, 21 M.J. 211 (C.M.A. 1985); United States v. Ayala, 21 M.J. 977 (N.M.C.M.R. 1986) concerning the effect of any error.

(2) That the accused be called on to answer each question personally and not by counsel or in writing.[22]

b. Inquiry into grounds for challenge of military judge. The text of article 39(a) is silent as to challenges, but the Manual indicates that the military judge should permit a challenge for cause at any stage of the proceedings, including the article 39(a) session.[23] Any known challenge to the military judge should be made at the article 39(a) session.

c. Inquiry into any request for trial by military judge alone. The accused may request to be tried by military judge alone, either in writing or orally on the record.[24] Such written request may be submitted before, at or after the pretrial article 39(a) session, but in any case it must be submitted before the court is assembled.[25] The accused has a right to know the identity of the military judge who will hear the case, and to consult with counsel before making the election.[26]

When such a request is made, the military judge at the article 39(a) session should conduct a careful inquiry to ensure that the accused is acting voluntarily and with full understanding of the effects of the request. Failure to make this inquiry, however, though error, has been held not prejudicial per se,[27] and the omission may be waived by the accused.[28]

Approval of the request is discretionary with the military judge.[29] If the request is denied, the military judge must put the reasons of the denial on the record.[30] If the military judge approves the request at the article 39(a) session, he or she should immediately terminate the session, declare the court assembled and proceed with the trial.[31]

d. Inquiry into any request for enlisted soldiers. The appropriate time for requesting enlisted soldiers to serve on the court is the pretrial article 39(a) session.[32] Article 25(c)(1) provides that the accused's right to request enlisted soldiers lapses at the conclusion of the article 39(a) session or in the absence of such session, before assembly.[33] The accused may request enlisted soldiers in writing or orally on the record,[34] and, except for military exigencies, the court is bound by the timely election of the accused.[35] In 1974, the Court of Military Appeals held that, as the accused had a right to request enlisted soldiers prior to the conclusion of the article 39(a) session or the assembly of court, the accused also had an absolute right to withdraw the request prior to conclusion of the session or the assembly of court.[36]

e. The arraignment. Procedural aspects of the arraignment, and its legal significance, are discussed in the next chapter. The UCMJ[37] and the Manual[38] provide that the accused may be arraigned at an article 39(a) session "if permitted by the regulations of the Secretary concerned." As previously noted, the Secretary of the Army has done so.[39]

The arraignment is complete when the accused has heard the charges read in open court, or has waived the reading, and has been called upon by the military judge to plead to them. The arraignment procedure is the same whether before the full court or at a pretrial article 39(a) session. The entry of the plea itself is not a part of the arraignment.[40]

f. Motions raising defenses or objections. Motion practice is considered in detail in chapter 25. It should be noted, however, that there are essentially three types of motions that occur in pretrial article 39(a) sessions: motions to suppress, motions to dismiss, and motions for appropriate relief.

g. Entry of plea. When all pending motions have been disposed of, the accused enters his or her pleas to all charges. Pleas are discussed in detail in chapter 27.

23–8. Typical sequence of events

The sequence of events at an article 39(a) session is usually as follows. After the session is called to order, the trial counsel states the convening order number, accounts for the parties, swears in the court reporter (if required), and states the qualifications and eligibility of the members of the prosecution.[41]

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[22] *Id.*; United States v. Davis, 43 C.M.R. 193 (C.M.A.1971); United States v. Goodin, 42 C.M.R. 352 (C.M.A. 1970).
[23] R.C.M. 902.
[24] R.C.M. 903(b)(2).
[25] UCMJ art. 16; R.C.M. 903(a)(2).
[26] UCMJ art 16; R.C.M. 903(c)(2)(A).
[27] United States v. Nelson, 43 C.M.R. 24 (C.M.A. 1970); R.C.M. 903(e)(2)(A) discussion.
[28] United States v. Parkes, 5 M.J. 489 (C.M.A. 1978); United States v. Jenkins, 42 C.M.R. 304 (C.M.A. 1970).
[29] United States v. Ward, 3 M.J. 365 (C.M.A. 1977) (accused has no absolute right to trial by military judge alone); United States v. Schaffner, 16 M.J. 903 (A.C.M.R. 1983) (military judge did not abuse discretion in denying request for trial by military judge alone), R.C.M. 903(c)(2)(B).
[30] United States v. Butler, 14 M.J. 72 (C.M.A. 1982).
[31] MCM, 1984, app. 8.
[32] R.C.M. 903(a)(1).
[33] UCMJ art. 25(c)(1); R.C.M. 903(a)(1).
[34] UCMJ art. 25 and R.C.M. 903(b)(1) overrule United States v. Brandt, 20 M.J. 74 (C.M.A. 1985) (no jurisdiction where request signed only by counsel).
[35] R.C.M. 903(c)(1).
[36] United States v. Stipe, 48 C.M.R. 267 (C.M.A. 1974) (military judge has no right to refuse revocation of request); R.C.M. 903(d)(1).
[37] UCMJ art. 39(a).
[38] R.C.M. 904 discussion.
[39] AR 27–10, para. 5–22.
[40] See R.C.M. 904 discussion.
[41] MCM, 1984, app. 8.

At this point, the defense counsel states the qualifications and eligibility of the members of the defense.[42] If all counsel have the requisite qualifications, the military judge and counsel are sworn if they have not previously been sworn.[43]

The military judge then informs the accused of his or her counsel rights.[44] The military judge directly questions the accused about the accused's understanding of the counsel rights; the judge reviews the accused's rights to detailed counsel, individual military counsel, and individual civilian counsel. As previously stated, the accused must personally answer the judge's questions. The trial counsel next proceeds to describe the general nature of the charges and invites the military judge to disclose any ground for challenge.[45]

The military judge then describes the accused's choices for court-martial composition and asks the accused's desires on composition of the court.[46] If the accused requests trial by military judge alone, the military judge questions the accused to determine whether the accused's request is knowing and voluntary. If the accused elects trial by court members, the judge next asks whether the accused desires enlisted court members.[47]

After the accused has decided whether to request enlisted court members, the judge directs that the accused be arraigned.[48] The trial counsel reads the charges to the accused unless the accused, with the judge's permission, waives the reading. In most instances, the reading of the charges is waived by the accused. The arraignment is complete when the judge asks the accused "How do you plead?" Before the accused enters a plea, the judge tells the accused that"[b] efore receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time."[49] Counsel then raise any objections or make any motions they feel the military judge should dispose of before trial. If the accused pleads guilty and the judge's inquiry of the accused demonstrates that the plea is provident, the judge may accept the guilty plea.[50] If the accused has successfully pleaded guilty to a charged offense, the judge may immediately enter a finding of guilty.

The accused's entry of the plea and the judge's entry of any findings on the plea usually conclude the article 39(a) session. If the trial will be by judge alone and the parties are ready to present their cases, the judge may begin the trial without an intervening recess or adjournment. If the trial will be by court members, the judge will recess or adjourn the court in order to permit the court members to assemble.

23–9. Limitation

Article 35, UCMJ, provides that, in time of peace, no person, over objection, may be compelled to participate in an article 39(a) session within 5 days of being served with referred charges in a general court-martial, or within 3 days in a special court-martial.[51]

23–10. Conferences

After referral, the military judge may order a conference with the parties to consider various matters to promote a fair and expeditious trial.[52]

a. Requesting the conference. The conference may be requested by any party or may be held at the initiative of the military judge.[53] Conferences will most often be held before trial, but may be requested or ordered at any time during the trial. The accused may be present at the conference, but may waive the right.[54] It is presumed the defense counsel at a conference speaks for the accused.[55] All parties must be represented at the conference; any ex parte communications with the military judge are prohibited.[56] Most conferences will be conducted in person, but there is no prescribed method or procedure. In some circumstances, a telephonic or radio conference could clarify issues and save significant trial time[57]

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] If there is a pretrial agreement, the military judge ensures the entire agreement is presented, that the agreement complies with R.C.M. 705, and ensures the accused understands the meaning and effect of each provision of the agreement and that the parties agree to it. *Id.*
[51] UCMJ art. 35.
[52] R.C.M. 802(a).
[53] *Id.*
[54] United States v. Walters, 16 C.M.R. 191 (C.M.A. 1954); United States v. Perry, 12 M.J. 920 (N.M.C.M.R. 1982); R.C.M. 802(a) discussion; R.C.M. 802(d).
[55] R.C.M. 802(d) discussion.
[56] United States v. Priest, 42 C.M.R. 48 (C.M.A. 1970) (law officer erred when he held unrecorded conference with staff judge advocate concerning case); United States v. Dean, 13 M.J. 676 (A.F.C.M.R. 1972) (military judge's *ex parte* session with clinical psychologist resulted in prejudicial error); Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6–2.1.
[57] R.C.M. 802(a) discussion.

b. Substance of the conference. The substance of the conference is determined by the parties. The conference could inform the military judge of anticipated issues, decide scheduling and procedural questions, or settle other uncontested matters.[58] Because neither side can be required to attend a conference, no contested matter can be resolved over a party's objections.[59] Conferences need not be recorded, but a complete summary of matters agreed upon must be included in the record of trial either orally or in writing.[60] If the parties neglect to put the results of the conference into the record, this requirement is waived.[61] If either the defense counsel or the accused makes any admission during the conference, it may not be used at trial unless reduced to writing and signed by the accused and defense counsel.[62]

[58] *Id.*
[59] R.C.M. 802(c).
[60] R.C.M. 802(b).
[61] *Id.*
[62] R.C.M. 802(e).

Chapter 24
The Arraignment

24–1. General

The arraignment normally occurs during an article 39(a) session.[1] In the arraignment, the trial counsel informs the accused of the specific charges and the military judge asks the accused how he or she desires to plead.[2] The plea itself is not part of the arraignment.[3] The accused may be arraigned only on charges and amendments thereto that have been properly referred to the arraigning court-martial for trial.[4]

24–2. The arraignment procedure

The military judge begins the arraignment by directing that "[t]he accused will now be arraigned."[5] The trial counsel then furnishes all trial participants with copies of the charges and specifications and announces for the record that "all parties and the military judge have been furnished with a copy of the charges and specifications."[6] Trial counsel then asks the defense counsel whether the accused desires that the charges be read.[7] If the accused desires that the charges be read, the charges and specifications are read aloud by the trial counsel. Ordinarily, the accused waives the reading of the charges. The trial counsel then states that the charges are sworn and identifies for the record the name of the accuser and convening authority.[8] The insertion of the Charge Sheet into the record is not an adequate substitute for the verbal statement and identification.[9] The judge then asks the accused whether there are any motions to dismiss or to grant other relief. Finally, the military judge asks the accused how he or she pleads.[10]

24–3. The effects of the arraignment

The arraignment has three principal consequences. First, if the accused voluntarily absents himself or herself without authority after arraignment, or is removed for disruptive conduct, trial may proceed in the accused's absence.[11] Before proceeding to try an accused in absentia, the military judge must be satisfied that the accused's absence truly is voluntary.[12] The judge must make a careful inquiry if there is evidence that at the time the accused absented himself or herself, the accused lacked the mental capacity to commit a voluntary act.[13] The accused's presence is essential, however, to the validity of the arraignment itself. The accused does not forfeit the right to be present at the arraignment even by voluntary absence.[14]

Second, after arraignment, additional charges may not be brought in the same trial without the express consent of the accused.[15]

Third, after arraignment, the convening authority may not withdraw charges from a court with a view to future prosecution without good cause.[16]

24–4. The effects of a defective arraignment

At common law, the defendant had few procedural safeguards. To compensate for this lack of safeguards, the courts tended to be very formalistic; if the prosecuting attorney failed to comply with a prescribed procedure such as the arraignment, the courts strained to find prejudicial error.

Today, the civilian defendant and the military accused have many procedural safeguards, and courts have a more realistic attitude toward minor defects in the arraignment procedure. Civilian courts often find that the defendant has

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[1] R.C.M. 904; AR 27–10, para. 5–22.

[2] The accused may waive the reading of the charges and specifications. R.C.M. 904.

[3] R.C.M. 904 discussion; United States v. Fleming, 40 C.M.R. 236 (C.M.A. 1969).

[4] R.C.M. 61(e)(2). After arraignment, no additional charges may be referred to the same trial without the consent of the accused. United States v. Pewtress, 46 C.M.R. 413 (A.C.M.R. 1972); United States v. Lee, 14 M.J. 983 (N.M.C.M.R. 1982) (but the accused can waive this "procedural" rule).

[5] MCM, 1984, app. 8b.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] United States v. LaBarron, 42 C.M.R. 561 (A.C.M.R. 1970); United States v. Perry, 42 C.M.R. 540 (A.C.M.R. 1970). *See infra* para. 24–4 for the effects of a defective arraignment.

[10] This procedure is set out completely in MCM, 1984, app. 8.

[11] R.C.M. 804(b); United States v. Peebles, 3 M.J. 177 (C.M.A. 1977); United States v. Condon, 42 C.M.R. 421 (A.C.M.R. 1970).

[12] For the absence to be voluntary,"the accused must have known of the scheduled proceedings and intentionally missed them." R.C.M. 804(b) discussion; United States v. Cook, 43 C.M.R. 344 (C.M.A. 1971) (insufficient inquiry into voluntariness of accused's absence).

[13] R.C.M. 804(b) discussion; United States v. Cook, 43 C.M.R. 344 (C.M.A. 1971) (insufficient inquiry into voluntariness of accused's absence).

[14] R.C.M. 804(b); United States v. Johnson, 44 C.M.R. 797 (A.C.M.R. 1971) (no valid arraignment unless the accused is present).

[15] R.C.M. 601 (e)(2);*see supra* note 4.

[16] R.C.M. 604(b);"Charges should not be withdrawn from a court-martial arbitrarily or unfairly to the accused." R.C.M. 604(a) discussion. "[R]easons for the withdrawal and later referral to another court-martial should be included in the record of the later court-martial, if the later referral is more onerous to the accused." Improper reasons for withdrawal would include interference with constitutional or codal rights of the accused or to affect the impartiality of the court-martial. R.C.M. 604(b) discussion; United States v. Fleming, 40 C.M.R. 236 (C.M.A. 1969).

waived formal defects in the arraignment. Military courts test the defects for prejudice.[17] In military law, a defective arraignment does not result in an automatic reversal; if the error was nonprejudicial, the court will not reverse the accused's conviction.[18]

[17] United States v. Napier, 20 C.M.A. 422, 43 C.M.R. 262 (1971) (several omissions from the "Trial Procedure Guide" held nonprejudicial); United States v. Adams, 6 M.J. 947 (A.C.M.R. 1979).

[18] United States v. Napier, 43 C.M.R. 262 (C.M.A. 1971) (several omissions from the "Trial Procedure Guide" held nonprejudicial); United States v. Adams, 6 M.J. 947 (A.C.M.R. 1979).

Chapter 25
Motions

25–1. Introduction

A motion is merely a request to the military judge for some particular relief. To make a good sound motion counsel must do three things. First, request the particular relief sought, such as suppression of specific statements or items. Second, state the specific grounds or rule upon which the motion is based. And third, identify and present the facts of the case which support the requested ruling. Facts win motions, not rules or laws or arguments by themselves. Motion practice is primarily the province of defense counsel. To successfully master this area of the law counsel must know the procedural rules governing motion practice, such as timing, waiver, and burdens of proof, and the substantive rules and law for the various types of motions. This chapter will first discuss the procedural rules governing motion practice, and then discuss these basic categories of military motions: (1) motions to dismiss; (2) motions for appropriate relief; and (3) motions to suppress evidence. Motions for mistrial and motions for findings of not guilty are discussed in Chapter 28 and R.C.M. 915 and 917. Post-trial correction motions under R.C.M. 1102 are discussed in Chapter 33. Motions are ordinarily made at an article 39(a) session, usually after arraignment.[1] Motions may be made orally or, at the discretion of the military judge, in writing.[2] If the motion is made in writing it must be served on all parties.[3] Upon request, either party is entitled to an article 39(a) session to present oral argument or to have an evidentiary hearing concerning the disposition of written motions.[4] Unique to military practice is the procedure that motions may be addressed to the convening authority before trial as long as the matter can be determined without trial of the general issue of guilt or innocence. Submission of such matter to the convening authority is not generally required, and when done is without prejudice to the renewal of the issue by a timely motion before the military judge.[5] This provision is intended to provide a forum for resolution of disputes before referral of charges to trial and in the absence of the military judge after trial.[6] A convening authority's order on such a motion is judicial in nature and binding.[7]

25–2. Timing of motions

Any defense objection or request which is capable of being determined before trial of the issue of guilt may be raised before trial.[8] While motions are normally made at a pretrial article 39(a) session following arraignment, a motion to dismiss a charge may be made at any time prior to final adjournment of the court.[9] Certain specified motions must be made before entry of a plea. Among these are: defenses or objections based on defects (nonjurisdictional) in the preferral, forwarding, investigation or referral of charges; defenses or objections based on defects in the charges and specifications (other than failure to show jurisdiction or state an offense); motions to suppress evidence under Military Rules of Evidence, Section III; motions for discovery or production of witnesses or evidence; motions for severance of charges or accused; and objections based on denial of a request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.[10] See table 25-1 for the effects of failing to raise a motion at the appropriate time.

Table 25–1
Waiver of motions generally

Motion	How waived
Suppression of confession or admission	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under Mil. R. Evid. 304(d) (1)] except for good cause, as permitted by the military judge. [Mil. R. Evid. 304(d)(2)(A)] 2. Plea of guilty* regardless of whether the motion was raised prior to plea. [Mil. R. Evid. 321(g)] 3. When a specific motion or objection has been made, the burden on the prosecution extends only to the grounds upon which the defense moved to suppress. [Mil. R. Evid. 321(d)]
Suppression of evidence seized from the accused or believed owned by the accused.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under Mil. R. Evid. 311(d)(1)],*except for good cause* shown, as permitted by the military judge. [Mil. R. Evid. 311(d)(2)] 2. Plea of guilty* regardless of whether the motion was raised prior to plea. [Mil. R. Evid. 311(i)] 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress.[Mil. R. Evid. 311(e)(3)]
Suppression of eyewitness ID	1. Failure to raise before submission of plea [after proper disclosure by trial counsel, under Mil. R. Evid. 321(c) (1)],*except for good cause* shown, as permitted by the military judge. [Mil. R. Evid. 321(c)(2)(A)] 2. Plea of guilty,* regardless of whether the motion was raised prior to plea. [Mil. R. Evid. 321(g)]

Table 25–1
Waiver of motions generally—Continued

Motion	How waived
Defenses or objection (other than juris. defects) in the preferral, forwarding, investigation, or referral of charges.	Failure to raise before plea is entered. [R.C.M. 905(b)(1)]
Defects in the charges or spec (other than failure to show juris.).	Failure to raise before plea is entered. [R.C.M. 905(b)(2)]
Motions for discovery (R.C.M 701) or for production of witnesses or evidence.	Failure to raise before plea is entered. [R.C.M. 905(b)(4)]
Motions for severance of charges or accuseds.	Failure to raise before plea is entered. [R.C.M. 905(b)(5)]
Objections based on denial of IMC request or for retention of detailed counsel when IMC granted.	Failure to raise before plea is entered. [R.C.M. 905(b)(6)]
Lack of jurisdiction over accused or offense (includes improperly convened courts-martial).	Not waivable. [R.C.M. 907(b)(1)(A)]
Failure of spec to state an offense.	Not waivable. [R.C.M. 907(b)(1)(B)]
Speedy trial.	Waived if not raised before final adjournment. [R.C.M. 907(b)(2)(A)] Plea of guilty, except as provided in R.C.M. 910(a)(2). [R.C.M. 707(e)]
Statute of limitations.	Waived if not raised prior to final adjournment, provided it appears that the accused is aware of his right to assert the statute, otherwise the judge must inform the accused of the right. [R.C.M. 907(b)(2)(B)]
Former jeopardy.	Waived if not raised before adjournment of the court. [R.C.M. 907(b)(2)(C)]
Pardon, grant of immunity, condonation of desertion or prior to punishment.	Waived if not raised before final adjournment of the court. [R.C.M. 907(b)(2)(D)]

* R.C.M. 910(a)(2) provides that with the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion.

Notes:

[1] R.C.M. 910(j) provides [except for a conditional guilty plea under R.C.M. 910(a)(2)] that a plea of guilty that 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 offenses to which the plea was made. R.C.M. 910(a)(2) provides that, with the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. R.C.M. 905(e) provides that the military judge for good cause may grant relief from the waiver. Other requests, defenses or objections, except lack of jurisdiction, or failure of a charge to allege an offense must be raised before the court-martial is finally adjourned and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

25–3. Kinds of motions

The Manual for Courts-Martial, 1984, separates motions into three main areas. R.C.M. 905 concerns motion practice generally, R.C.M. 906 deals with motions for appropriate relief, and R.C.M. 907 deals with motions to dismiss.[11] A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of determination without trial of the general issue of guilt.[12] Grounds for dismissal include waivable and nonwaivable grounds. Those grounds which can be waived include the statute of limitations, speedy trial as set forth in R.C.M. 707; prior trial for the same offense; pardon; grant of immunity; constructive condonation of desertion and prior punishment under articles 13 or 15, UCMJ, for the same offense, if the offense was a minor one.[13] Those grounds

[1] MCM, 1984, app. 8.
[2] R.C.M. 905(a). Counsel must give appropriate notice of motions. *See* Benchbook, app. H, Rules of Practice Before Army Courts-Martial, Rule 32b (5 working days before trial).
[3] R.C.M. 905(i).
[4] R.C.M. 905(h).
[5] R.C.M. 905(j).
[6] R.C.M. 905(j) analysis.
[7] United States v. Nix, 36 C.M.R. 76 (C.M.A. 1965).
[8] R.C.M. 905(b).
[9] R.C.M. 907(b)(2).
[10] R.C.M. 905(b).
[11] *See generally* R.C.M. 905, 906, 907. R.C.M. 905 also discusses pretrial motions, including motions to suppress evidence under Mil. R. Evid. 304, 311, and 321.
[12] R.C.M. 907(a).
[13] R.C.M. 907(b)(2). This list is not exhaustive. Motions to dismiss on waivable grounds must be made before final adjournment of the court-martial.

for dismissal which cannot be waived include lack of jurisdiction and failure of the specification to state an offense.[14] The military judge may dismiss any specification if it is defective or multiplicious and dismissal is required in the interest of justice.[15]

A motion to grant appropriate relief, on the other hand, 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.[16] It should be noted that it is the substance of a motion and not its form or designation which controls, though counsel should be as specific as possible in stating the grounds for their motions.[17]

25–4. Burden of proof

Where factual matters must be resolved in order to decide a motion, the burden of persuasion is generally upon the moving party, who must prove the matter by a preponderance of the evidence.[18] There are exceptions to this general rule. In the case of motions to dismiss for lack of jurisdiction, denial of the right to a speedy trial, or the running of the statute of limitations, the burden of proof to demonstrate by a preponderance of evidence is always upon the prosecution.[19] In motions to suppress evidence under Military Rules of Evidence, Section III, the prosecution has the burden of demonstrating by a preponderance that the evidence is admissible.[20] For targeted inspections under Mil. R. Evid. 313(b), consent searches pursuant to Mil. R. Evid. 314, and subsequent identifications under Mil. R. Evid. 321(d)(2), the Government has the burden to establish lawfulness by clear and convincing evidence.[21] The standard the Government must meet in unlawful command influence motions is proof beyond a reasonable doubt.[22]

25–5. Rulings on motions

A motion which is made before pleas are entered shall be determined before pleas are required to be entered, unless the military judge orders that determination of the matter be delayed until trial, for good cause. In no event may such a determination be delayed if a party's right to review or appeal is adversely affected. The military judge is required to state essential findings of fact which bear on the ruling on the record.[23]

25–6. Reconsideration of rulings on motions

The military judge may, sua sponte, or upon request of any party, reconsider any ruling which does not amount to a finding of not guilty.[24] While the military judge may reconsider a ruling on his or her own initiative, or at the request of either party, it is equally clear that the convening authority cannot compel the military judge to reverse the ruling.[25] The military judge may not reconsider a ruling which is tantamount to an acquittal.[26] There are certain limited situations, however, where the Government can appeal from an interlocutory ruling by the military judge.[27]

25–7. Motions to dismiss

A motion to dismiss is a request to terminate further proceedings as to one or more charges or specifications on grounds capable of resolution without trial of the issue of guilt or innocence.[28] The Rules for Courts-Martial divide motions to dismiss into nonwaivable, waivable, and permissible grounds. Failure of a specification to allege an offense is a nonwaivable ground for dismissal. If a specification fails to state an offense it will be dismissed, upon motion, at any stage of the proceedings, including appeal. The right to make a motion to dismiss for failure to state an offense cannot be waived.[29] Charges will also be dismissed at any stage of the proceedings when the court lacks either in personam or subject matter jurisdiction. Lack of jurisdiction is not waived by failure to make a motion or objection.[30]

Some motions to dismiss are waived if not raised before the conclusion of the proceedings. A motion to dismiss for lack of speedy trial under R.C.M. 707 must be raised prior to conclusion of the trial or it is waived.[31]

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[14] R.C.M. 907(b)(1).
[15] R.C.M. 907(b)(3).
[16] R.C.M. 906(a). The rule lists 14 grounds for appropriate relief, but the military judge may consider any reasonable request for relief. *See, e.g.*, R.C.M. 912(b) (motion for appropriate relief alleging improper selection of court members).
[17] R.C.M. 905(a). *See also* United States v. Thomson, 3 M.J. 271 (C.M.A. 1977); United States v. Barber, 20 M.J. 678 (A.F.C.M.R. 1985).
[18] R.C.M. 905(c). The Manual may provide for a different burden of proof. *See* Mil. R. Evid. 313(b) (prosecution must prove that an examination to locate weapons or contraband under certain specified conditions is an inspection by "clear and convincing"evidence).
[19] R.C.M. 905c(2).
[20] Mil. R. Evid. 31(e), 32(d), 304(d).
[21] Mil. R. Evid. 31 3(b).
[22] United States v. Thomas, 22 M.J. 388 (C.M.A. 1986).
[23] R.C.M. 905(d). *See generally infra* sec. 25–10.
[24] R.C.M. 905(f). For the scope of evidence the military judge may consider on reconsideration, see United States v. Harrison, 20 M.J. 55 (C.M.A. 1985).
[25] United States v. Ware, 1 M.J. 282 (C.M.A. 1976). Under R.C.M 905(f), only a "party" may request reconsideration. The convening authority is not a"party." *See* R.C.M. 905(f) analysis.
[26] United States v. Kinner, 7 M.J. 974 (N.C.M.R. 1979); R.C.M. 905(f).
[27] R.C.M. 908. *See infra* chap. 35.
[28] R.C.M. 907(a).
[29] R.C.M. 907(a)(1).
[30] *Id.*
[31] R.C.M. 907(b)(2)(A).*See supra* chap. 15.

A motion to dismiss because the statute of limitations has run must also be made before the conclusion of the proceedings.[32] There are three different periods of limitation under the Uniform Code of Military Justice. There is no limitation whatsoever for any offense punishable by death, such as murder, or for absence without leave or missing movement in time of war, and these offenses may be tried and punished at any time.[33] All other offenses have a 5-year statute of limitations, and the statute of limitations is tolled by the receipt of sworn charges by the summary court-martial convening authority.[34] The statute of limitations for nonjudicial punishment under article 15 is 2 years. A person cannot receive nonjudicial punishment for an offense committed more than 2 years before the imposition of punishment.[35] Periods when the accused was absent from territory where the United States had authority to apprehend the accused, was in the custody of civil authorities, or in the hands of the enemy, are excluded in computing the period of limitation applicable.[36] The statute of limitations may also be tolled or extended in time of war.[37] There is a 6-month grace period to reprefer charges and specifications which are dismissed as defective or insufficient for any cause, even though the statute of limitations has expired, so long as the original charges and specifications were not barred by the statute of limitations.[38]

When it appears on the face of the charge sheet that the statute of limitations has run and that the accused is unaware of that fact, the military judge must advise the accused of the effect of the statute of limitations.[39] Properly advised of the meaning and effect of the statute of limitations, the accused may then choose to waive the protection.[40] When the charged offense is not within the statute of limitations, but a finding of a lesser included offense would be barred by the statute of limitations, the accused is entitled to instructions on the lesser included offense (when placed in issue by the evidence in the case) only if the accused waives the bar of the statute of limitations.[41]

A motion to dismiss charges may be made on the ground that the accused has previously been tried for the same offense.[42] The Manual for Courts- Martial provides that no proceeding is a trial in the sense of former jeopardy until the presentation of evidence on the merits, that no proceeding involving a finding of guilty is a trial until review of the case has been fully completed, and no proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of former jeopardy.[43] After grant of a mistrial,[44] former jeopardy may be raised in bar of trial in very limited situations. The general rule is that when the defense has asked for a mistrial, it will not be heard to complain at a later trial that the relief was granted.[45] A second trial will be barred after declaration of a mistrial on grounds of former jeopardy only when the grant was an abuse of discretion and without the consent of the defense, or if the mistrial was the direct result of prosecutorial misconduct intended to necessitate a mistrial.[46]

There is no constitutional bar to trial by military courts after the conviction of the accused by a foreign court for the same offense because the offenses would be committed against different sovereigns and the trials are by different sovereigns. Status of Forces Agreements, however, may change that result. The NATO SOFA contains a provision that prohibits trial by one party after a conviction or acquittal by another party to the treaty.[47] The Court of Military Appeals has held that an accused may assert this double jeopardy provision in bar of a subsequent court-martial where the charges were the same as those upon which he or she was tried and acquitted by the foreign court.[48] In interpreting the effect of the Korean Status of Forces Agreement, the Court of Military Appeals held that the protection against double jeopardy applied only when there was a final judgment by the foreign court. When charges were dismissed by the Korean Supreme Court for lack of jurisdiction because martial law had been declared, there was no foreign judgment to which jeopardy had attached, and consequently there was no bar to a subsequent trial by court-martial.[49] Further, the foreign determination must be made by a criminal court, not an administrative body, before any issue of double jeopardy is raised under the Status of Forces Agreement.[50] A Presidential pardon may be interposed as a bar to trial and can be raised by a motion to dismiss made before the conclusion of the trial.[51] Such power must be exercised

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[32] R.C.M. 907(b)(2)(B). United States v. Salter, 20 M.J. 116 (C.M.A. 1985).
[33] UCMJ, art. 43(a). Applies to any capital offense.*See* footnote 32.
[34] UCMJ art. 43(b)(1).
[35] UCMJ art. 43(b)(2).
[36] UCMJ art. 43(d). Periods of absence without leave or desertion also toll the statute.
[37] UCMJ art. 43(e) and (f).
[38] UCMJ art. 43(g).
[39] United States v. Salter, 20 M.J. 116 (C.M.A. 1985); United States v. Rogers, 24 C.M.R. 36 (C.M.A. 1957).
[40] United States v. Burkey, 49 C.M.R. 204 (A.C.M.R. 1974).
[41] R.C.M. 920(e) (C2, 1985). The 1985 amendment specifically overrules United States v. Wiedemann, 36 C.M.R. 521 (C.M.A. 1966), and is consistent with Spaziano v. Florida, 104 S. Ct. 3154 (1984).
[42] UCMJ art. 44 provides that no person may, without his or her consent, be tried a second time for the same offense.
[43] R.C.M. 907(b)(2)(c). *But cf.* United States v. Culver, 46 C.M.R. 141 (C.M.A. 1973). *See* R.C.M. 907(b)(2)(C)(iv) analysis.
[44] *See infra* chap. 28.
[45] United States v. Ivory, 26 C.M.R. 296 (C.M.A. 1958).
[46] R.C.M. 915(c). Burtt v. Schick, 23 M.J. 140 (C.M.A. 1986).
[47] NATO Status of Forces Agreement, art. VII, para. 8, 4 U.S.T. 1792 at 1802.
[48] United States v. Green, 14 M.J. 461 (C.M.A. 1983).
[49] United States v. Miller, 16 M.J. 169 (C.M.A. 1983).
[50] United States v. Stokes, 12 M.J. 229 (C.M.A. 1982).
[51] R.C.M. 907(b)(2)(D)(i).

by the President, and excuses the offense.[52] A motion to dismiss may also be made on the grounds that the accused has been granted immunity from prosecution by a person authorized to do so.[53]

A motion to dismiss a desertion charge in violation of article 85, UCMJ, may be made based upon constructive condonation of the desertion. If a general court-martial convening authority, with knowledge of the alleged desertion, unconditionally restores a deserter to duty without trial, such action amounts to a constructive condonation of the desertion and may be interposed to bar trial.[54] The accused must assert the defense during trial or it is waived.[55] The defense does not apply to the lesser included offense of absence without leave.[56]

Prior punishment under either article 13 or 15, UCMJ, may bar subsequent trial for the same offense if that offense is minor.[57] Whether an offense is a minor offense depends upon the nature of the offense and surrounding circumstances, the age, rank, record, and duty assignment of the offender, and the maximum sentence imposable if the offense were tried by general court-martial. The determination whether an offense is"minor" is a matter within the discretion of the commander imposing nonjudicial punishment.[58] If a commander imposed nonjudicial punishment for a serious offense, that would not be a bar to trial.[59] While nonjudicial punishment for a serious offense is not a bar to trial, it would be admissible at trial in mitigation.[60]

Finally, the military judge is permitted to dismiss charges if he or she finds that a specification is so defective as to substantially mislead the accused and in the interest of justice trial should proceed on the remaining charges, or that a specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof, and should be dismissed in the interest of justice.[61]

25–8. Motions for appropriate relief

a. In General. The motion for appropriate relief is designed to remedy defects of form or substance that require corrective action short of dismissal. A motion for appropriate relief is one made to cure a defect which impedes the party in properly preparing for trial or conducting one's case.[62] There are numerous grounds for motions for appropriate relief and it is the substance, not the form of the motion, which controls.[63] R.C.M. 906(b) contains a nonexhaustive list of some grounds for motions for appropriate relief. The military judge must consider other reasonable requests for relief.

b. Continuances. A motion for a continuance may be granted only by the military judge.[64] The rule makes clear that the military judge controls the docketing and scheduling of cases. While the convening authority can grant many pretrial motions, he or she is without power to grant a continuance. The Uniform Code of Military Justice, article 40, provides that the military judge, or a court-martial without a military judge, may grant a continuance for reasonable cause to any party for such time and as often as may appear to be just.[65] The decision to grant or deny the continuance rests within the discretion of the trial judge and he or she remains accountable for an abuse of discretion which prejudices a substantial right of the accused.[66] The burden is upon the moving party to demonstrate that a continuance is justified.[67]

The right to obtain civilian defense counsel will normally justify a continuance. When the accused acts with reasonable diligence in attempting to obtain civilian counsel and the period of delay is reasonable, failure to grant a continuance could constitute abuse of discretion and denial of the accused's right to counsel.[68] There are, of course, limits to reasonable delay, and the accused is not entitled to unlimited continuances to allow civilian counsel to appear at trial.[69] Indeed, the Court of Military Appeals has stated that the accused may always discharge one's attorney, but if the accused desires to substitute other counsel, the right is qualified in that the request for substitute counsel cannot impede or unreasonably delay the proceedings. Thus, a judge may deny a request for continuance if the delay sought

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[52] United States v. Batchelor, 22 C.M.R. 144 (C.M.A. 1956).
[53] R.C.M. 907(b)(2)(D)(ii).*See also* R.C.M. 704(c).
[54] R.C.M. 907(b)(2)(D)(iii).
[55] *Id. See also*United States v. Perkins, 4 C.M.R. 94 (C.M.A. 1952).
[56] United States v. Minor, 4 C.M.R. 89 (1952).
[57] R.C.M. 907(b)(2)(D)(iv).
[58] MCM, 1984, Part V, para. 1e provides: Ordinarily, a minor offense is one for which the maximum sentence imposable at a general court-martial does not include a dishonorable discharge or confinement for longer than 1 year.
[59] *Id. See also* United States v. Fretwell, 29 C.M.R. 193 (C.M.A. 1960).
[60] R.C.M. 1001(c)(1)(B).*See also* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (accused must be given complete sentence credit for any punishment resulting from the article 15 proceeding).
[61] R.C.M. 907(b)(3).
[62] R.C.M. 906(a).
[63] R.C.M. 905(a).
[64] R.C.M. 906(b)(1).
[65] UCMJ art. 40. A request for continuance made by the prosecution and denied by the military judge was held not appealable under article 62 by the Court of Military Appeals in United States v. Browers, 20 M.J. 356 (1985).
[66] United States v. Dunks, 1 M.J. 254 (C.M.A. 1976).
[67] United States v. Johnson, 12 M.J. 670 (A.C.M.R. 1981).
[68] United States v. Conmy, 44 C.M.R. 756 (N.C.M.R. 1971).
[69] United States v. Thomas, 22 M.J. 5 (C.M.A. 1986). *Cf.* United States v. Wilson, 28 M.J. 1054 (N.M.C.M.R. 1989).

would be unreasonable.[70] While the judge cannot foreclose exercise of the accused's unfettered choice to select civilian counsel at any time during the trial, the exercise of this right cannot unreasonably delay the progress of the trial. Among the factors that may be considered in determining whether a request of continuance is reasonable and should be granted are: the length of time that the accused knew of the right to counsel; the attempts which he or she made to obtain civilian counsel; and the Government's reliance on the date set for trial, including the continued availability of witnesses.[71]

There is no requirement to grant a continuance simply to comply with a procedural rule which confers no benefit on the accused. For example, where the accused at trial requests an individual military counsel from another service who is located more than 100 miles from the trial situs, there is no requirement to grant a continuance in order to get a formal denial from the convening authority.[72] Even in the case where a continuance is requested to ensure the accused's presence for trial following his or her apprehension for an AWOL occurring after the trial date was set, the court's decision required a balancing of the accused's right to be present at his or her trial against the inconvenience and expense inflicted on the Government, court, and witnesses by the accused's own misconduct.[73] When surprise evidence is introduced, the opposing party may be entitled to a continuance to test and examine that evidence.[74] Once materiality of a witness' testimony is established, the Government must either produce the witness or abate the proceedings. Once a defense- requested witness is determined to be material, it is an abuse of discretion to deny a continuance to secure the attendance of the witness.[75] A defense request that the Government take all appropriate steps to enforce a subpoena for a defense witness was interpreted by the appellate court as a motion for a continuance until such time as either the subpoena was enforced, or the Government demonstrated good-faith attempts at enforcement.[76] The military judge, in exercising his or her discretion whether to grant a continuance, must weigh the interests of both parties, consider the existing circumstances, and ensure that the trial is conducted in a fair and impartial manner and that the individual accused receives a fair trial.[77]

c. Denial of request for individual military counsel. A motion for appropriate relief may be made to record the denial of individual military counsel request or denial of requests to obtain detailed counsel when a request for individual military counsel was granted.[78] While a trial judge can take a number of actions to ensure that a complete record of the determination that the accused's requested military counsel was unavailable is included in the record, the trial judge cannot dismiss charges without trial on the grounds that the accused has been denied military counsel of his or her choice improperly.[79] The judge has no authority to dismiss charges referred to trial, or otherwise prevent further proceedings in the case on the grounds that the command's determination of nonavailability of the accused's individual military counsel was so wrong as to constitute an abuse of discretion.[80]

d. Procedural defects: investigation, amendment and severance of specifications. Correction of defects in the article 32 investigation or the pretrial advice may be the subject of motions for appropriate relief.[81] The accused is entitled to judicial enforcement of the right to a proper pretrial investigation regardless of whether such remedy will ultimately benefit him or her at trial.[82] A defect in the pretrial investigation, however, does not deprive a court-martial of jurisdiction. Rather, the trial must be postponed until the convening authority determines whether to order continuation of proceedings or to dismiss charges.[83] Failure to make a timely objection to the lack of an investigation, or to defects in the investigation, constitutes waiver.[84]

A motion for appropriate relief may be made to amend a charge or specification.[85] A charge or specification may not be amended, however, over the objection of the accused unless the amendment is minor within the meaning of R.C.M. 603(a). Any change is minor unless it adds a party, offense, or substantial matter not fairly included in charges previously preferred, or unless the charge is likely to mislead the accused as to the offenses charged.[86] After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time

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[70] United States v. Montoya, 13 M.J. 268 (C.M.A. 1982); United States v. Maresca, 28 M.J. 328 (C.M.A. 1989).
[71] United States v. Brown, 10 M.J. 635 (A.C.M.R. 1980); United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985); United States v. Galinato, 28 M.J. 1049 (N.M.C.M.R. 1989).
[72] United States v. Perry, 14 M.J. 856 (A.C.M.R. 1982).
[73] United States v. Thornton, 16 M.J. 1011 (A.C.M.R. 1983).
[74] United States v. Tope, 47 C.M.R. 294 (A.C.M.R. 1973).
[75] United States v. Rhodes, 14 M.J. 919 (A.F.C.M.R. 1982). United States v. Mow, 22 M.J. 906 (N.M.C.M.R. 1986).
[76] United States v. Cover, 16 M.J. 800 (N.M.C.M.R. 1983). *See also* R.C.M. 905(a). A motion is governed by the substance of the request for relief not by the form in which the request is made.
[77] United States v. Cover, 16 M.J. at 802;*see* United States v. Keys, 29 M.J. 920 (A.C.M.R. 1990).
[78] R.C.M. 906(b)(2).
[79] United States v. Redding, 11 M.J. 100 (C.M.A. 1981).
[80] *I*d. at 112.
[81] R.C.M. 906(b)(3); *but see* United States v. Murray, 22 M.J. 700 (A.C.M.R. 1986) (cannot waive failure to provide written pretrial advice).
[82] United States v. Maness, 48 C.M.R. 512 (C.M.A. 1974); United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).
[83] United States v. Johnson, 7 M.J. 496 (C.M.A. 1979).
[84] United States v. Donaldson, 49 C.M.R. 542 (C.M.A. 1975); United States v. Henry, 50 C.M.R. 685 (A.F.C.M.R. 1975). *See supra* chap. 16. *See generally* R.C.M. 405 on pretrial investigation and R.C.M. 406 on pretrial advice.
[85] R.C.M. 906(b)(4).
[86] R.C.M. 603(a).

before findings are announced if no substantial right of the accused is prejudiced.[87] A specification may be amended if the change does not result in a different offense, in the allegation of an additional or more serious offense, in raising a substantial question as to the statute of limitations, or in misleading the accused. For example, amending the title of the officer alleged to have given an order in a case charging a violation of article 92, UCMJ, does not change the nature of the offense.[88] It has been held, however, that amending the termination date of an absence without leave specification to increase the period of the absence increases the severity of the offense charged and thus constitutes a major change to the specification.[89] The addition of a termination date, unlike the amending of the termination date, to a previously sworn AWOL charge is a permissible amendment which does not change the identity of the offense for the purpose of the amendment rules and so does not require that the charge be sworn anew.[90] An accused may not be tried upon unsworn charges over his or her objection, and a change to a specification, unless minor, results in unsworn charges.[91] When the original charge or specification is amended to aver a new offense or the amendment results in a major change, charges should be resworn.[92] While the remedy for a defective specification which still states an offense is amendment, and a continuance if necessary, in an appropriate case the specification may be dismissed by the military judge.[93]

A motion for appropriate relief may be made to sever a duplicitous specification into two or more specifications.[94] Each specification may state only one offense.[95] A specification is not necessarily duplicitous when it alleges an offense containing lesser included offenses.[96] A specification is not duplicitous if two acts constituting a single offense are alleged,[97] or if an offense is committed by more than one means.[98] In some cases, a severance might reduce the total maximum authorized punishment.[99] Duplicity itself is not a ground for reversing a conviction, and is only fatal when it materially prejudices the substantial rights of the accused.[100] As an example, a duplicitous larceny specification, increasing the value of the stolen property, might result in an increase in the authorized maximum punishment.[101] If an accused does not object to a duplicitous pleading at trial, he or she waives the objection.[102]

e. Bills of particulars and discovery. A motion for appropriate relief may also request a bill of particulars.[103] The purposes of the bill of particulars are: to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare the case; to minimize surprise at trial; and to assert former jeopardy when the specification itself is too vague and indefinite for such purpose.[104] Similarly, a motion for appropriate relief may address disclosure or production of evidence or witnesses.[105] Failure to raise a discovery motion based upon R.C.M. 701 or to produce witnesses or evidence before entry of a plea will result in waiver of the issue.[106] The rationale here is that both parties are held to have equal access to witnesses and evidence; if a party does not ask for help, it will be presumed that help is not required.[107]

f. Severance, venue, and multiplicity. A motion for appropriate relief may be made to sever an accused's case, where there are multiple accused, if it appears that either the accused or the Government is prejudiced by a joint or common trial.[108] When such a motion is made in a common trial, a severance will be granted whenever any accused, other than the moving party, faces charges unrelated to those charged against the moving party.[109] In a common trial a motion to sever will be liberally considered, and the motion should be granted if good cause is shown.[110] The moving party has the burden of showing a risk of prejudice, and the decision whether to grant the motion rests within the discretion of the military judge.[111] Of course, if a motion for a severance is denied, the accused may force the issue by his or her election of mode of trial, that is, requesting trial by judge alone or with enlisted members if not requested by the co-

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[87] R.C.M. 603(c).
[88] United States v. Johnson, 31 C.M.R. 296 (C.M.A. 1962).
[89] United States v. Krutsinger, 35 C.M.R. 207 (C.M.A. 1965).
[90] United States v. Reeves, 49 C.M.R. 841 (A.C.M.R. 1975).
[91] R.C.M. 603(d).
[92] R.C.M. 307(b).
[93] *See* R.C.M. 907(b)(3).
[94] R.C.M. 906(b)(5).
[95] R.C.M. 307(c)(4).
[96] United States v. Parker, 13 C.M.R. 97 (C.M.A. 1953).
[97] United States v. Bull, 14 C.M.R. 53 (C.M.A. 1954).
[98] United States v. Riggins, 9 C.M.R. 81 (C.M.A. 1953) (specification alleging robbery by force and violence and putting in fear held *not* duplicitous).
[99] United States v. Davis, 36 C.M.R. 363 (C.M.A. 1966).
[100] United States v. Branford, 2 C.M.R. 489 (A.B.R. 1951).
[101] United States v. Davis, 36 C.M.R. at 365.
[102] United States v. Parker, 13 C.M.R. at 104. *See supra* chap. 12.
[103] R.C.M. 906(b)(6).
[104] R.C.M. 906b)6) discussion.
[105] R.C.M. 906(b)(7).
[106] R.C.M. 905(b)(4).
[107] R.C.M. 701(e). But see United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980).
[108] R.C.M. 906(b)(9).
[109] *Id.*
[110] United States v. Oliver, 33 C.M.R. 404 (C.M.A. 1963); United States v. Washington, 33 C.M.R. 505 (A.B.R. 1963).
[111] United States v. Pringle, 3 M.J. 308 (C.M.A. 1977).

accused. Ordinarily, a failure to make a timely objection constitutes waiver.[112]

Charges against two or more accuseds may be referred to a joint trial if the accuseds 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. They may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations which may be proved by substantially the same evidence against two or more accused may be referred to a common trial.[113] In many cases, however, the joint or common trial will be complicated by both procedural and evidentiary rules.[114] Consequently, joint trials should normally be avoided.

A motion for appropriate relief may be made to sever offenses at trial, but only to prevent a manifest injustice.[115] In the discretion of the convening authority, two or more offenses charged against a single accused may be referred to the same court for trial, whether those charges are serious or minor offenses.[116] The convening authority may join such charges at a single trial whether or not the charges are related.[117] It is the preference that all known charges be tried at a single proceeding; however, the motion for severance of charges is still available as a remedy in appropriate and unusual cases.[118]

A motion may also be made for a change in the place of trial.[119] 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.[120] The grounds for change of venue include moving to obtain compulsory process over an essential witness or to obtain a fair trial where the risk of prejudice against the accused at the place of trial is too great.[121] In the military, a change of venue may be effected by selecting members from another location without moving the trial, thereby accomplishing the same result in those cases where the accused has requested trial by a court with members.

The accused may move for a determination of the multiplicity of offenses for sentencing purposes. Such motion is ordinarily ruled on after findings are entered.[122] Analyze the facts and refer to the case law for the concerned charges to determine whether offenses are separate or multiplicious for sentencing.

g. Motions in limine. A motion may be made requesting a preliminary ruling on admissibility of evidence. Such a motion requests that certain matters be decided outside of the presence of the members in order to avoid potential prejudice if inadmissible matters were brought out before them, and at a time in the proceeding prior to the offering of the matter into evidence.[123]

Motions in limine are closely akin to suppression motions, except that motions in limine are based on nonconstitutional grounds.[124] A motion in limine asks the court to address an evidentiary objection as a preliminary matter, rather than waiting until the evidence is offered in court and ruling as an ordinary trial objection. The trial judge has some discretion whether to hear a matter as a motion in limine, but should consider the risk of a mistrial if the evidence comes out before members and is later held to be inadmissible.[125] The Manual for Courts-Martial expresses a preference that a ruling on motions made before pleas be issued prior to entry of pleas, unless there is good cause to delay ruling.[126] When the accused's decision whether or not to testify in one's own behalf rests upon the military judge's ruling on a motion in limine, the military judge should inquire as to the scope and probable content of the evidence and require a statement of the precise nature of the objection before deciding whether to entertain an evidentiary objection as a motion in limine.[127]

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[112] United States v. Baca, 33 C.M.R. 288 (C.M.A. 1963).

[113] R.C.M. 601(e)(3).

[114] Where co-accused has made pretrial statements,*see*, United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Green, 3 M.J. 320 (C.M.A. 1977); United States v. Pringle, 3 M.J. 308 (C.M.A. 1977). Where accused enters different pleas or inconsistent defenses, *see* United States v. Oliver, 33 C.M.R. 404 (C.M.A. 1963); United States v. Washington, 33 C.M.R. 505 (A.B.R. 1963).

[115] R.C.M. 906(b)(10).

[116] *See* MCM, 1984, Part V, para. 1e for a discussion of what constitutes a minor offense.

[117] R.C.M. 601(e)(2).

[118] *See* United States v. Gettz, 49 C.M.R. 79 (N.C.M.R. 1974).

[119] R.C.M. 906(b)(11).

[120] *Id.*

[121] *See* R.C.M. 906(b)(11) discussion.

[122] R.C.M. 906(b)(12).

[123] R.C.M. 906(b)(13). The motion may be made before or during trial. The burden of proof is on the proponent of the evidence.

[124] *See generally* Siano, *Motions in Limine, An Often Neglected Common Law Motion*, The Army Lawyer, Jan. 1976, at 17.

[125] R.C.M. 906(b)(13). *See* United States v. Cofield, 11 M.J. 422 (C.M.A. 1981); United States v. Helweg, 29 M.J. 714 (A.C.M.R. 1989).

[126] R.C.M. 905(d) provides:

> 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.

See United States v. Postle, 20 M. J. 632 (N.M.C.M.R. 1985).

[127] United States v. Cofield, 11 M.J. at 431.

The Court of Military Appeals recently clarified whether the accused must testify to preserve a denied motion in limine concerning the admissibility of a prior conviction for impeachment purposes. In United States v. Sutton, the court followed prior Supreme Court precedent and held that the accused must testify to preserve the reviewability of the military judge's ruling.[128]

A motion in limine may be raised by either party. This is especially true in light of the Government's right to appeal adverse evidentiary rulings under R.C.M. 908. Although such motions will usually be raised by the defense,[129] there may be circumstances, such as those involving evidence of uncharged misconduct, where the Government chooses to take the initiative.[130] In any event, the military judge must exercise caution in determining whether the issue is capable of resolution before evidence is presented at trial.[131] A plea of guilty will waive a motion in limine issue, whether the motion was litigated and lost or whether the judge refused to hear the objection as a motion in limine.[132]

25–9. Motions to suppress evidence

The Military Rules of Evidence provide for suppression motions to challenge certain types of evidence on constitutional grounds. Confessions and admissions made by the accused,[133] evidence obtained from a search or seizure or believed to belong to the accused,[134] and prior eyewitness identification of the accused[135] may all be challenged by a motion to suppress the evidence. Once properly notified by the trial counsel that such evidence exists,[136] the defense counsel must make the motion to suppress the evidence prior to entering pleas unless the defense can show good cause for raising the motion after submission of a plea.[137] Failure to do so will result in waiver of the objection.[138] Even when the trial counsel indicates to the defense counsel that the questioned evidence will not be used, where that assurance could only be interpreted as going to the Government's case in chief and not rebuttal, the defense was held to have waived the issue by entering a plea prior to raising the issue via motion to suppress.[139] When the motion is made, the military judge may require the defense counsel to state the specific grounds for the objection to the evidence, unless the defense counsel is unable to do so after the exercise of due diligence.[140] Absent good cause, the military judge must conduct a hearing and make a ruling on a motion to suppress before requiring entry of the plea. Where there are factual disputes involved in resolving the motion the military judge must sua sponte make essential findings of fact on the record.[141] The Military Rules of Evidence also specifically provide that even if the motion is raised prior to plea, a plea of guilty will waive the issue.[142] When the defense has been specific as to the grounds for the motion, the Government's burden extends only to the grounds upon which the defense moved to suppress the evidence.[143] When a motion to suppress evidence is made, the prosecution has the burden of demonstrating by a preponderance of the evidence (unless a different standard is prescribed) that the offered evidence is properly admissible.[144] A ruling of the military judge suppressing evidence may be appealed by the Government in certain situations.[145]

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[128] *See* United States v. Sutton, 31 M.J. 11 (C.M.A. 1990);*see also* Luce v. United States,469 U.S. 38 (1984). *Luce* and *Sutton* overruled*Cofield* insofar as *Cofield* allowed an accused to preserve an appeal from an adverse ruling on a motion *in limine* permitting use of a prior conviction for impeachment without the accused taking the stand. In *Sutton*, the Court of Military Appeals clarified the issue of preserving the review ability of the military judge's ruling on the motion *in limine* and adopted the Supreme Court's holding in *Luce* to the military. The court held that the accused must testify as a prerequisite for a review of an *in limine* ruling on admissibility of a prior conviction or other impeaching evidence.

[129] *See*United States v. Goins, 20 M.J. 673 (A.F.C.M.R. 1985); United States v. Rogers, 17 M.J. 990 (A.C.M.R. 1984); United States v. Wright, 13 M.J. 824 (A.C.M.R. 1982); Defense counsel must comply with Mil. R. Evid. 103(a)(2) and "present appellant's position with perspicacity and precision." United States v. Means, 20 M.J. at 526.

[130] United States v. Peterson, 20 M.J. 806 (N.M.C.M.R. 1985). Upon Government appeal, the*Peterson* court held the military judge erred in excluding evidence of uncharged misconduct. The court found the evidence admissible to prove intent under Mil. R. Evid. 404(b), and commented that: "[A]ny ultimate determination of *inadmissibility* cannot be made until the conclusion of the defense case." 20 M.J. at 814. *But see* United States v. Rivera, 24 M.J. 156 (C.M.A. 1987) (court discourages government use of a motion *in limine* as a preemptive strike to exclude anticipated "good soldier" evidence). *See also*United States v. Varela, 25 M.J. 29 (C.M.A. 1987); *see also*United States v. West, 27 M.J. 223 (C.M.A. 1988).

[131] *See* United States v. Owens, 21 M.J. 117 (C.M.A. 1986) (ruling on impeachment evidence deferred until after accused testified at trial). Certain issues may be clarified by deferring ruling on the motion until other evidence has been introduced. This permits a more accurate balancing test for prejudice under Mil. R. Evid. 403.

[132] United States v. Cannon, 33 M.J. 376 (C.M.A. 1991); United States v. Helweg, 32 M.J. 129 (C.M.A. 1991); United States v. Wilson, 12 M.J. 652 (A.C.M.R. 1981).

[133] Mil. R. Evid. 304.

[134] Mil. R. Evid. 311.

[135] Mil. R. Evid. 321.

[136] *See* Mil. R. Evid. 304d(1), 311(d)(1), 321(c)(1).

[137] Mil. R. Evid. 304(d)(2)(A), 311(d)(2)(A), 321(c)(2)(A).

[138] United States v. Gholston, 15 M.J. 582 (A.C.M.R. 1983); United States v. Coffin, 25 M.J. 32 (C.M.A. 1987) (good cause to raise motion after a plea should be liberally construed).

[139] United States v. Yarborough, 18 M.J. 452 (C.M.A. 1984). The court went on to say a military judge should conduct an adequate inquiry to ensure no bad faith on the part of the Government in assuring that the evidence (statement made by the accused) would not be used. 18 M.J. at 456.

[140] Mil. R. Evid. 304(d)(3), 311(d)(3), 321(c)(3).

[141] Mil. R. Evid. 304(d)(4), 311(d)(4), 311(f).

[142] Mil. R. Evid. 304d(5), 311(i), 321(g). *See*United States v. Mortimer, 20 M.J. 964 (A.C.M.R. 1985).

[143] Mil. R. Evid. 304(e), 311(e)(3), 321(d).

[144] Mil R Evid 304, 311(e)(1), 321.

[145] *See infra* chap. 29.

25–10. Essential findings

The Rules for Courts-Martial require generally that whenever factual findings are involved in determining a motion, "the military judge shall state the essential findings on the record."[146] With identical language, different portions of the Military Rules of Evidence highlight this duty in connection with motions regarding unlawfully seized evidence, statements or confessions, and eyewitness identification.[147] The Analysis to these various rules indicates that the pertinent language was drawn from Rule 12(e) of the Federal Rules of Criminal Procedure.[148] Thus, cases construing Rule 12(e) should be relied upon, where appropriate, in interpreting these various portions of the Manual regarding essential findings.[149]

The purpose of requiring trial judges to state their essential findings on the record is to "hav[e] the record of trial reveal the factual and legal basis for each decision."[150] By setting forth the bases for decisions, the trial judge facilitates meaningful review of the case on appeal, and permits the reviewing court to provide specific guidance to other trial courts addressing the same issue.[151] The trial judge has a sua sponte duty to set forth essential findings on the record,[152] regardless whether the parties dispute the facts.[153] The failure to provide sufficiently detailed findings constitutes grounds for reversal.[154]

The Manual requires a trial judge to "state the essential findings" when "factual issues are involved in determining a motion."[155] The courts have construed the rule to require that the trial judge recite the essential factual findings and the essential legal findings which support the decision on the motion. With respect to factual matters, the trial judge is not required to provide detailed findings or to restate all the testimony.[156] It is sufficient if the judge recites the "factual findings upon which the [court] based its grant [or denial of] the motion."[157] The boundaries for providing special findings provides trial judges with substantial guidance as to the role of essential findings:[158]

> Such findings should include a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which determine the case.[159]

The trial judge should be careful to recite not only those factual findings which directly support his or her legal conclusions, but also those which exclude any legal conclusion inconsistent with the judge's ruling.[160] In ruling on inherently factual issues which are determined by a "totality of the circumstances" or similar standard,[161] it is"particularly important"[162] that trial judges provide a comprehensive recitation of the factual findings underlying their rulings.

R.C.M. 905(d) and its counterparts in the Military Rules of Evidence[163] require trial judges to state the essential legal findings incident to their rulings. The statement should be tailored to facilitate appellate review.[164] This requires a

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146 RCM 905(d) (emphasis supplied).

147 Mil. R. Evid. 304(d)(4), 311(d)(4), 321(f).

148 *See*R.C.M. 905(d) analysis and Mil. R. Evid. 304(d)(4) and 321(f) analysis. Although the analysis to Mil. R. Evid. 311(d)(4) is silent in this regard, both the fact that the language in all these rules is identical and the reference in Mil. R. Evid. 321(f) analysis to "the analogous provisions in Rules 304 and 321 [sic] [apparently intended as a reference to 311]"provides a strong basis for inferring that the language of Mil. R. Evid. 311(d)(4), too, was drawn from Fed. R. Crim. P. 12(e).

149 *Cf.* United States v. Gerard, 11 M.J. 440, 442 (C.M.A. 1981) (opinion of Everett, C.J.) (evidence that Congress adopted UCMJ art. 51(d) from Fed. R. Crim. P. provides basis for relying on Federal judicial interpretations of that Federal rule in interpreting military analogue); *see also* United States v. Postle, 20 M.J. 632, 638 (N.M.C.M.R. 1985) (Fed. R. Crim. P. 12(e) is "identical" to R.C.M. 905(d) "but for conforming language to render [Fed. R. Crim. P. 12(e)] applicable to military terminology").

150 United States v. Postle, 20 M.J. at 630 n.16;*accord* United States v. Comosona, 614 F.2d 695, 697 (10th Cir. 1980).

151 United States v. Castrillon, 716 F.2d 1279, 1282-83 (9th Cir. 1983); United States v. Comosona, 614 F.2d at 697.

152 United States v. Postle, 20 M.J. at 640 n.16.*But cf.* United States v. Allen, 629 F.2d 51, 57 n.5 (D.C. Cir. 1980) (judge's failure to state essential findings as required by Fed. R. Crim. P. 12(e) waived by trial defense counsel's failure to request such findings or object to their absence and appellate defense counsel's failure to assign the issue as reversible error on appeal).

153 United States v. Postle, 20 M.J. at 641; United States v. Spriddle, 20 M.J. 804, 806 (N.M.C.M.R. 1985).

154 United States v. Robertson, 606 F.2d 853 (9th Cir. 1979); United States v. Postle; United States v. Butterbaugh, 21 M.J. 1019 (N.M.C.M.R. 1986).

155 R.C.M. 905(d); Mil. R. Evid. 304(d)(4); 311(d)(4); 321(f).

156 United States v. Comosona.

157 United States v. Castrillon, 715 F.2d at 1282.

158 Cases interpreting rules regarding special findings maybe relied upon in interpreting those regarding essential findings because the common objective of both sets of rules is to provide appellate courts with the basis for the trial judge's decision. United States v. Postle.

159 Burr v. Des Moines Railroad Company, 68 U.S. 99, 102 (1864).

160 *See, e.g.*, United States v. Robertson, 606 F.2d at 859 (in ruling that exigent circumstances justified a warrantless search, trial judge's recitation of findings was inadequate because, *inter alia*, he failed to find explicitly how much time would have been required to obtain a warrant.

161 *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (voluntariness of consent to search).

162 United States v. Castrillon, 716 F.2d at 1282.

163 *See supra* notes 145-46 and accompanying text.

164 *United States v. Postle, accord United States v. Comosona, see United States v. Spriddle*, 20 M.J. at 806 (holding that military judge erred by not stating essential findings upon denial of defense motion for credit for illegal pretrial confinement).

statement of the legal standards applied[165] and of the"rationale for their application in assessing the"[166] legal issues raised by the motion. It is insufficient for the judge merely to state that "[t]he motion to suppress is granted."[167] Rather, the judge should identify the legal issue on which the grant or denial is based,[168] and the rationale for resolving that issue.[169]

Although military judges have a sua sponte duty to state their essential findings on the record,[170] trial and defense counsel still may use essential findings to their advantage. By requesting that the judge include certain matters in the statement of essential findings, counsel may ensure that the judge considers their arguments in deciding a motion.[171] Although the judge is required to cover such matters in his or her findings if the matters identified by counsel are truly "essential,"[172] counsel's pointing to the matters certainly provides strong proof that they are indeed "essential," and provides incentive to the judge to address the matters in his or her findings. In addition to this use of essential findings, counsel also may use essential findings as a tool for preserving for appellate consideration the precise terms of a novel or controversial issue, as well as a tool for avoiding needless appellate litigation by eliminating all doubt as to whether the judge applied the correct legal standard to a motion. [173] In sum, counsel should use essential findings to their advantage, while assisting the judge in discharging his or her obligations, by recommending or requesting the essential findings which support a favorable resolution of any motion before the court.[174]

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[165] *E.g.*,"totality of the circumstances".

[166] United States v. Postle, 20 M.J. at 647.

[167] *Id.* at 637.

[168] *E.g.*, whether the evidence presented to the commanding officer established probable cause supporting a search authorization.

[169] *E.g.*, whether the informant was reliable or whether the informant's information was credible.

[170] United States v. Postle.

[171] *See* United States v. Bishop, 469 F.2d 1337 (1st Cir. 1972); *see also* Schinasi, *Special Findings: Their Use at Trial and on Appeal*, 87 Mil. L. Rev. 73, 88 (1980).

[172] *See* R.C.M. 905(d).

[173] *See* 8A Moore's Federal Practice § 23.05 at 23–24 & 23–25.

[174] *See* United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985). The military judge in *Austin*, pursuant to a Government request for "special findings," made lengthy essential findings of fact in support of his ruling that the evidence obtained in an"inspection" by the Government was inadmissible under Mil. R. Evid. 313(b). The Army Court of Review held that it was bound by the military judge's findings of fact and denied the Government's appeal under article 62.

Chapter 26
Voir Dire and Challenges

26–1. Introduction

While it is the convening authority who initially selects the court members, and the Trial Judiciary which details the military judge, it is the counsel who test the qualifications of the participants in a court-martial. Counsel perform this function through pretrial investigation, voir dire examinations, and the exercise of challenges against both the military judge and the court members. Court members and the military judge must be properly detailed, qualified, and impartial in order to perform their respective functions. If not, they are subject to challenge for cause by counsel.

26–2. Challenge of the military judge

a. General. Each party to the court-martial is permitted to question the military judge and to present evidence regarding any possible ground for his or her disqualification.[1] It is the military judge who rules, either sua sponte or upon motion of either party, whether the military judge is disqualified from hearing the case.[2] The military judge should disqualify himself or herself from any proceeding in which the military judge's impartiality might reasonably be questioned.[3]

b. Specific grounds for challenge of the military judge. [4]

(1) *Bias or prejudice.* When the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding, the military judge should disqualify himself or herself.[5]

(2) *Prior participation.* The military judge should not have acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged, or in the same case generally.[6]

(3) *Witness or accuser.* When the military judge has been or will be a witness in the same case, is the accuser, has forwarded the charges 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, the military judge cannot hear that case.[7]

(4) *Ineligible.* The military judge is not eligible to act in a case unless qualified under R.C.M. 502(c) as a military judge, and detailed under R.C.M. 503(b).

(5) *Personal interest.* The military judge shall disqualify himself or herself whenever the military judge, the judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person: is a party to the proceeding; 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 is to the military judge's knowledge likely to be a material witness in the proceeding.[8]

c. Procedures. The military judge will normally disqualify himself or herself in the appropriate circumstances, and remains the final arbiter of his or her qualifications.[9] Counsel have a right to question the military judge,[10] and they should consider doing so in any case to be tried before a military judge alone. Questions to the military judge should simply ascertain whether any basis for challenge exists and not, for example, how the judge might rule on a particular motion or upon sentencing in the case.[11]

d. Waiver. A ground for disqualification under R.C.M. 902(b) may not be waived by the parties. A waiver may be accepted where the challenge is based on R.C.M. 902(a) (where the judge's impartiality might reasonably be questioned), but only upon full disclosure on the record of the basis for disqualification.[12]

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[1] R.C.M. 902(d)(2).

[2] R.C.M. 902(d)(1). *See*United States v. Soriano, 20 M.J. 337 (C.M.A. 1985).

[3] R.C.M. 902(a).*See* 28 U.S.C. § 455(a) (1982). Like the Federal rule, the military rule discourages even the appearance of impropriety when the judge's qualifications are reasonably called into question.*See* United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988) (judge was neighbor and family friend of assault victim); United States v. Wiggers, 25 M.J. 587 (A.C.M.R. 1987) (prior determination of alleged accomplice's lack of credibility); United States v. Petersen, 23 M.J. 828 (A.C.M.R. 1986) (busted plea, after changing accused's plea to not guilty judge should have recused himself or directed trial before members).

[4] R.C.M. 902(b).

[5] United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988); United States v. Wiggers, 25 M.J. 587 (C.M.A. 1988); United States v. Kratzenberg, 20 M.J. 670 (A.F.C.M.R. 1985); United States v. Blanchard, 24 M.J. 803 (N.M.C.M.R. 1987).

[6] United States v. Burrer, 22 M.J. 544 (N.M.C.M.R. 1985); United States v. Edwards, 20 M.J. 973 (N.M.C.M.R. 1985).

[7] United States v. Garwood, 20 M.J. 148 (C.M.A. 1985); United States v. Conley, 4 M.J. 327 (C.M.A. 1978). *See also* United States v. Peterson, 23 M.J. 828 (A.C.M.R. 1986) (discussion of military judge's responsibilities upon an improvident guilty plea) and United States v. Hunt, 24 M.J. 725 (A.C.M.R. 1987) (judge should recuse himself or direct trial by members).

[8] R.C.M. 902(b)(5).

[9] R.C.M. 902(d)(1).

[10] R.C.M. 902(d)(2).

[11] United States v. Small, 21 M.J. 218 (C.M.A. 1986).

[12] R.C.M. 902(c). United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988).

26–3. Voir dire and challenge of court members

a. Pretrial investigation of court members. The Rules for Courts-Martial authorize the use of pretrial questionnaires in order to obtain information from prospective court members. Such questionnaires may be used at the discretion of the trial counsel, and must be used if the defense counsel requests.[13] Among the information which may be obtained from court members by questionnaire is: date of birth; sex; race; marital status; number, age, and sex of dependents; home of record; civilian and military education; current unit of assignment; past duty assignments; awards and decorations; date of rank; and whether the member has acted in any disqualifying capacity, such as forwarding the case with recommendation as to disposition or acting as accuser or investigating officer. Counsel may also request additional information with the approval of the military judge.[14] Also, upon request, any party will be provided a copy of any written materials considered by the convening authority in selecting the court members detailed to the court.[15] Use of pretrial questionnaires is a valuable tool which saves time and improves the quality of voir dire at trial.

b. Voir dire of court members. The trial counsel is required to state on the record any ground for challenge for cause against any member of which the trial counsel is aware.[16] Usually the military judge will also give preliminary instructions to the court members indicating that they should disclose any matter which they believe may be a ground for challenge against them.[17] The military judge may then permit the parties to conduct the examination of the members, or the examination may be conducted by the judge.See Benchbook para. 2-24.[18] When the military judge so directs, a member may be questioned outside the presence of the other members. Counsel should keep in mind that the traditional purpose of voir dire is to obtain information for use in exercising challenges.[19]

c. Challenges for cause of court members.

(1) *Lack of statutory qualification.* Article 25, UCMJ, requires that all court members be on active duty. Additionally, unless the accused has requested that the court include enlisted soldiers, the members must be either commissioned or warrant officers. Lack of qualification is a ground for challenge for cause, and competency to serve based upon whether the member is an officer cannot be waived.[20]

(2) *Not detailed by the convening authority.* Court members must be personally selected by the convening authority. Court members who are not personally selected by the convening authority are subject to challenge for cause.[21]

(3) *Accuser or witness for the prosecution.* A court member who has signed the charge sheet as accuser, or who has such a personal interest in the case as to be de facto an accuser is disqualified from sitting as a court member.[22] Further, a court member cannot become a witness for the prosecution, take the stand and testify and still function as a court member. Similarly, a court member who has developed some expertise in a particular area, or who has personal knowledge of some facts relevant to the case, may also be disqualified from sitting as a court member even though he or she does not actually take the witness stand, and even though no challenge is made.[23]

(4) *Investigating officer.* Any officer required in the course of duty to investigate the facts surrounding a charge is subject to challenge for cause. For example, a public affairs officer who is responsible for investigating the facts of an incident in order to prepare and issue releases to the press is subject to challenge if the public affairs officer sits as a court member on a trial arising out of that incident.[24]

(5) *Counsel as to offense charged.* A court member is subject to challenge if the member acted for either side at any stage of the proceedings. This includes the situation where the court member (or military judge), by the questioning of witnesses, departs from an impartial role and becomes an advocate for either side.[25]

(6) *Member of accused's unit.* When the accused requests a court which includes enlisted soldiers, the enlisted soldiers cannot be from the same company-sized unit as the accused.[26]

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[13] R.C.M. 912(a).
[14] R.C.M. 912(a)(1).
[15] R.C.M. 912(a)(2).
[16] R.C.M. 912(c).
[17] *See* Benchbook para. 2–24.
[18] R.C.M. 912(d). Military practice favors voir dire by counsel. United States v. Slubowski, 7 M.J. 1461 (C.M.A. 1979). Procedures in other Federal courts vary, but most Federal judges conduct voir dire personally. *See* Fed. R. Crim. P. 24(a). For a historical overview of military voir dire, *see*Holdaway, *Voir Dire—A Neglected Tool of Advocacy*, 40 Mil. L. Rev. 1 (1968).
[19] R.C.M. 912(d) discussion. Few military judges now allow counsel to test their theory of the case during voir dire. R.C.M. 912(d) discussion states that counsel should not purposely use voir dire to argue their case.*See also* United States v. Smith, 27 M.J. 25 (C.M.A. 1988)(defense not permitted to inform members of mandatory life sentence during voir dire); United States v. Torres, 25 M.J. 555 (A.C.M.R. 1987) (military judge may require counsel to present voir dire questions to him for approval).
[20] R.C.M. 912(f)(4). The requirement that enlisted soldiers belong to different units than the accused has been held not to be jurisdictional. The defect may be waived unless specific prejudice is shown. *See* United States v. Wilson, 21 M.J. 193 (C.M.A. 1986).
[21] United States v. Newcomb, 5 M.J. 4 (C.M.A. 1978); United States v. Ryan, 5 M.J. 97 (C.M.A. 1978); *see*R.C.M. 502(a)(1); R.C.M. 912(f)(1)(B).
[22] R.C.M. 912(f)(1)(C).
[23] R.C.M. 912(f)(1)(D).*See also* United States v. Conley, 4 M.J. 327 (C.M.A. 1978); United States v. Ivey, 37 C.M.R. 626 (A.B.R. 1967).
[24] R.C.M. 912(f)(1)(F); United States v. Burkhalter, 38 C.M.R. 64 (C.M.A. 1967).
[25] United States v. Lamela, 7 M.J. 277 (C.M.A. 1979).
[26] UCMJ art. 25; R.C.M. 912(f)(1)(A) and R.C.M. 912(f)(4). This disqualification is not jurisdictional and may be waived. *See* supra note 20 and accompanying text.

(7) *Convening authority.* The convening authority cannot appoint oneself and sit as a court member. This is so even when the individual appointed oneself when the individual was an acting commander, and is no longer the convening authority at the time of trial.[27]

(8) *Opinion as to guilt or innocence.* A prior expression of opinion as to the guilt or innocence of the accused is ground for challenge against a court member.[28]

(9) *Rigid notion as to punishment.* A mere distaste for criminal conduct or a particular offense is not enough to disqualify a member. If the member, however, has an inflexible attitude concerning a particular offense that will not be changed by either the evidence or the military judge's instructions, then the member is subject to challenge for cause.[29] A member who initially indicates a preconceived notion concerning the penalty in a particular case or for a particular crime may remain on the case if the member is able to state that he or she can consider and decide the case upon the facts introduced in evidence and the instructions on the law given by the military judge. Such a disclaimer must be delivered in a manner indicative of truthfulness without any equivocation, and there must be no other evidence of record controverting the disclaimer or questioning its sincerity.[30]

(10) *Duty as military police officer.* While military courts have long frowned on the practice of assigning military police (MP) as court members, only the principal law enforcement officer of a post is per se disqualified from acting as a court member.[31] Of course, an MP who is not per se disqualified would still be subject to challenge if, during the course of one's duties, he or she gained knowledge of the case either as the investigator or as a result of reading reports or conversing with other MPs.

(11) *Other challenges to a member's impartiality.* Whether a challenge to a member's impartiality is grounds to grant a causal challenge often depends on how the facts are presented on the record.[32] A member who has some degree of experience in a field related to the charges is not per se disqualified.[33] A member who has a casual professional and social relationship with a victim's relative,[34] or with a Government witness[35] is also not per se disqualified. A member who has a familial relationship with a member of the staff judge advocate's office is not per se disqualified, but the existence of the relationship should be disclosed by the judge advocate.[36] A rating chain relationship between members may be grounds for disqualification, but is not per se improper.[37]

d. Challenges to be liberally construed. In the interest of having the trial free from doubt as to legality, fairness, and impartiality, a member should be excused for cause whenever it appears that the member should not sit on the court. The Court of Military Appeals has stated that challenges for cause should be liberally construed because peremptory challenges are limited to only one per side.[38] As discussed earlier, the parties get an additional peremptory challenge when new members are added to the court.[39]

e. Exercise of challenges for cause.

(1) *When made.* After the court has initially assembled, the trial counsel will ask the members to disclose any grounds for challenge against them of which they may be aware. The challenge for cause is normally made after completion of the examination of the court members. Challenge for cause may be made at any other time during the trial when it becomes apparent that a ground for challenge may exist.[40] Each party is permitted to state his or her

[27] R.C.M. 912(f)(1)(G).

[28] R.C.M. 912(f)(1)(M).*See* United States v. Miller, 19 M.J. 159 (C.M.A. 1985) (former member of court who expressed opinion accused was guilty tainted other members); United States v. Anderson, 23 M.J. 894 (A.C.M.R. 1987) (member believed accused "had something to prove" in court); United States v. Lane, 18 M.J. 586 (A.C.M.R. 1984) (member believed accused must prove innocence).

[29] United States v. Reynolds, 23 M.J. 292 (C.M.A. 1987) (an inclination to be tough on someone who steals from other soldiers is not a ground for disqualification); United States v. Heriot, 21 M.J. 11 (C.M.A. 1985); United States v. Tippit, 9 M.J. 106 (C.M.A. 1980); United States v. Karnes, 1 M.J. 92 (C.M.A. 1975); United States v. Blevins, 27 M.J. 678 (A.C.M.R. 1988) (military judge should inquire whether member's responses are due to artful questioning or an inflexible attitude).

[30] United States v. Reichardt, 28 M.J. 113 (C.M.A. 1989) (victim analysis; member whose spouse was victim of a similar crime was not disqualified, based on member's unequivocal responses); United States v. Smart, 21 M.J. 15 (C.M.A. 1985) (fact that member had been victim of "six or seven" robberies supports finding of implied bias); United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987) (member should have been disqualified where sister was a victim of indecent acts similar to those charged).

[31] United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983). *See also* United States v. McPhaul, 22 M.J. 808 (A.C.M.R. 1986) (presence of military policemen as court members creates needless litigation).

[32] United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987) (member's sister a child abuse victim; more than mere mechanical rehabilitative questioning required).

[33] United States v. Tower, 24 M.J. 143 (C.M.A. 1987) (member was a former State child abuse counselor).

[34] United States v. Huitt, 25 M.J. 136 (C.M.A. 1987) (member knew child abuse victim's father).

[35] United States v. Lauzon, 21 M.J. 791 (A.C.M.R. 1986) (member knew psychologist who testified for Government).

[36] United States v. Glenn, 25 M.J. 278 (C.M.A. 1987) (member was deputy staff judge advocate's sister-in-law).

[37] United States v. Murphy, 26 M.J. 454 (C.M.A. 1988) (rater is not per se disqualified); United States v. Garcia, 26 M.J. 844 (A.C.M.R. 1988) (rating relationship merits inquiry and appropriate action based on rating and rated members' responses). United States v. Eberhardt, 24 M.J. 944 (A.C.M.R. 1987) (rater and rated members not disqualified based on strong exculpatory declarations).

[38] United States v. Mason, 16 M.J. 455 (C.M.A. 1983).*See also* United States v. Reynolds, 23 M.J. 292 (C.M.A. 1987) (liberality is to be used in ruling on challenges for cause; failure to heed this exhortation only results in the creation of needless appellate issues); United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987) (the threshold for clear abuse of discretion in denying a challenge for cause is lower than has heretofore been articulated).

[39] U.C.M.J. art. 41(b).

[40] R.C.M. 912(f)(2). For example, when a new member is added, counsel are permitted to question the member and challenge for cause. Also when facts become known during the trial, an additional challenge may be granted. *See* United States v. Millender, 27 M.J. 568 (A.C.M.R. 1988) and United States v. Arnold, 26 M.J. 965 (A.C.M.R. 1988). *But see* United States v. Yardley, 24 M.J. 719 (A.C.M.R. 1987) (member not disqualified for emotional response to evidence presented at trial).

challenges for cause outside the presence of the members, and the party making the challenge must state the ground for the challenge. Generally, the trial counsel challenges first, followed by the defense counsel. Any ground for challenge, except status as a commissioned or warrant officer, may be waived if a challenge is not raised in a timely manner after the party knew or could have discovered the ground for challenge by the exercise of diligence.[41] The military judge rules finally on all challenges and may excuse a member against whom a challenge for cause would lie, even though the parties fail to challenge that member or waive the challenge.[42]

(2) *Waiver and review.* When a challenge for cause has been denied by the military judge, further consideration of the challenge on later review is waived if the challenging party fails to exercise his or her peremptory challenge. Exercise of a peremptory challenge against any member will preserve the denied challenge for cause.[43] Note, however, that if the member unsuccessfully challenged for cause is now peremptorily challenged by the same party, the party must state that it would have exercised the peremptory challenge against another member if the challenge for cause had been granted.[44] This is the "but-for" rule.

f. Peremptory challenges.

(1) *When made.* Each party may challenge one member peremptorily. Peremptory challenges are made at the conclusion of examination of the members and after the determination of any challenges for cause. Ordinarily, the trial counsel will make the peremptory challenge before the defense.[45] Each party is entitled to an additional peremptory challenge when the defense has exercised its peremptory challenge, the number of members has fallen below a quorum, and additional members are appointed.[46] The additional peremptory may only be used against the newly appointed members.[47]

The use of peremptory challenges to exclude members of minority groups based solely on race was prohibited in Batson v. Kentucky.[48] In Batson, a prosecutor's purposeful discriminatory use of peremptory challenges to remove four black persons from the jury of a black defendant violated the equal protection clause. The Supreme Court removed the requirement from Batson that the accused and the challenged juror be of the same race.[49] Batson applies in the military.[50] In United States v. Moore,[51] the court held that when the accused is a member of a cognizable racial group, and the trial counsel exercises the peremptory challenge against a member of the accused's racial group, then the trial counsel must give a racially-neutral explanation why the trial counsel challenged that member. The explanation need not amount to a challenge for cause, but must be race-neutral,[52] be relevant to the case at hand, and may not be a subterfuge for a discriminatory purpose.[53] Explanations should be sufficiently specific to rebut the inference of a discriminatory intent.[54] Following the 1991 extension of Batson to civil cases in Edmonson v. Leesville Concrete,[55] the Supreme Court has stated Batson applies to peremptory challenges by defense counsel. In Georgia v. McCollum,[56] race- based peremptory challenges by defense counsel were found to violate the equal protection rights of excluded potential jurors and therefore racially- neutral explanations are required in Batson situations.

(2) *Waiver and review.* Failure to exercise a peremptory challenge when called upon to do so waives the right to make such challenge. A peremptory challenge may not be made after the presentation of evidence before the members has begun, unless it is the exercise of an additional peremptory challenge against a newly detailed member.[57]

g. Challenges to the array. Challenges must be made and ruled on individually. Where the defense wishes to challenge the entire panel, the remedy is a motion for appropriate relief for reselection of the court members. Upon

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[41] R.C.M. 912(f)(3).

[42] *Id.*

[43] R.C.M. 912(f)(4).

[44] R.C.M. 912(f)(4). United States v. Campbell, 26 M.J. 970 (A.C.M.R. 1988). *See* Ross v. Oklahoma, 108 S. Ct. 2273 (1989). *See also* United States v. Jobson, 31 M.J. 117 (C.M.A. 1990). *But see* United States v. Collins, 29 M.J. 778 (A.C.M.R. 1989).

[45] R.C.M. 912(g).*See also* United States v. Newson, 29 M.J. 17 (C.M.A. 1989) (trial counsel may not conditionally exercise his peremptory challenge and then withdraw it after defense exercises its peremptory challenge).

[46] U.C.M.J. art. 41(b). United States v. Carter, 25 M.J. 471 (C.M.A. 1988) *overruling* United States v. Holley, 17 M.J. 361 (C.M.A. 1984).

[47] U.C.M.J. art. 41(c). United States v. Banks, 29 M.J. 691 (A.C.M.R. 1989).

[48] 106 S. Ct. 1712 (1986).

[49] United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988).

[50] Powers v. Ohio, 111 S.Ct. 1366 (1991).

[51] 28 M.J. 366 (C.M.A. 1989).

[52] *See*Hernandez v. New York, 111 S.Ct. 1859 (1991).*See also* United States v. Curtis, 33 M.J. 101 (C.M.A. 1991).

[53] In effect, this creates a third type of challenge, a mid-level one between a peremptory challenge, where any or no reason is required, and a causal challenge, where a specific bias or disqualifier must be shown.*See* United States v. Cooper, 30 M.J. 201 (C.M.A. 1990); United States v. St. Fort, 26 M.J. 764 (A.C.M.R. 1988); United States v. Shelby, 26 M.J. 921 (N.M.C.M.R. 1988).

[54] *See* United States v. Cooper, 30 M.J. 201 (C.M.A. 1990).

[55] 111 S.Ct. 2077 (1991).

[56] _S.Ct. _(1992).

[57] R.C.M. 912(g)(2).

motion and presentation of evidence, if the military judge determines that the members have been improperly selected, the military judge may stay proceedings until proper selection is made.[58] Failure to make a timely motion waives improper selection.[59] The motion is timely if made prior to voir dire[60]

[58] R.C.M. 912(b). *See* R.C.M. 912(b) analysis; United States v. Daigle, 1 M.J. 139 (C.M.A. 1975); United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (error to systematically exclude junior officers and junior noncommissioned officers from court-martial panels).
[59] R.C.M. 912(b)(3).
[60] R.C.M. 912(b)(1).*See* United States v. Autrey, 20 M.J. 912 (A.C.M.R. 1985).

Chapter 27
Pleas

27–1. General

Ordinarily, the initial article 39(a) session consists of four parts: introductory matters;[1] arraignments; [2] motions;[3] and pleas.[4] After reviewing with the accused the rights in a trial by court-martial, the charges are read and the military judge asks the accused how he or she pleads and instructs the accused that, before entering the plea, the accused should make any motions to dismiss any charge or to grant other relief. If, as noted in chapter 25, the accused wishes to present pretrial motions, the defense counsel submits them to the judge in the form of motions to dismiss or motions for appropriate relief. After the military judge has ruled on all of the accused's motions, the accused must enter pleas to the charges and specifications referred to trial.

27–2. Types of pleas and their effect

a. Not-guilty plea. An accused at a court-martial may plead not guilty to any or all specifications and charges. Such a plea places all matters in issue and requires the prosecution to prove the accused's guilt beyond a reasonable doubt. If an accused fails or refuses to plead, or makes an irregular plea, the military judge will enter a plea of not guilty for the accused.

To enter a plea of not guilty for the accused, counsel simply announces, "Your honor, the accused, _____, pleads, to the specification and the charge, not guilty." The accused must enter a plea to both the specification and the charge.

b. Guilty plea. A plea of guilty, if accepted by the military judge, admits the accused's guilt and relieves the prosecution of the burden of proving the accused guilty beyond a reasonable doubt.[5] Such a plea of guilty must be in accord with the truth. Before the plea is accepted, the accused must admit every element of the offense to which a plea of guilty is entered.[6] The military judge must make a searching and detailed inquiry of the accused to determine if the accused understands the plea, that it is entered into voluntarily and that the accused is, in fact guilty.[7] This discussion between the accused and the military judge is commonly called the guilty plea or providence inquiry and is discussed in paragraph 27-3 below.

Normally 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 to which the plea was made.[8] An exception is the conditional guilty plea which preserves for appeal issues waived by a provident guilty plea. Conditional guilty pleas are discussed in paragraph 27-2e below. Those issues waived by a provident guilty plea are discussed in chapter 31.

c. Guilty by exceptions or guilty by exceptions and substitutions. An accused may enter a plea which either excepts out words from the charged specification or, in addition to exceptions, substitutes words in the specification, and, thereby, enters a plea to an offense included in the offense charged. The result is to plead not guilty to the charged offense but guilty to a different, and often lesser included offense. For example, an accused charged with robbery can plead guilty to the lesser included offense of wrongful appropriation. The accepted method to enter such a plea is to announce: "Your honor, the accused, _____, pleads to the specification: guilty, except the words, 'by means of force and violence steal from the person of Victor Victim against his will,' substituting therefor the words 'wrongfully appropriate,' to the excepted words not guilty, to the substituted words guilty, to the charge, not guilty, but guilty of a violation of Article 121."

A plea of guilty by exceptions and substitutions relieves the prosecution of the burden to prove the offense to which a plea of guilty results. A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged[9] and the prosecution need not prove the elements of the greater offense admitted in the plea.[10] Thus, if an accused charged with desertion pleads guilty to absence without leave, the prosecution's only remaining burden is to prove that the accused absented himself or herself with the intent to remain away permanently.[11] The military judge must make a guilty plea inquiry into the plea of guilty by exceptions and substitutions.

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[1] R.C.M. 901, 902, 903.
[2] R.C.M. 904.
[3] R.C.M. 905–907.
[4] R.C.M. 910.
[5] R.C.M. 910(c). A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. R.C.M. 910(a) discussion.*See* R.C.M. 1001(b)(4).
[6] R.C.M. 910(e) discussion.
[7] R.C.M. 910(c).
[8] R.C.M. 910(j). *But see* United States v. Hilton, 27 M.J.323 (C.M.A. 1989).
[9] R.C.M. 910(a) discussion.
[10] United States v. Owens, 28 C.M.R. 312 (C.M.A. 1959). (Owens, charged with larceny, pleaded guilty to wrongful appropriation; the law officer correctly instructed only on the issue of intent using the guilty plea to prove the common elements of the two offenses). Where the prosecution *separately charges* both the more serious offense and its lesser included offense, however, the prosecution cannot use the accused's plea of guilty to the lesser included charged offense as evidence of the more serious offense. United States v. Wahnon, 1 M.J. 144 (C.M.A. 1975). (Wahnon was charged with AWOL and missing movement; the Government could not use the guilty plea to AWOL to prove the missing movement).
[11] *Compare* MCM, 1984, Part IV, para. 9 (the elements of desertion) *with* MCM, 1984, Part IV, para. 10 (the elements of AWOL).

d. Mixed pleas. An accused may enter mixed pleas, that is, guilty to some specifications, guilty by exceptions and substitutions to others, and/or not guilty to other specifications. After a guilty plea inquiry and acceptance by the military judge of any guilty pleas, the prosecution may attempt to prove the remaining offenses. If the accused pleads guilty to some but not all of the specifications, the accused's admission of an element in one specification does not relieve the Government from the burden of proving the same element in the remaining, contested specifications. Thus, "admissions implicit in a plea of guilty to one offense cannot be used as evidence to support the findings of guilty of an essential element of a separate and different offense."[12] When the military judge accepts the guilty pleas in a mixed plea situation, the judge should ordinarily defer informing the members of the guilty pleas until after the findings on the remaining contested charges have been entered.[13]

e. Conditional pleas.[14] With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion.[15] If the accused prevails on further review or appeal, the accused is allowed to withdraw the plea of guilty. The underlying basis for recognizing the conditional plea is an acknowledgement that many accused were pleading not guilty simply to preserve their pretrial motions for appellate review. A conditional plea enables the accused to preserve the appeal and also saves the Government the time and expense of a trial on the merits.

There is no right to enter a conditional guilty plea. The military judge and the Government each have complete discretion whether to permit or consent to a conditional guilty plea. Because the purpose of a conditional guilty plea is to conserve judicial and governmental resources, this discretion is not subject to challenge by the accused.[16]

The Government will typically not agree to a conditional guilty plea unless it is part of a pretrial agreement. The military judge should normally not permit such pleas unless the motion is capable of full pretrial litigation. When the pretrial motion requires trial on the merits for a full development of the underlying factual issues or the motion is not case dispositive, it would be proper for the judge to exercise discretion and disapprove the conditional plea.[17]

27–3. Guilty plea inquiry[18]

a. United States v. Care.[19] The guilty plea or providence inquiry is a dialogue between the military judge and the accused. It is made on the record to assure the military judge that the accused personally understands the meaning and effect of the plea and that an adequate factual basis exists for the military judge to accept the accused's admission of guilt.

The Court of Military Appeals set out the standards for the guilty plea inquiry in United States v. Care:

> [T]he record of trial … must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president [of the court] has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty… The record must also demonstrate the military trial judge or president personally addressed the accused, advised him that his plea waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him; and that he waives such rights by his plea.[20]

The Care rule is based primarily on the decision of the Supreme Court in McCarthy v. United States.[21]

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[12] United States v. Caszatt, 29 C.M.R. 521, 522 (C.M.A. 1960) (accused pleaded guilty to violation of the order of a sergeant, but not guilty of disobeying the same order given later in the day by an officer; it was error to instruct the court that the guilty plea could be used to prove elements in the contested case).

[13] R.C.M. 913(a).

[14] R.C.M. 910(a) (2). This provision in the Manual is new to military practice. It is based upon Fed. R. Crim. P. 11(a)(2) and changes prior case law which held most guilty pleas did not preserve appellate issues. United States v. Schaffer, 12 M.J. 425, 428, n.6 (C.M.A. 1982); United States v. Mallett, 14 M.J. 631 (A.C.M.R. 1982). *See generally* United States v. Burke, 517 F.2d 377 (2nd Cir. 1975); Comment, *Conditional Guilty Pleas*, 26 U.C.L.A. L. Rev. 360 (1978).

[15] The specified grounds preserved for appeal must be litigated at the trial court level. Thus, notwithstanding that a conditional plea was entered, failure to raise issue of urinalysis in a pretrial motion waived the issue for appeal. United States v Forbes, 19 M.J. 953 (A.F.C.M.R. 1985).

[16] Fed. R. Crim. P. 11(a) advisory committee notes to 1983 amendments.

[17] *Id.*; *see also* Wright, Federal Practice and Trial Judiciary SOP, 20 Feb. 1987; United States v. Phillips, 32 M.J. 955 (A.F.C.M.R. 1991).

[18] *See*, Moriarty,*The Providence Inquiry: A Guilty Plea Gauntlet*?, 13 The Advocate 252 (1981); Lukjanowitz, *The Providence Inquiry: An Examination of Judicial Responsibilities*, 13 The Advocate 333 (1981). The inquiry has "commonly, but incorrectly, become known in military jurisprudence as an inquiry into the providency of a plea of guilty. The term providency is not recognized by Mr. Webster; and although providence and ' provident ' are recognized words, the correctness of their use in a judicial setting is doubtful."United States v. Footman, 13 M.J. 827, 828 (A.C.M.R. 1982) (per Hanft, J.).

[19] 40 C.M.R. 247 (C.M.A. 1969).

[20] United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969). Assurances of counsel are insufficient. "By personally interrogating the defendant, not only will the judge be better able to ascertain the pleas voluntariness, but he also will develop a more complete record." McCarthy v. United States, 394 U.S. 459, 465–66 (1969).

[21] 394 U.S. 459 (1969).

This rule is based on the principle that a person who pleads guilty waives certain constitutional rights, including the privilege against self-incrimination, the right to a trial by jury, and the right to confrontation. For this waiver to be consistent with due process, it must be, as decreed in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), an intentional relinquishment or abandonment of a known right or privilege.[22]

Also, the Care inquiry serves to produce a record of the factors relevant to the determination of voluntariness. The Supreme Court has held that a silent record would not support a finding of waiver of the accused's rights.[23]

b. Components of the guilty plea inquiry; R.C.M. 910(c). The components of the guilty plea inquiry are listed in R.C.M. 910(c).[24] They are:

(1) *The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law.* The requirement that the accused understands the elements of the offense is of constitutional dimensions.[25] The military judge should describe the elements of the offense to the accused. The best method is for the military judge to tailor the elements to the offense charged and explain them one at a time to the accused, receiving the accused's assurance of understanding. While failure to list the elements is not per se error, the record must fully demonstrate that the accused was apprised of the elements and understands and admits that each is true[26] The Court of Military Appeals has rejected"a structured, formalistic interpretation of United States v. Care," but it has noted that "it would have been eminently appropriate for the trial judge to have explicitly advised the accused."[27]

Although the elements need not be listed seriatim, there are some hard and fast rules that can be stated. In those cases in which the judge has failed to list the elements, the Court of Military Appeals has upheld the adequacy of the plea only when there was a thorough and detailed questioning of the accused,[28] or when the entire inquiry as a whole adequately advised the accused.[29] Thus, when charged with violating a lawful general regulation, the accused's acknowledgment that the possession of the controlled substance was unauthorized, "wrongful and a violation of law" was sufficient to satisfy the elements requirements of Care.[30] In United States v. Footman,[31] the military judge, in listing the elements for the accused, failed to use the words"wrongfully took" and "permanently deprived." The inquiry was adequate, despite the omission of these terms in the description of the elements, because the remainder of the inquiry and the stipulation of fact clearly evidenced the accused's understanding of the offense and his admission of guilt.

Particular problems arise when the charged offense involves another, such as conspiracy. The military judge must explain the elements of both conspiracy and the substantive offense which was the object of the conspiracy.[32] When the accused is charged as a principal, or as an accessory after the fact, the inquiry as a whole must demonstrate the accused was apprised of the underlying offense and his or her role in its commission.[33] A complete failure to explain to the accused that one must share the intent of the active perpetrator or the difference of one's position as an aider and abettor will require reversal.[34] In determining the adequacy of the inquiry, the appellate courts look to the inquiry itself,[35] the language of the specification[36] or the stipulation of fact.[37]

When the charge is a violation of article 134, and conduct prejudicial to good order and discipline or service discrediting conduct is an element of the offense, the record must demonstrate the accused's admission of this element. "The [best] and less risky practice is to insure that the inquiry is logically and clearly structured" such that discipline prejudicing or service discrediting conduct is explained as an element of the offense.[38] If the judge fails to separately list this element, the inquiry is adequate if the accused admits the prejudicial nature of the conduct, or if the character of the conduct charged is so recognized as prejudicial to good order and discipline that independent proof of the

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[22] United States v. Mirabal, 48 C.M.R. 803, 806 (A.C.M.R. 1974).

[23] Boykin v. Alabama, 95 U.S. 28 (1969).

[24] RCM 910(c) is based on Fed. R. Crim. P. 11(c) and MCM, 1969, para. 70(b)(2).

[25] Henderson v. Morgan, 2 U.S. 637 (1976).

[26] United States v. Crouch, 11 M.J. 128, 130 (C.M.A. 1981). SP4 Crouch was charged with larceny and unlawful entry. While on guard duty two of his friends broke into the motor pool in order to remove Government property. Although the military judge did not specifically address the question of Crouch's intent, the court found that the entire inquiry clearly supported the plea of guilty.

[27] United States v. Crouch, 11 M.J. 128, 130 (C.M.A. 1981); United States v. Kilgore, 44 C.M.R. 89 (C.M.A. 1971); United States v. Grecco, 5 M.J. 1018 (C.M.A. 1976); *but see* United States v. Pretlow, 13 M.J. 85 (C.M.A. 1982).

[28] *See supra* cases cited in note 27.

[29] United States v. Wimberly, 42 C.M.R. 242 (C.M.A. 1970); United States v. Wheaton, 15 M.J. 941, 945 (N.M.C.M.R. 1983) ("progression of questions" detailed the elements of the offense).

[30] United States v. Grecco, 5 M.J. 1018, n.1 (C.M.A. 1976); United States v. DeLos Santos, 7 M.J. 519 (A.C.M.R. 1979).

[31] 13 M.J. 827 (A.C.M.R. 1982).

[32] United States v. Pretlow, 13 M.J. 85 (C.M.A. 1982). *But see* United States v. Luby, 14 M.J. 619 (A.F.C.M.R. 1982), where the plea was upheld when the accused, charged with introduction of marijuana and conspiracy to introduce marijuana, was adequately advised of the second offense by the listing of the elements of the first offense. *See also* United States v. Finn, 20 M.J. 696 (N.M.C.M.R. 1985).

[33] United States v. Epps, 20 M.J. 534 (A.C.M.R.);*cert. for review filed*, 20 M.J. 255 (C.M.A. 1985); United States v. Williams, 6 M.J. 611 (A.C.M.R. 1978).

[34] United States v. Craney, 1 M.J. 142 (C.M.A. 1975); United States v. Radzewicz, 16 M.J. 781 (A.C.M.R. 1983).

[35] United States v. Chasteen, 17 M.J. 580 (A.F.C.M.R. 1983).

[36] United States v. Lee, 16 M.J. 532 (A.C.M.R. 1983).

[37] United States v. Harclerode, 17 M.J. 981 (A.C.M.R. 1984).

[38] United States v. Finn, 20 M.J. 696, 698 (N.M.C.M.R. 1985).

element is unnecessary.[39]

(2) *The accused has the right to be represented by counsel.* A plea of guilty should not be accepted at a special or general court-martial unless the accused is represented by counsel. In the absence of a right to counsel at summary courts- martial this component does not apply to summary courts.[40] The rights of the accused to counsel and choice of counsel are discussed with the accused earlier in the trial and need not be repeated during the providency inquiry; it is wise, however, to inquire that the accused has had sufficient time to discuss the case with his or her attorney, and that the accused is satisfied with the attorney's advice and feels it is in his or her best interest.[41]

(3) *The other rights waived by a plea of guilty*. The military judge must personally address the accused and advise that the guilty plea waives the right against self-incrimination, the right to a trial of the facts by court-martial, and the right to be confronted by the witnesses against him or her.[42] The accused must understand the right to plead not guilty and the right to a trial of the facts, and that, if he or she pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has pleaded.[43] For this advice to be effective, it should be put in words the accused can understand,; the particular colloquy may vary from case to case depending on the personal characteristics of the accused, including age, education, intelligence, and alacrity of one's responses.[44]

(4) *Factual basis for the plea.* A plea of guilty must be in accord with the truth.[45] Accordingly, the accused must be placed under oath[46] and questioned by the military judge about the offense. The accused must be convinced of, and able to describe, all the facts necessary to establish guilt.[47]

The military judge must reject a guilty plea when the accused refuses to admit his or her guilt. These so-called Alford pleas, sanctioned by the Supreme Court in Alford v. North Carolina, [48] in which the accused refuses to admit guilt but nevertheless voluntarily and intelligently makes a "choice among alternate courses of action open"[49] of pleading guilty, are in contradiction to the UCMJ and the Manual and must be rejected.

The accused must be advised that he or she will be placed under oath while the military judge asks questions about the offenses, and that, if the accused answers falsely, such statements may be used against him or her in a later prosecution for perjury or false statement.[50] The provision for the oath is designed to ensure compliance with article 45 and to reduce the likelihood of later attacks on the providence of the plea.[51] Requiring the accused to take an oath prior to discussion of the offense does not violate military due process.[52]

The best way to conduct the factual inquiry is to ask the accused, while remaining at the counsel table,[53] to describe in his or her own words what happened. Elicitation of mere acquiescence or legal conclusions from the accused is insufficient,[54] although the judge may direct the accused's attention to the significant areas.[55] For example, if the accused's rendition of the facts raises the possibility of a defense, the military judge should attempt to elicit facts from the accused that negate the defense rather than the accused's acquiescence with the judge's legal conclusion.[56]

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[39] *Id.* at 698; *but see* United States v. Seymore, 19 M.J. 608 (A.C.M.R. 1985); United States v. Chambers, 3l M.J. 776 (A.C.M.R. 1990).

[40] *See* R.C.M. 1301(e).

[41] Benchbook, para. 2–14.

[42] United States v. Bailey, 20 M.J. 703 (A.C.M.R. 1985).

[43] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); R.C.M. 910(c)(3) and (4); Fed. R. Crim. P. 11(c)(4)(5).

[44] United States v. Gray, 611 F.2d 194 (7th Cir.),*cert. denied,* 446 U.S. 911 (1979). An example explanation is location in Benchbook, paras. 2–9, 2–10.

[45] UCMJ art. 45(b); R.C.M. 910(e) discussion; *see*Fed. R. Crim. P. 11(f); ABA Standards, Pleas of Guilty § 1.6 (1978).

[46] The requirement that the accused be placed under oath is new in MCM, 1984. It brings the military in accord with Federal practice. *See* Fed. R. Crim. P. 11(c)(5). Requiring the accused to be placed under oath in order to enter a plea of guilty does not offend military due process. United States v. Daniels, 20 M.J. 648 (N.M.C.M.R. 1985).

[47] R.C.M. 910(e) discussion. *Compare* United States v. Epps, 25 M.J. 319 (C.M.A. 1987), where an accused pleads guilty and then at the providence inquiry, gives sworn testimony which clearly establishes his guilt of a different but closely-related offense having the same maximum punishment, the pleas of guilty may be treated as provident.

[48] 400 U.S. 25 (1970).

[49] *Id.* at 31. In *Alford*, The accused's plea to unpremeditated murder was allowed to stand despite his protestations of innocence. Alford entered his plea to avoid the death sentence possible under North Carolina law. While not endorsing such pleas, the Court found that the constitutional standard is not if the defendant believes himself guilty, but rather whether the plea was voluntary and intelligent. This is not the standard in the military. Art. 45(b) and R.C.M. 91(e) specifically preclude *Alford* pleas in the military.

[50] The absence of this advice, or the failure to place the accused under oath, will not affect the providence of the plea but may bar subsequent prosecution for perjury. United States v. Conrad, 598 F.2d 506 (9th Cir. 1979); *see* Wright, Federal Practice & Procedure: Criminal 2d § 173 (1982).

[51] R.C.M. 910(e) analysis; refusal to take the oath would be grounds to reject the plea as the rule requiring the oath is written in mandatory terms.

[52] United States v. Fletcher, 21 M.J. 162 (C.M.A. 1985) (summary disposition); United States v. Daniels, 20 M.J. 648 (N.M.C.M.R. 1985). *See* United States v. Coronado, 554 F.2d 166, 174 (5th Cir.), *cert. denied*, 434 U.S. 870, (1977); Vandenades v. United States, 523 F.2d 1220, 1224 (5th Cir. 1975); Bryan v. United States, 492 F.2d 775 (5th Cir.), *cert. denied,* 419 U.S. 1079 (1974); Fed. R. Crim. P. 11(c)(5). *See also*Blackledge v. Allison, 431 U.S. 63, 80 n.19 (1977).

[53] R.C.M. 910(e) discussion.

[54] United States v. Frederick, 23 M.J. 837 (A.C.M.R. 1986) (military judge's inquiry requiring simple "yes" or "no" answers when asked whether he did what the specification alleged was inadequate); United States v. Duval, 31 M.J. 650 (A.C.M.R. 1990) (mere acceptance by accused that his conduct was "dishonorable" was insufficient for guilty plea to dishonorable failure to maintain sufficient funds in checking account—the judge should have elicited how the accused's actions were dishonorable).

[55] United States v. Fruscella, 44 C.M.R. 80 (C.M.A. 1971); United States v. Goins, 2 M.J. 458 (A.C.M.R. 1975); the judge may refer to the stipulation of fact, United States v. Harclerode, 17 M.J. 981 (A.C.M.R. 1984); the accused may refer to prepared remarks, United States v. McCann, 11 M.J. 506 (N.M.C.M.R. 1981).

[56] United States v. Buske, 2 M.J. 465 (A.C.M.R. 1975). In *Buske*, the accused raised the defense of agency by stating he merely purchased and delivered the drugs for another. The military judge, rather than elicit more facts from the accused, asked a yes or no question that incorporated the conclusion that the defense of agency did not exist. This was error.

A stipulation of fact may be used by the military judge during the guilty plea inquiry. The stipulation alone, without further inquiry, is insufficient to establish providence of a plea.[57]

If the accused, during the plea inquiry, or later in the proceedings, raises a matter inconsistent with guilt, further inquiry by the judge is warranted.[58]

If any potential defense is raised by the accused's account of the offense or by other matters presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense.[59]

The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless, the accused must be convinced of, and be able to describe, all the facts necessary to establish guilt. For example, an accused may be unable to recall certain events in an offense, but may still be able to adequately describe the offense based on witness statements or similar sources which the accused believes to be true.[60]

(5) *Plea agreement inquiry.* The military judge must make an inquiry of the accused and counsel as to the existence of any pretrial agreement. The scope and content of this inquiry is covered in chapter 18.

27–4. Refusal to accept plea

The military judge will refuse to accept an accused's plea of guilty in five situations. In these situations, the military judge will unilaterally enter a plea of not guilty for the accused and proceed to trial on the merits.

a. Grounds for refusing to accept plea.

(1) *The accused enters an irregular plea.* If the accused attempts to enter a plea of guilty without criminality, or guilty but insane, or guilty to the charge but not guilty to the specification, the military judge will refuse to accept such a plea and substitute a plea of not guilty.[61] Although permitted in the Federal courts, a plea of nolo contendere would be rejected by a military judge and a plea of not guilty entered.[62]

(2) *The accused pleads guilty to an offense referred to trial as capital.* When a case is referred to trial and the death penalty could result, the accused, by operation of article 45(b), must enter a plea of not guilty. Any attempt to enter a guilty plea must be rejected by the military judge and a not guilty plea entered.[63] The accused is not foreclosed from entering a guilty plea to a lesser included offense which does not include the death penalty, and the Government may then proceed on the greater offense.[64]

(3) *There are irreconcilable inconsistencies between the plea and statements of the accused or evidence.* If any potential defense is raised by the accused's account of the offense or other matters presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense.[65] Inquiry is required only where there is substantial indication of inconsistency; mere possibility of a defense does not require additional inquiry.[66] For instance, if an accused charged with housebreaking alleges that threats were made against his or her family and then states to the military judge that he "wouldn't have done it … if these people hadn't forced [him] into this," the military judge must make further inquiry to negate the defense of duress or he or she must reject the guilty plea.[67] If the accused states that he or she had about six or seven beers prior to the larceny offense, but the providence inquiry does not show an inference of intoxication, the defense of intoxication is not raised and further inquiry is not mandated.[68]

This is true as to the defense of entrapment in a drug distribution case; if the defense appears available, the military judge should inquire to establish the accused's acts and intentions and not base acceptance of the plea on the defense counsel's conclusion as to the validity of the defense[69] The military judge may also call witnesses to resolve any potential defense.[70]

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[57] United States v. Sawinski, 16 M.J. 808 (N.M.C.M.R. (1983).

[58] United States v. Jennings, 1 M.J. 414 (C.M.A. 1976).

[59] R.C.M. 910(e) discussion. United States v. Smith, 14 M.J. 68 (C.M.A. 1982) (claim that money was owed to accused requires judge to inquire as to defense, and plea to robbery may not be accepted); United States v. Russell, 2 M.J. 433 (A.C.M.R. 1975) (where the accused's responses raised the defense of lawful possession, the military judge should have made a more searching inquiry); United States v. Peterson, 1 M.J. 972 (N.C.M.R. 1976) (accused statement that "it was like the devil was in me and it told me to pick up this" raised the defense of lack of mental responsibility and the judge should have made an inquiry).

[60] R.C.M. 910(e) discussion; United States v. Moglia, 3 M.J. 216 (C.M.A. 1977); United States v. Luebs; 43 C.M.R. 315 (C.M.A. 1971); United States v. Butler, 43 C.M.R. 87 (C.M.A. 1971) United States v. Olson, 7 M.J. 898 (A.F.C.M.R. 1979).

[61] R.C.M. 910(b).

[62] Nolo contendere pleas are unnecessary in the military. *Hearings on H.R. 4080 Before a Subcomm. of the Comm. on Armed Services*; Fed. R. Crim. P. 11(b); art. 45(a), UCMJ; United States v. Davis, 4 C.M.R. 195 (A.B.R. 1952). Law Officer properly refused to accept accused plea of nolo contendere.

[63] R.C.M. 910(a)(1). United States v. Matthews, 13 M.J. 501, 514 (A.C.M.R. 1982), *rev'd on other grounds,*16 M.J. 354 (C.M.A. 1983). *See also* United States v. Dock, 28 M.J. 117 (C.M.A. 1989).

[64] *See supra* notes 9–11.

[65] R.C.M. 910(e) discussion.

[66] United States v. Logan, 47 C.M.R. 1 (C.M.A. 1973); United States v. Deavers, 7 M.J. 677 (A.C.M.R. 1979) (possible defense of intoxication); United States v. McCray, 5 M.J. 820 (A.C.M.R. 1978), *aff'd*, 7 M.J. 191 (C.M.A. 1979).

[67] United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976).

[68] United States v. Devers, 7 M.J. 677 (A.C.M.R. 1979).

[69] United States v. Collins, 17 M.J. 901 (A.F.C.M.R. 1983); United States v. Dejong, 13 M.J. 721 (N.M.C.M.R. 1982).

[70] United States v. Diaz-Padilla, 17 M.J. 752 (A.C.M.R. 1984).

It is only inconsistent matter disclosed after entry of a plea that requires resolution. Inconsistent matter revealed during preplea motions does not preclude a later plea. Such circumstances should, however, generate some discussion during the guilty plea inquiry to ensure that the plea is knowing and voluntary.[71]

Although these appellate standards of when a defense raised is sufficient to mandate further inquiry are easy to state, the better practice for the military judge is to be alert and inquire into possible defenses. In sale of drug cases, for instance, it would not be inappropriate for the judge to make an inquiry to negate an entrapment defense as an initial matter in the providence inquiry. Such questioning avoids needless appellate litigation as any inconsistency is often negated by answers to a few short questions.

(4) *The accused enters an improvident plea.* If the military judge finds that the accused's plea is improvident or that it is made without understanding of its meaning and effect, he or she will reject the plea and enter a not guilty plea for the accused. The standards for determining the providence of the accused's guilty plea are discussed in paragraph 27-3.

(5) *The fifth situation in which the military judge will enter a plea of not guilty for an accused is when the accused refuses to enter a plea.* Occasionally, an accused will stand mute. In that situation the military judge enters a plea of not guilty and the trial proceeds on the merits.[72]

b. Effect of the refusal of the military judge to accept the guilty plea of the accused. If, for any of the reasons stated in paragraph 27-4a, the military judge refuses to accept the accused's plea of guilty, a plea of not guilty will be entered and trial will proceed. The Government has the burden to prove beyond a reasonable doubt the offenses for which a not guilty plea has been entered for the accused. Of course, the trial counsel may need a continuance if the not guilty plea surprised him or her and time is needed to gather evidence.

What if the military judge has heard the potential facts of the case during the guilty plea inquiry when the guilty plea is rejected?

A military judge who has already accepted the accused's request for trial by judge alone, and then later rejects the attempt to plead guilty, has four options on how to proceed. The judge may (1) recuse himself or herself and seek appointment of a new trial judge; (2) give the accused the option to withdraw the request for trial by military judge alone; (3) on his or her own motion direct the case be tried with members; (4) or continue to sit as fact finder and judge in the trial.

Recusal of the military judge is not automatic.[73] A military judge may continue to serve as judge, even if the accused has requested trial by judge alone. In United States v. Kaufman, the Army Court of Military Review held it was not error for the military judge to continue with a bench trial after finding a plea of guilty to be improvident.[74] The general basis for recusal is personal bias on the part of the military judge;[75] knowledge that the accused once attempted to plead guilty does not disqualify the judge.[76] The defense should request the opportunity to voir dire the judge as to possible bias that may have resulted from the proceedings, and a challenge preserves the issue for later appeal.[77] Of course, if the military judge does not recuse himself or herself, the military judge must ignore matters brought out during the previous sessions.[78]

c. Withdrawal of a plea of guilty. Prior to the acceptance of a guilty plea by the military judge, the accused has an absolute right to withdraw a guilty plea and enter a plea of not guilty or guilty to a lesser included offense.[79] After acceptance of the plea, but before the sentence is announced, an accused can request permission from the military judge to withdraw the guilty plea. If the accused has sound reasons for the request, the judge in the exercise of discretion can allow the accused to withdraw the plea.[80] A popular formula is that withdrawal of the plea after

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[71] United States v. Bethke, 13 M.J. 71 (C.M.A. 1982). United States v. Kish, 20 M.J. 652, 656 (A.C.M.R. 1985), "[I]t is the existence of an unresolved contradiction of an accused's assertion of guilt which precludes acceptance of a guilty plea, rather than the order in which the assertions are made."

[72] R.C.M. 910(b). "The effect of the refusal of a defendant to plead when arraigned is too well known to require discussion. A not guilty plea is entered for him and the case proceeds." Ruckle v. Warden, 335 F.2d 336, 338 (4th Cir.), *cert. denied,* 379 U.S. 934 (1964).

[73] United States v. Jophlin, 3 M.J. 858 (A.C.M.R. 1977). The stage of the proceedings should influence the action of the military judge. *Compare* United States v. Bradley, 7 M.J. 332 (C.M.A. 1979) (judge must recuse himself when withdrawal of guilty plea occurs after findings) *with* United States v. Cooper, 8 M.J. 5 (C.M.A. 1979). Mere exposure to information related by an accused during a providence inquiry into his or her proffered guilty plea, which the trial judge subsequently rejects, "does not *necessarily* cause the judge to have reached any conclusions about the accused's culpability and legal liability" as to render him or her disqualified. After a thorough providence inquiry, however, during which the accused fully and unequivocally admitted his or her guilt and, resultantly, "where the judge not only has gained detailed knowledge of the factual basis for the offenses charged but also *necessarily* has been required to reach certain conclusions regarding an accused's factual and legal guilt—and to have *manifested* those conclusions by having accepted pleas of guilty and entering findings of guilt," the trial judge has no choice and must recuse himself or herself. *See also* United States v. Winter, 32 M.J. 901 (A.F.C.M.R. 1991) (in a judge alone trial, when the military judge rejects a guilty plea before findings, the judge should offer the accused an option of withdrawing the judge alone request).

[74] 2 M.J. 794 (1977).

[75] United States v. Jarvis, 46 C.M.R. 260 (C.M.A. 1973); United States v. Cockerell, 49 C.M.R. 567 (A.C.M.R. 1974); R.C.M. 902(b)(3).

[76] United States v. Hodges, 47 C.M.R. 923 (C.M.A. 1973).

[77] United States v. Melton, 1 M.J. 528 (A.F.C.M.R. 1975).

[78] In United States v. Shackelford, 2 M.J. 17 (C.M.A. 1976), after 23 questions on direct examination and 51 on cross-examination, the military judge, using knowledge he had gained during the accused's attempt to plead guilty, asked 29 searching questions of his own. This type of examination in front of the members using knowledge gained during the abortive providence inquiry warranted reversal.

[79] United States v. Politano, 34 C.M.R. 298 (C.M.A. 1964); United States v. Leonard, 16 M.J. 984 (A.C.M.R. 1983); United States v. Hayes, 9 M.J. 825 (N.C.M.R. 1980).

[80] R.C.M. 910(h)(1); United States v. Leonard, 16 M.J. 9 (A.C.M.R. 1983) (defect in chain of custody discovered after acceptance of guilty plea is not sufficient cause to permit withdrawal of plea); United States v. Hayes, 9 M.J. 825 (N.C.M.R. 1980).

acceptance should be permitted if the guilty plea was induced by fraud, mistake, imposition, misrepresentation, or misapprehension of the legal rights of the accused.[81] During proceedings in revision or appellate ordered rehearings, the directive to hold such sessions governs the accused's right to withdraw a properly accepted plea of guilty.[82] If the judge or accused withdraws the plea, all related matters must also be withdrawn. If the accused entered into a stipulation of fact, showing his or her commission of each element of the offense, the stipulation must be withdrawn.[83] If the fact finder has already heard the withdrawn evidence, there is a strong possibility that the evidence will prejudice the fact finder against the accused. Recusal of the military judge or disapproval of the request for trial by judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings; in a trial with members, a mistrial will ordinarily be necessary.[84]

[81] Wright, Federal Practice & Procedure: Criminal 2d § 537 (1982); withdrawal of a guilty plea is covered in Fed. R. Crim. P. 32(d), although the rule offers"little guidance as to the applicable standard."United States v. Michaelson, 552 F.2d 472, 474 (2nd Cir. 1977).

[82] United States v. Barfield, 2 M.J. 136 (C.M.A. 1977); United States v. Newkirk, 8 M.J. 684 (N.C.M.R. 1980); *see* R.C.M. 810(a)(2)(B).

[83] United States v. Daniels, 28 C.M.R. 276 (C.M.A. 1959).

[84] R.C.M. 910(h)(2) discussion; *see* United States v. Peterson, 23 M.J. 828 (A.C.M.R. 1986) (judge must either recuse himself from the trial or direct a trial by members).

Chapter 28
The Trial

28–1. General

The trial follows the article 39(a) session. The court-martial assembles with court members, the military judge, counsel for both sides, and the accused. After voir dire and challenges, counsel make their opening statements (the defense counsel may reserve opening until the beginning of the defense case),[1] present their cases in chief, present any rebuttal and surrebuttal, and make closing arguments. Following arguments, the military judge instructs the court members concerning the applicable law,[2] and the members then retire to deliberate on findings.

28–2. Accused's elections on court-martial composition

The accused has the right to elect the composition of the court-martial. If the accused does not request a specific forum, the court-martial will be composed of a panel of officers. The accused may, however, request trial by military judge alone,[3] or, if the accused is an enlisted soldier, he or she may request trial by a court including enlisted soldiers.[4]

Requests for trial by military judge alone should be made before assembly of the court. The request may be in writing and signed by the accused or made orally on the record. Once the request is made, the military judge determines if the accused has consulted with defense counsel, knows the identity of the military judge, and is aware of the right to trial by members.[5] The military judge then approves or disapproves the request. Although that decision is within the discretion of the military judge, the request should be granted in the absence of a substantial reason why, in the interest of justice, the military judge should not be the fact-finder.[6] If the military judge denies the "judge alone"request, he or she must include the reasons for the denial in the record of trial.[7] The accused has the right to withdraw a request for trial by military judge alone at any time before it is approved or if the military judge is changed.[8]

If the accused requests the court-martial include enlisted soldiers, the convening authority must detail enlisted soldiers to the court.[9] At least one-third of the members must be enlisted soldiers, senior in rank to the accused and not from the accused's immediate unit.[10] A request for enlisted soldiers may be made in writing and signed by the accused or it may be made orally on the record.[11]

28–3. Presence of participants

The accused must be present at arraignment and all other stages of the trial, including article 39(a) sessions and post-trial sessions.[12] The accused waives this right to be present if, after being present for arraignment, he or she is voluntarily absent, or if the military judge orders the accused removed from the courtroom for disruptive conduct, after first warning the accused that persistent misconduct will result in removal.[13]

The military judge must be present at all proceedings of any court-martial to which the judge is detailed, except for deliberations by the members.[14] If a new judge is detailed after presentation of evidence on the merits in a trial by military judge alone, the transcript of the prior proceedings must be read to the judge, or the previously presented evidence can be introduced again.[15]

Court members must be present for all court-martial proceedings in cases to which they are detailed and have not been properly excused.[16] Members are not present during article 39(a) sessions conducted during trial or during individual voir dire of other court members.[17] When new members are detailed after some evidence has been presented on the merits, the verbatim transcript must either be read to the member or all previously presented evidence must be introduced again.[18]

One qualified counsel for each party must be present at each court-martial session.[19] The absence of other counsel

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[1] R.C.M. 913(b).
[2] R.C.M. 920(b).
[3] R.C.M. 903(a)(2).
[4] R.C.M. 903(a)(1).
[5] R.C.M. 903(c)(2).
[6] United States v. Butler, 14 M.J. 72 (C.M.A. 1982);*see also* United States v. Edwards, 27 M.J. 504 (C.M.A. 1988).
[7] *Id. See also* R.C.M. 903(c)(2)(B) discussion.
[8] R.C.M. 903(d)(2).
[9] R.C.M. 903(c)(1).
[10] UCMJ art. 25.
[11] R.C.M. 903(b)(1).
[12] R.C.M. 804(a).
[13] R.C.M. 804(b).
[14] R.C.M. 805(a).
[15] R.C.M. 805(d)(2).
[16] R.C.M. 805(b).
[17] *Id.*
[18] R.C.M. 805(d)(1).
[19] R.C.M. 805(c).

does not affect the validity of the proceedings. Normally, court-martial proceedings should not take place in the absence of any defense counsel or assistant defense counsel. If a defense counsel or assistant counsel is absent, the military judge should determine that the accused consents to proceeding despite the absence, or the judge may proceed without the accused's consent after finding that, under the circumstances, a continuance is unwarranted and the accused's right to be adequately represented is not impaired.[20]

28–4. Assembly

The military judge announces the assembly of the court-martial.[21] If trial is by military judge alone, the court-martial is assembled following approval of the request for trial by judge alone.[22]

If trial is by court members, the court-martial is ordinarily assembled immediately after the members are sworn. After the initial article 39(a) session dealing with arraignment, motions, and other preliminary issues, the members assemble with other trial participants. After all parties and personnel have been announced, the military judge announces that the court has been assembled.[23] The military judge sets the time, place, and uniform for all sessions of the court.[24]

Before calling the court to order, the judge reviews the convening order to determine whether a quorum of the members is present. If the necessary participants, including counsel and the accused, are present, the judge calls the court to order.[25] The members are seated with the president, who is the senior member, in the center. The other members are seated alternately to the president's right and left, according to rank. If the membership of the court changes, either by challenges or absences of court members, the remaining members should be reseated.[26] The military judge sits apart from the court members. The accused sits with defense counsel.

The defense counsel and the accused are responsible for ensuring that the accused is properly attired at trial, including the designated uniform, insignia of rank, and any decorations and awards. The accused's commander must assist as necessary to ensure that the accused properly appears before the court.[27]

After the court is called to order, the trial counsel states the court is convened by a certain convening order, names the present and absent members, and states the prosecution is ready to proceed in the case of the United States versus the named accused.[28] During the trial any changes in court personnel are announced. Whenever the court opens after a recess or adjournment, the military judge must ensure that the record reflects whether all participants who were present before the recess are again present.[29] The military judge normally has the trial counsel make the appropriate announcement on the record.

After the initial announcement of parties and the swearing of the members, the military judge ordinarily announces that the court is assembled. Assembly of the court is significant because it is the point after which substitution of members or the military judge may take place only for good cause; the accused no longer may request trial by judge alone or withdraw such a request as a matter of right; and the accused may no longer request or withdraw from a request for trial by enlisted soldiers, even with the permission of the military judge.[30]

28–5. The introduction and swearing of participants

All court-martial personnel, including the military judge, counsel for both sides, reporter, and any interpreter, must take oaths that they will perform their duties faithfully.[31] Often these oaths are taken on a one-time basis in a prescribed written format. If this procedure is followed, there is no need for an additional oath to be administered at a particular court-martial to which that judge or counsel is detailed.[32]

All court members must also take an oath to perform their duties faithfully and in accordance with the law. The trial counsel normally administers this oath to the members in the initial open session of court.[33] As a matter of policy, the oath to court members should be administered at every court-martial to impress on the participants the solemnity of the proceedings.[34] All court members must be sworn; if even one member is unsworn, the court-martial lacks jurisdiction.[35]

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[20] R.C.M. 805(c) discussion.
[21] R.C.M. 911.
[22] *Id.* discussion.
[23] *Id.*
[24] R.C.M. 801(a)(1).
[25] MCM, 1984, app. 8, at A8–9, note 42.
[26] MCM, 1984, app. 8, at A8–11, note 49.
[27] R.C.M. 804(c)(1).
[28] R.C.M. 901(b); MCM, 1984, app. 8 at A8–10.
[29] R.C.M. 813(b).
[30] R.C.M. 911 discussion.
[31] R.C.M. 807(b)(1)(A).
[32] AR 27–10, paras 11–3(a), 11–4(b).
[33] *Id.* at para. 11–5.
[34] *Id.*

At the initial article 39(a) session, the trial counsel introduces all members of the prosecution, states whether they have been previously sworn, how they were detailed to the court, and whether they have acted in any disqualifying capacity.[36] If it appears that any member of the prosecution has acted in a disqualifying capacity, the military judge should give the accused an opportunity to decide whether to waive the disqualification. Otherwise, any disqualification must be reported to the convening authority, who must excuse the disqualified member of the prosecution. If any member of the prosecution has not been previously sworn, the military judge administers the oath.[37]

After the trial counsel introduces the members of the prosecution, the defense counsel identifies himself or herself and all other detailed members of the defense, stating whether all counsel have been previously sworn, and whether they have acted in any inconsistent or disqualifying capacity.[38] If a defense counsel has acted in a disqualifying capacity, the accused should be informed by the military judge and be given an opportunity to waive the disqualification. If the accused elects not to waive, or if the disqualification is not waivable, the military judge should inform the accused of the available choices and grant him or her an opportunity to exercise an appropriate option.[39] If individual civilian defense counsel has been retained, that counsel should state his or her qualifications, state whether they have acted in a disqualifying capacity, and be sworn by the military judge because normally individual defense counsel will not have been previously sworn.[40] The military judge also administers an oath to any other member of the defense who has not been previously sworn. Failure to swear the detailed defense counsel is reversible error if that counsel conducts the defense.[41] Failure to swear civilian defense counsel is nonprejudicial error.[42]

After introduction of counsel, the military judge states whether counsel for both sides have the necessary qualifications and administers the oath to any counsel not previously sworn.[43]

At the initial session with court members, the military judge normally introduces counsel for both sides to the court members during the preliminary instructions. If the military judge does not introduce counsel, the counsel can introduce themselves at the beginning of voir dire or in the opening statement.

After announcing the presence of trial participants at the initial article 39(a) session, the trial counsel administers the oath to the court reporter detailed to the court.[44] Frequently, the court reporter will have already taken the prescribed oath to perform duties faithfully in all courts-martial.[45] In that event, the trial counsel should state that the reporter has previously been sworn. Court reporters are detailed only to general courts-martial and special courts-martial authorized to adjudge bad conduct discharges.[46] The reporter's duties are mechanical and ministerial; court reporters record the proceedings and testimony and transcribe them to prepare the required record of trial.[47] Because the court reporter's duties are limited, failure to swear the court reporter is nonprejudicial error.[48]

Interpreters must also be sworn.[49] If a witness is to testify in a language other than English, an interpreter will be appointed. An interpreter will also be appointed if the accused does not speak or understand English.[50] The accused may also retain an unofficial interpreter without expense to the United States.[51] If an official interpreter is appointed and has not been previously sworn, the trial counsel will administer the appropriate oath.[52]

28–6. Witnesses

During the case in chief, the counsel and the court may call witnesses to testify. The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and recross-examination are conducted as necessary, followed by any questioning by the military judge and members.[53] Unless otherwise provided, the testimony of witnesses is taken orally in open session of the court-martial.[54] The military judge has the discretion to limit the number of redirect and recross-examinations.[55]

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[35] United States v. Stephenson, 2 C.M.R. 571 (N.B.R. 1951).
[36] R.C.M. 901(d)(1).
[37] R.C.M. 901(d) and discussion. *See also* Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980).
[38] R.C.M. 901(d)(2).
[39] R.C.M. 901(d)(3) discussion.
[40] R.C.M. 807(b)(1)(A).
[41] United States v. Kendall, 38 C.M.R. 359 (C.M.A. 1968).
[42] United States v. Danilson, 11 C.M.R. 692 (A.F.B.R. 1953).
[43] R.C.M. 901(d)(5).
[44] MCM, 1984, app. 8, at 8–1, note 9.
[45] AR 27–10, para. 11–6.
[46] *Id.* at para. 5–11.
[47] R.C.M. 502(e)(3)(B).
[48] United States v. Williams, 16 C.M.R. 717 (A.F.B.R. 1954).
[49] R.C.M. 807(b)(1)(A).
[50] R.C.M. 502(e)(3)(A).
[51] *Id.* at discussion.
[52] AR 27–10, para. 11–7*(a)*.
[53] R.C.M. 913(c)(2) discussion; *see also* Mil. R. Evid. 611, 614.
[54] R.C.M. 913(c)(2). For example, Mil. R. Evid. 412(c)(2) (the "rape shield law") provides authority for closed session when the admissibility of the previous sexual conduct of the victim is in question.
[55] Mil. R. Evid. 611(a).

Unlike the practice in Federal court, Military Rule of Evidence 614(b) allows court members, as well as the military judge and counsel, to interrogate witnesses. The rule applies whether the witness was called by the members, the judge, or the parties.[56] Questioning of a witness is permitted for purposes of clarification of testimony or to be better informed in doubtful areas.[57] The right of the court members to question witnesses is subject to two limitations. First, the questioning must not "reach the level of partisan advocacy."[58] Court member questioning must be "accomplished in a nonpartisan manner."[59] Second, questioning by the members is subject to the control and broad discretion of the military judge.[60] The members' questions are to be submitted in writing to the military judge who rules on their propriety and then poses the question to the witness. Either the trial counsel or defense counsel may object to the questions posed by the members.[61]

The court members may call additional witnesses or recall a witness who has already testified. The military judge rules whether it is appropriate to call or recall the witness.[62] If the military judge determines the request is proper, the judge may assign the responsibility of initiating examination to either the trial counsel or defense counsel, or the judge may examine the witness. Past practice indicates that this examination usually will be conducted by the party standing to benefit the most from such evidence. In any event, both parties, even the party who conducts the first examination, may proceed as if on cross- examination and may use leading questions.[63]

28–7. Production of witness statements

a. Requirements under R.C.M. 914. R.C.M. 914, Production of statements of witnesses, is based on the Jencks Act.[64] The Jencks Act requires the production of any prior statements made by a Government witness which are in the possession of the United States. Such statements must be produced, upon motion by the defense counsel, after the witness has testified on direct examination.[65]

It has long been established that the provisions of the Jencks Act apply to military practice.[66] However, prosecution compliance with R.C.M. 701 should make resort to this rule by the defense unnecessary in most cases.[67]

(1) Statements within R.C.M. 914. While it is clear that producible statements under R.C.M. 701(a)(1)(C) must be either signed or sworn to, the definition of "statement" under the Jencks Act has been the subject of some litigation. The statute itself defines the producible statement as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; [or]
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement.[68]

Military courts have concluded that when a written, recorded observation is transferred to a Government agent for the purpose of imparting information and is simultaneously verified by its author as to truth and accuracy, that writing becomes a statement within the meaning of the Jencks Act.[69] A statement relates to the subject matter of the witness'

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[56] Mil. R. Evid. 614. R.C.M. 913(c)(2) discussion.*See* 3 Wigmore § 784 A, (Chad. Rev. 1970), where it is stated that "the discretion of the court to allow such questioning is undoubted." See also Annot., 31 A.L.R. 3rd 872 (1970); MCM 1969 (rev. ed.), para. 149(b)(3).

[57] United States v. Lamela, 7 M.J. 277, 278 (C.M.A. 1979). Of course, this includes questioning of the accused should he become a witness on his own behalf.*Id.*

[58] United States v. Papenheim, 41 C.M.R. 203, 205 (C.M.A. 1970).

[59] United States v. Lamela, 7 M.J. 277, 278 (C.M.A. 1979).

[60] Mil. R. Evid. 611; MCM 1969 (rev. ed.), paras. 149(a), 137.

[61] Mil. R. Evid. 614(b), (c). The objection by a party to a member's question may be delayed until the"next available opportunity when the members are not present." While this may appear to conflict with the requirement for a timely objection in Mil. R. Evid. 103, it recognizes that a timely objection in front of the court members may alienate the member posing the question. In United States v. Miller, 14 M.J. 924 (A.F.C.M.R. 1982), the Air Force Court of Review suggested that to avoid member speculation, if the military judge rules that a question is not proper, the judge should explain the reasons to the members. The court also felt that the requirement for written questions discouraged the use of questions by the members, and therefore written questions were discretionary with the trial judge. This is in direct contradiction to Military Rule of Evidence 614(b). The better practice is to adhere to the rule and have the members submit written questions. McCormick's Evidence § 8, note 7. (3rd ed. 1984).

[62] Mil. R. Evid. 614(a).

[63] S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence Manual, 573 (2d ed. 1986).

[64] 18 U.S.C. § 3500 (1982). The MCM, 1984, has formally adopted the Jencks Act as R.C.M. 914. This discussion of the Jencks Act also applies to R.C.M. 914, although paragraph 27–7*b, infra* will discuss specifically those aspects of R.C.M. 914 not traditionally covered by the Jencks Act. *See also* Jencks v. United States, 353 U.S. 657 (1957).

[65] 18 U.S.C. § 3500(a) provides:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

[66] United States v. Albo, 46 C.M.R. 30 (C.M.A. 1972).

[67] R.C.M. 701; R.C.M. 914, analysis.

[68] 18 U.S.C. § 3500(e)(1), (2).

[69] United States v. Kilmon, 10 M.J. 543 (N.C.M.R. 1980).

testimony for purposes of the Act as long as the statement relates generally to the events about which the witness testified.[70] A statement may also be adopted by a witness and become producible under the Jencks Act. Where written notes were taken by a Government agent and were later verified by the witness as a true and accurate summary of what the witness had said, the notes became the witness' own statement for purposes of the Act and were properly discoverable after the witness testified on direct examination.[71] Surveillance notes, however, are distinguishable as records of police activity rather than witness statements and are not producible under the Act.[72]

Tape recordings have also generated considerable military litigation. The Jencks Act applies to testimony given at the article 32 investigation, and, while there is no requirement to tape record the statements of witnesses at the article 32, once the statements are taped, they must be retained and made available for production upon a proper defense request.[73] A defense request for a verbatim transcript of an article 32 investigation was properly treated by the military judge as a motion under the Jencks Act for production of the tapes made at the article 32.[74] Civilian courts have held that an inaudible tape recording of a witness' prior statement is properly producible under the Jencks Act, based upon the rationale that it is for the court, not the Government, to determine whether the tape is in fact inaudible.[75] The Air Force Court of Military Review, when faced with such an issue, found no reason to expand that rationale to the military, particularly where the loss or destruction of the inaudible tape was not the result of bad faith or any attempt to prevent the defense from obtaining the information.[76] The Army Court of Military Review held that blank tapes which had failed to record the testimony simply were not statements and therefore were not producible under the Act.[77] There is no duty to tape record article 32 investigations. The Jencks Act requires only that the Government provide the defense with the tape recordings that exist and are in its possession, even if they are blank or garbled.[78] The transcript made from lost audio tapes satisfies the production requirement for a CID agent's investigative report. The Government need not provide both the report and the tapes.[79]

(2) When statements are within the possession of the United States for purposes of production under the Act. Only those statements which are within the possession and control of a prosecutorial arm of the Government, including its investigative personnel, fall within the purview of the Jencks Act.[80] A confidential informant, who made notes of drug transactions he undertook on behalf of military investigators, was held to be part of the prosecutorial arm of the Government for purposes of the Jencks Act, and the notes he kept were properly producible.[81] Similarly, statements which are given to the company commander are "in the possession of the U.S." for purposes of the Jencks Act because the commander has investigative and disciplinary duties. The Army Court of Military Review, however, has refused to extend this concept to the commander's representative, the charge of quarters.[82] Administrative personnel who perform non-investigative functions for the military police, such as military police dispatchers, are not part of the prosecutorial arm of the Government, and statements given to them are not producible under the Jencks Act.[83]

(3) A good faith exception. When a statement which is properly producible under the Act cannot or will not be produced by the Government, the remedy is to strike the direct testimony of the witness or, if required in the interest of justice, to grant a mistrial.[84] When the statement has been lost without bad faith on the part of the Government, such a remedy may not be required, however. Good faith loss of article 32 investigation tapes does not require striking the testimony where there is no evidence that the Government intentionally withheld or destroyed the tapes in a bad-faith effort to frustrate the defense.[85] The Jencks Act is not an instrument of pretrial discovery; Jencks Act requests made at

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[70] United States v. Dixon, 7 M.J. 556 (A.C.M.R. 1979).

[71] United States v. Jarrie, 5 M.J. 193 (C.M.A. 1978).

[72] United States v. Gomez, 15 M.J. 954 (A.C.M.R. 1983). *See also* United States v. Griffin, 659 F.2d 932 (9th Cir. 1981).

[73] United States v. Marsh, 21 M.J. 445 (C.M.A. 1986); United States v. Patterson, 10 M.J. 599 (A.F.C.M.R. 1979); United States v. Thomas, 7 M.J. 655 (A.C.M.R. 1979).

[74] United States v. Crumb, 10 M.J. 520 (A.C.M.R. 1980).

[75] United States v. Buffalino, 576 F.2d 446 (2d Cir. 1978).

[76] United States v. Allen, 13 M.J. 597 (A.F.C.M.R. 1982) (a civilian social worker had tried to tape a witness interview and it was the civilian, not Government, investigators who concluded the tape was inaudible).

[77] United States v. McDaniel, 17 M.J. 553 (A.C.M.R. 1983).

[78] United States v. Guisti, 22 M.J. 733 (C.G.C.M.R. 1986). This case gives a good history of the Jencks Act and argues that it need not apply to article 32 investigations due to the broader discovery provisions in the military.

[79] United States v. Pena, 22 M.J. 281 (C.M.A. 1986).*See also* United States v. Guthrie, 25 M.J. 808 (A.C.M.R. 1988).

[80] United States v. Bosier, 12 M.J. 1010 (A.C.M.R. 1982).

[81] *Id.*

[82] United States v. Ali, 12 M.J. 1018 (A.C.M.R. 1982).

[83] United States v. Gomez, 15 M.J. 954 (A.C.M.R. 1983).

[84] 18 U.S.C. § 3500(d) provides:

> If the United States elects not to comply with an order of the court … to deliver to the defendant any such statement … the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

[85] United States v. Marsh, 21 M.J. 445 (C.M.A. 1986) (article 32 investigation tapes accidentally destroyed, but summarized transcript provided to defense). *See also* United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

a pretrial session are premature and need not be granted; even properly producible Jencks Act statements need not be produced until after a Government witness has testified on direct examination.[86] While in certain instances it may serve the interests of all parties to resolve the issue at a pretrial session and to determine whether producible statements exist and will be produced in order to avoid striking testimony or risking mistrial, the defense cannot be compelled to make a Jencks Act motion prior to trial. A Jencks Act motion is timely if it is made at the conclusion of the direct testimony of the Government witness, no matter how inconvenient that may be for the Government.[87]

b. Production Issues under the Rules for Courts- Martial and Rules of Evidence.

(1) Statements of prosecution and defense witnesses. R.C.M. 914, while tracking closely the language of the Jencks Act as to what constitutes a statement and the timing and procedure for release, has added the requirement that prior statements made by defense witnesses other than the accused be disclosed.[88]

A previous statement of a defense witness must be disclosed if it is in the possession of either the accused or the defense counsel.[89] While earlier disclosure is not mandated by the rule, counsel are advised to anticipate such requests at trial, and to act to avoid trial delays by voluntarily disclosing such statements before arraignment.[90] Nothing in the rule is intended to prevent or prohibit earlier disclosure of such material on a voluntary basis in order to avoid delay at trial.[91]

(2) Writings used to refresh memory. The Military Rules of Evidence provide that when a witness uses a writing to refresh his or her memory for the purpose of testifying, either while testifying or before testifying, if the trial judge determines it is necessary in the interest of justice, the adverse party may have the writing produced at the hearing, inspect it, and cross-examine the witness thereon as well as introduce into evidence those portions which relate to the witness' testimony.[92] When such a statement is ordered produced and the party elects not to do so, the military judge may make such order as is required in the interests of justice. As under the Jencks Act, when it is the Government which elects not to comply, the order shall either strike the testimony of the witness or, in the discretion of the military judge, declare a mistrial. Unlike the Jencks Act, however, the Military Rules of Evidence do not require that the writing be a statement of the witness.[93]

28–8. Stipulations

There are two common types of stipulations, stipulations of fact and stipulations of expected testimony. Stipulations may be made orally or in writing.[94]

The parties may stipulate that a certain fact exists or does not exist. If the stipulation of fact is in writing, it is presented to the members.[95] Once accepted, a stipulation of fact, in whatever form, unless properly withdrawn and stricken from the record, is binding on the court-martial and may not be contradicted by the parties.[96]

The parties may also stipulate that, if a witness were present, he or she would testify in a specified manner or that, if an original document were introduced, the document's contents would include certain information. Unlike a stipulation of fact, the parties are free to contradict, attack, or explain the evidence presented in this manner. A stipulation of expected testimony is read to the members; to present it to them as documentary evidence is error.[97] The fact that a party has entered into a stipulation of expected testimony or a stipulation of a document's contents does not admit the truth of the evidence and does not add weight to the evidentiary nature of the testimony or document.[98]

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[86] United States v. Burrell, 5 M.J. 617 (A.C.M.R. 1978). *Cf.* United States v. Barber, 20 M.J. 678 (A.F.C.M.R. 1985) (court entertained Jencks Act request made as motion *in limine*).

[87] United States v. Strand, 17 M.J. 839 (N.M.C.M.R. 1984), *aff'd* 21 M.J. 912 (N.M.C.M.R. 1986). This procedure ensures that the military judge conducts a balancing of prejudice and Government culpability. *See* United States v. Jones, 20 M.J. 919, 934 (N.M.C.M.R. 1985).

[88] R.C.M. 914(a) provides:

> 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.

[89] R.C.M. 914(a)(2). This rule is based on United States v. Nobles, 422 U.S. 225 (1975), which held that the accused's right against self-incrimination is personal and does not extend to prior statements of witnesses other than the accused.

[90] R.C.M. 914(a) discussion.

[91] R.C.M. 914 analysis.

[92] Mil. R. Evid. 612. *See also* United States v. White, 23 M.J. 891 (A.C.M.R. 1987) (defense motion construed as relating to refresher notes and not to Jencks Act).

[93] *Id.*

[94] R.C.M. 811.

[95] R.C.M. 811(f).

[96] R.C.M. 811(e). This provision is a change from previous manual provisions and brings military treatment of stipulations of fact, and their effect on the trier of fact and the parties, in line with Federal and State law. *See* R.C.M. 811(e) analysis. Thus, if the trial counsel enters into a stipulation of fact that the accused was kicked in the groin, it is improper to present contrary evidence and argue that the accused was never so kicked. United States v. Gerlach, 37 C.M.R. 3 (C.M.A. 1966).

[97] United States v. Schmitt, 25 C.M.R. 822 (A.B.R. 1985).

[98] R.C.M. 811(e). The analysis to R.C.M. 811(e) points out that a stipulation to the contents of a document may be attacked by the parties in that such a stipulation is like a stipulation of expected testimony rather than a stipulation of fact.

A stipulation is an agreement between the parties and hence not a ruling on admissibility of the evidence. Inadmissible evidence, such as hearsay, contained in a stipulation may be subject to a proper objection. If the parties fail to object to inadmissible matters in a stipulation this will normally constitute a waiver of such objection.[99]

The following example illustrates the different stipulations and their effects. In a trial for larceny there are many methods to prove the value of the stolen object. If the parties enter into a stipulation of fact that the object is of a certain value, that fact is binding on the parties and may not be contradicted. The parties may add to or supplement (but not contradict) the stipulation of fact. For instance, if the parties stipulate that a new pistol of a certain make and model is of a value of $150.00, the defense may adduce evidence that the pistol in the specification was used or broken. The parties may stipulate to the contents of a document, for example, that the Army property list shows the value of a pistol as $150.00. The defense may adduce evidence that the document is incorrect, or that the pistol differs from those listed in the property list. Or the parties may enter into a stipulation of expected testimony that a specialist in Army supply would testify that a new pistol was of a value of $150.00. The defense could contradict this stipulation of expected testimony by other evidence.

The military judge rules on the admissibility of a stipulation.[100] The military judge should not accept a stipulation if there is any doubt of the accused's or any other party's understanding of the nature and effect of the stipulation. The military judge should also refuse to accept a stipulation which is unclear or ambiguous.[101] Ordinarily, before accepting any stipulation, the military judge should inquire to ensure that the accused understands the right not to stipulate, understands the stipulation, and consents to it.[102] If the military judge refuses to accept a stipulation, the parties should be granted a continuance to be able to gather proof on the issue. If the stipulation is accepted, military judge should instruct the members as to the effects of a stipulation.[103]

The accused may, after a plea of not guilty, enter into a stipulation that amounts to a confession.[104] These "confessional stipulations" are closely scrutinized. They are subject to the same constraints as guilty pleas and are discussed in

A party may withdraw from an agreement to stipulate or from a stipulation at any time before the stipulation is accepted. After a stipulation has been accepted by the military judge, he or she may permit withdrawal. If a party withdraws from an agreement to stipulate or from a stipulation, the opposing party may be entitled to a continuance to obtain proof of the matters which were to have been stipulated. If there is withdrawal of a stipulation previously accepted, the stipulation must be disregarded by the court-martial, and an instruction to that effect should be given.[105]

28–9. Views and inspections[106]

The military judge may, as a matter of discretion,[107] permit the court-martial to view or inspect the 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.[108] 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 an escort, party, military judge, or any member shall be made part of the record.[109]

A view or inspection should be permitted only in extraordinary circumstances.[110] The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible.[111]

Court members who make a view or inspection without the order of the court are guilty of misconduct. The effect of the unauthorized view must, therefore, be measured by its possible impact on the verdict.[112] A casual or fortuitous view, for instance when court members live in the area near the crime scene, is treated differently than a deliberate act

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[99] Mil. R. Evid. 103(a). *Cf.* United States v. Schell, 40 C.M.R. 122 (C.M.A. 1969). *But cf.* United States v. Bolden, 16 M.J. 722 (A.F.C.M.R. 1983) (court found no error in admission of stipulation of fact as to accused's improperly filed article 15. That this inadmissible evidence was admitted per stipulation was not discussed).

[100] R.C.M. 811(b). *See also* United States v. Glazier, 26 M.J. 268 (C.M.A. 1988).

[101] R.C.M. 811(b) discussion.

[102] R.C.M. 811(c) discussion; United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977); United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978); United States v. Onan, 5 M.J. 514 (A.C.M.R. 1978); Benchbook, para. 2–11 contains a sample inquiry of an accused when a stipulation of fact is part of a pretrial agreement.

[103] *See* Benchbook, para. 7–4.

[104] R.C.M. 811(c) discussion.

[105] R.C.M. 811(d).

[106] R.C.M. 913(c)(3). R.C.M. 913(c)(3) is based on MCM, 1969 (rev. ed.), para. 54(3). *See also* McCormick's Evidence, § 216 (3rd ed. 1984). Wigmore includes views and inspections under the discussion of autoptic proference. 4 Wigmore § 1150–1169 (Chad. Rev. 1972).

[107] The judge has broad discretion in this area. 4 Wigmore § 1164 (Chad. Rev. 1972); McCormick's Evidence § 216, n.7 (3rd ed. 1984).

[108] Wigmore refers to these escorts as "view showers." 6 Wigmore § 1802 (Chad. Rev. 1976).

[109] R.C.M. 913(c)(3).

[110] If photographs or sketches would adequately describe the premises, the judge may properly deny a defense request for a view. United States v. Borner, 12 C.M.R. 62 (C.M.A. 1953).

[111] R.C.M. 913(c)(3) discussion.

[112] United States v. Wolfe, 24 C.M.R. 57 (C.M.A. 1957).

of seeking out the scene of the crime for the purpose of making observations.[113] When the information obtained from the improper view is more than matters of common knowledge,[114] it is presumed that such information is prejudicial to the accused.[115] The presumption is rebuttable, and the appropriate procedure calls for referral of the matter to the trial judge for judicial assessment of the facts and the prejudicial impact on the rights of the accused.[116]

28–10. Contempt

Any level of court-martial, provost court, or military commission has the power to punish for contempt.[117] Only"-direct" contempt is punishable; that is, contempt committed in the presence of the court-martial or its immediate proximity.[118] Contempts directly witnessed by the court-martial may be punished summarily, but contempts occurring outside the court may be punished only after an evidentiary hearing.[119] Any person may be punished for contempt except the military judge, members, and foreign nationals outside the territorial limits of the United States who are not subject to the Code.[120] A court-martial does not have inherent power to protect its proceedings against disruption; it is within the authority of the military judge to delay contempt proceedings until the end of trial.[121]

If the contempt occurs when the members are not present, the military judge shall determine whether to punish for contempt, and if so, the punishment.[122] If the contempt occurs before the members, the military judge will instruct the members who will then determine whether to find the offender in contempt and, if so, what the punishment shall be.[123]

The punishment for contempt may not exceed confinement for 30 days or a fine of $100, or both.[124] The convening authority approves or disapproves all or part of the sentence, with no further review or appeal.[125] Any confinement will begin when adjudged unless it is deferred, suspended, or disapproved by the convening authority.[126] Any fine adjudged does not become effective until ordered executed by the convening authority.[127]

28–11. Mistrial

a. General Considerations. A mistrial may be declared as a matter of discretion when circumstances arising during the proceedings make it manifestly necessary in the interest of justice.[128] If error prejudicial to either party occurs during trial which cannot be cured by instructions or other means, a mistrial may be appropriate.[129] Examples of such circumstances include: when court members are informed of inadmissible matters which are so prejudicial that a curative instruction would be inadequate; when the members themselves engage in prejudicial misconduct; or when the proceedings must be terminated because of some legal defect which cannot be cured.[130] A mistrial may be granted either as to findings of some or all charges or only as to the sentence.[131]

When a mistrial is requested, the military judge will ask the position of the parties and then decide the matter as an interlocutory question.[132] Mistrial is a drastic remedy and should be employed only when manifestly necessary to preserve the ends of justice. In determining whether manifest necessity exists, the courts will judge each case on its own facts.[133] The decision of the military judge will be reversed on appeal only when there has been a clear abuse of discretion.[134] An abuse of discretion cannot be readily defined in terms which establish hard and fast rules; to do so would curtail the broad power of the trial judge to ensure a fair trial.[135] For instance, an error in admitting evidence

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[113] United States v. Bishop, 11 M.J. 7 (C.M.A. 1981).
[114] United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983).
[115] United States v. Wolfe, 24 C.M.R. 57 (C.M.A. 1975).
[116] United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983); United States v. Davis, CM 445883 (A.C.M.R. 31 Oct. 1984).
[117] UCMJ art. 48.
[118] R.C.M. 809(a) discussion.
[119] R.C.M. 809(b). The alleged offender is given an opportunity to be represented by counsel and present evidence for contempt not directly witnessed by the court-martial.
[120] R.C.M. 809(a) discussion.
[121] United States v. Burnett, 27 M.J. 99 (C.M.A. 1988).
[122] R.C.M. 809(c)(1). The military judge must recite the facts for the record and state they were directly witnessed by the military judge in the presence of the court-martial.
[123] R.C.M. 809(c)(2).
[124] UCMJ art. 48. But contempt is not the exclusive remedy for unlawful conduct at a court-martial. United States v. Gray, 14 M.J. 551 (A.C.M.R. 1982).
[125] R.C.M. 809(d); United States v. Snipes, 19 M.J. 913 (A.C.M.R. 1985) (convening authority disapproved contempt findings and sentence of fine of $50 against trial defense counsel).
[126] R.C.M. 809(e).
[127] *Id.*
[128] R.C.M. 915(a).
[129] United States v. Pastor, 8 M.J. 280 (C.M.A. 1980); United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978); United States v. Shamlian, 25 C.M.R. 290 (C.M.A. 1958).
[130] R.C.M. 915(a) discussion. *See also* United States v. Mora, 26 M.J. 122 (C.M.A. 1988) (appellant's right to a fair trial was vindicated).
[131] R.C.M. 915(a).
[132] R.C.M. 915(b). As a general rule, the Government has a strong burden to show why a mistrial was granted over defense objection. *See* Burtt v. Schick, 23 M.J. 140 (C.M.A. 1986); United States v. Ghent, 21 M.J. 546 (A.F.C.M.R. 1985).
[133] United States v. Pastor, 8 M.J. 280 (C.M.A. 1980). *See also* United States v. Williams, 26 M.J. 644 (A.C.M.R. 1988).
[134] United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978). *See also* United States v. Burnett, 27 M.J. 99 (C.M.A. 1988).
[135] United States v. Rosser, 6 M.J. 267 (C.M.A. 1979).

can ordinarily be cured by striking the testimony or evidence and instructing the court members to disregard it.[136] Only in the extraordinary case in which the improper evidence is inflammatory or highly prejudicial to the extent that its impact cannot be erased reasonably from the minds of an ordinary person is there occasion for the judge to grant a mistrial.[137] When an error of constitutional dimension occurs which causes probable prejudice to the accused, denial of a mistrial is proper if a clear and convincing instruction correcting the error is given; when the instruction is ambiguous or unclear, the error is not cured and denial of the motion for mistrial is an abuse of discretion.[138] A mistrial should be declared where the effects of the error are manifestly prejudicial and cannot be cured by instructions.[139] The court must determine whether, notwithstanding the curative instruction, there is a fair risk that the admission of the improper material influenced the court members.[140]

b. Illustrations. Mere mention of the fact that the accused invoked article 31 rights or that a Government witness mentioned that the accused took a polygraph does not automatically entitle the accused to a mistrial.[141] Argument of counsel may create grounds for the granting of a mistrial if it is prejudicial and improper.[142] A curative instruction may, on the other hand, correct and remove errors made in argument.[143]

Improper activities by court members may also lead to a mistrial in unusual circumstances. If, for instance, a court member were sleeping during the case, or if some other form of inattentiveness prevented him or her from considering the evidence or the judge's instructions, it would be the duty of the military judge to declare a mistrial.[144] When, after the presentation of evidence, the court members disclosed that they recognized a witness from a previous trial and had formed an opinion as to the witness' credibility, a mistrial was the appropriate remedy.[145] When a court member had expressed displeasure that a witness was not present when called to testify, the military judge properly denied a motion for a mistrial and cured the error with an appropriate curative instruction, followed by voir dire of the members to ensure that they could follow the instruction in their deliberations.[146] When a court member was heard to say that he was fed up with the delays in the trial and attributed them to the civilian defense counsel, the military judge cured any possible error by instructing the members and allowing the counsel to voir dire the members to ensure that they could follow those instructions.[147] When one court member inadvertently saw autopsy photos during a recess, any prejudice was remedied by curative instructions.[148] A Government investigator asking a court member for a ride to a local hotel was not grounds for a mistrial.[149]

c. Effect. Granting a motion for a mistrial has the effect of withdrawing the charge and specification as to which the motion was granted.[150] The jeopardy protections of the Constitution are normally waived by an accused who has successfully moved for a mistrial.[151] A second trial will be barred only if the grant of a mistrial was done without the consent of the accused and was an abuse of discretion or was the direct result of intentional prosecutorial misconduct intended to necessitate a mistrial.[152]

28–12. Motions for finding of not guilty

A motion for a finding of not guilty is similar to the motion for a judgment of acquittal in civilian practice.[153] The motion is a procedural device whereby the defense may test the sufficiency of the Government's case. The motion may also be raised sua sponte by the military judge.[154] The motion may be made at the conclusion of the prosecution's case or at the conclusion of the defense case[155] but must be made before the announcement of the findings on the general

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[136] United States v. Garrett, 24 M.J. 413 (C.M.A. 1987) (curative instructions sufficed to cure any prejudice from asking Government investigator about accused's assertion of his right to remain silent); United States v. Seymore, 19 M.J. 608 (A.C.M.R. 1984) (curative instructions concerning uncharged misconduct, no mistrial).

[137] United States v. Patrick, 24 C.M.R. 22 (C.M.A. 1957).

[138] United States v. Suttles, 15 M.J. 972 (1983).

[139] United States v. Brice, 19 M.J. 170 (C.M.A. 1985); United States v. Massey, 50 C.M.R. 346 (A.C.M.R. 1975).

[140] United States v. Yanuski, 36 C.M.R. 326 (C.M.A. 1966). *Cf.* United States v. Keenan, 39 C.M.R. 108 (C.M.A. 1969); United States v. Simonds, 36 C.M.R. 139 (C.M.A. 1966); United States v. Seymore, 19 M.J. 608 (A.C.M.R. 1984).

[141] United States v. Fitzpatrick, 14 M.J. 394, 398 (C.M.A. 1983); United States v. McCray, 15 M.J. 1086 (A.C.M.R. 1983); United States v. Dennis, 16 M.J. 957 (A.F.C.M.R. 1983); *see also* United States v. Palumbo, 27 M.J. 565 (A.C.M.R. 1988).

[142] United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976).

[143] United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982).

[144] United States v. Groce, 2 M.J. 866 (A.C.M.R. 1976). *See also* United States v. West, 27 M.J. 223 (C.M.A. 1988).

[145] United States v. Waldron, 36 C.M.R. 126 (C.M.A. 1966).

[146] United States v. Thompson, 5 M.J. 28 (C.M.A. 1978).

[147] United States v. Gore, 14 M.J. 945 (A.C.M.R. 1982).

[148] United States v. Johnson, 23 M.J. 327 (C.M.A. 1987).

[149] *Id. See also* United States v. Stone, 23 M.J. 773 (A.C.M.R. 1987) (laughter coming from deliberation room, remark from one member to another during recess that accused was guilty).

[150] R.C.M. 915(c)(1).

[151] United States v. Ivory, 26 C.M.R. 296 (C.M.A. 1958).

[152] R.C.M. 915(c)(2). *See* Oregon v. Kennedy, 456 U.S. 667 (1982); Burtt v. Schick, 23 M.J. 140 (C.M.A. 1986); United States v. Rex, 3 M.J. 604 (N.C.M.R. 1977).

[153] *See* Fed. R. Crim. P. 29a.

[154] R.C.M. 917(a).

[155] *Id.*

issue of guilt.[156] The motion must specifically indicate where the Government's evidence is insufficient and the military judge must give the parties an opportunity to be heard before ruling on the motion. The military judge should ordinarily allow the trial counsel to reopen the Government's case as to the insufficiency specified in the motion, if further evidence is available.[157]

The test for granting the motion is whether there is some evidence, which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of the offense charged.[158] The evidence is viewed in the light most favorable to the prosecution and without evaluating the credibility of witnesses.[159] The 1984 Manual for Courts-Martial, unlike its predecessor, clearly allows the military judge to grant a motion for a finding of not guilty as to part of a specification, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted.[160] Thus, the military judge can now grant the motion as to the charge or offense, but still submit to the court members, upon proper instructions, a lesser included offense on which the Government was able to meet the standard.[161] A ruling granting a motion for a finding of not guilty is an acquittal and is final when announced; it may not be reconsidered by the military judge.[162] A ruling which denies a motion for finding of not guilty may be reconsidered at any time prior to announcement of findings.[163] On appeal, the ruling will not be reversed simply because the motion should have been granted based on the state of the evidence at the time the motion was made. Instead, the appellate court will look at all evidence offered before findings, including evidence offered by the defense, to determine if the evidence is sufficient to sustain findings of guilty.[164]

28–13. Effect of final determinations: res judicata

a. Historical development. At common law, former jeopardy did not bar a second trial in cases where the first trial never received evidence or where the second trial related to a different offense. Civilian courts subsequently developed the doctrines of res judicata and collateral estoppel to give additional protection in these instances. The Supreme Court accepted the application of the res judicata doctrine to criminal cases in the 1916 case of United States v. Oppenheimer.[165] The military subsequently adopted this doctrine, which simply states that once a question of fact has been judicially and finally determined by a court of competent jurisdiction, further litigation between the parties is precluded.[166] The doctrine operates only against the United States and never against the accused.[167]

b. Manual for Courts-Martial, 1984. R.C.M. 905(g) differs from the earlier MCM provision in two main respects. First, the term res judicata is not used. The analysis indicates that the term is "legalistic" and potentially confusing because res judicata generally includes such distinct, but related concepts as merger, bar, direct and collateral estoppel. Second, the distinction that collateral estoppel does not apply to determinations of law when the cases arise out of different transactions is now recognized in the rule.[168]

c. Approach.

(1) An issue of law or fact. The rule now clearly states the distinction made between such issues. Under R.C.M. 905(g), the United States is bound by a final determination by a court of competent jurisdiction, even if the earlier determination is erroneous. When the offenses charged at a second proceeding arise out of a different transaction from those charged in the first and the ruling at the first proceeding was based on an incorrect determination of law, the United States is not bound. This is limited to incorrect determinations of law, and only when the second case arises from a different transaction. If the case arose from the same transaction as the earlier case, the United States would still be bound by the incorrect determination of law. Similarly, a determination of fact is binding on the United States, regardless of whether the second case arises from a different transaction or not.[169] It is the issue, not the offense charged, which governs.[170]

(2) Placed in issue. If the defense counsel attempts collaterally to estop the Government from relitigating an issue, the judge must determine whether the previous judge actually considered and decided the question. If the question was interlocutory, the motion or objection raising the question identifies the issue, and the ruling constitutes a decision. At a subsequent trial the defense counsel would only have to produce the record of the first trial and point out that the issue

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[156] R.C.M. 917(a) analysis. Nothing is intended to limit authority of the military judge to dismiss charges after findings on other grounds, such as multiplicity. *See* U.S. v. Cartwright, 13 M.J. 174 (C.M.A. 1982).
[157] R.C.M. 917(c) discussion.
[158] *See* United States v. Latimer, 30 M.J. 554 (A.C.M.R. 1990).
[159] R.C.M. 917(d). United States v. Felix, 25 M.J. 509 (A.F.C.M.R. 1987).
[160] R.C.M. 917(e).
[161] *Compare* United States v. Smith, 43 C.M.R. 487 (A.C.M.R. 1970) *with* United States v. Spearman, 48 C.M.R. 405 (C.M.A. 1974).
[162] R.C.M. 917(f). United States v. Hitchcock, 6 M.J. 188 (C.M.A. 1979).
[163] R.C.M. 917(f). *But see* United States v. Griffith, 27 M.J. 42 (C.M.A. 1988) (military judge may conduct post-trial proceedings to correct errors, including insufficient evidence, after announcement of the verdict and up to the point of authentication of the record).
[164] R.C.M. 917(g).
[165] 242 U.S. 85 (1916).
[166] United States v. Saulter, 5 M.J. 281 (C.M.A. 1978); United States v. Hart, 42 C.M.R. 40 (C.M.A. 1970). *See* MCM, 1969 (rev. ed.), para. 71b.
[167] United States v. Caszatt, 29 C.M.R. 521 (C.M.A. 1960).
[168] R.C.M. 905(g) discussion.
[169] *See* R.C.M. 905(g) analysis; United States v. Washington, 7 M.J. 78 (C.M.A. 1979).
[170] United States v. Marks, 45 C.M.R. 55 (C.M.A. 1972).

had been raised and ruled upon.[171]

The problem is more difficult if the defense counsel contends that a general verdict resolved the particular issue. It could be argued that the collateral estoppel doctrine should not apply as the judge or court members could have decided the case without considering the issue. It could also be argued that the doctrine should apply only if the general verdict necessarily resolved the particular issue. The Court of Military Appeals has rejected both arguments and stated that the test is "whether a rational jury could have grounded its verdict on an issue other than that which the appellants seek to foreclose from consideration."[172] When a general verdict has been given an estoppel effect on a particular issue, the courts have emphasized that only one real issue or defense was raised in the case.[173] In United States v. Hooten,[174] the Court of Military Appeals used the approach of identifying "the most reasonable basis for the acquittal."[175]

(3) Same accused. An issue cannot be said to be finally determined unless the same parties are involved: "the matter may not be disputed by the United States in any other court-martial of the same accused."[176] While the term "same parties" appears clear, questions about its meaning arise in circumstances involving conspirators, principals, and accessories. It has been held, for example, that res judicata bars the conviction of an accused charged with subornation of perjury when his subornee is acquitted of the perjury.[177] The rationale here is that subornation of perjury cannot be committed by a single individual and that sufficient privity exists between the two parties to invoke res judicata.

As a general rule, though, the term "same parties" should be strictly construed. The acquittal of a principal, it has been held,[178] will not bar the conviction of another as an aider and abettor to the same offense. Rejecting the "bilateral theory" of conspiracy, the United States Court of Military Appeals held in United States v. Garcia [179] that acquittal of one co-conspirator did not bar the conviction of the remaining conspirators. In these circumstances, because different parties are involved, usually in a separate proceeding, final determinations made in another case should not bind the trier of fact. Each case should stand or fall on its own merits, and it is only when the Government overreaches and attempts to relitigate an issue previously resolved in the same accused's favor that R.C.M. 905(g) applies.[180]

(4) Finally determined. The determination of the issue must have been made by a court-martial, reviewing authority, appellate court, or by another judicial body, such as a United States court. The pretrial determination of the convening authority is not a final determination under the rule.

It does not matter whether the earlier proceeding ended in acquittal, conviction, or otherwise, as long as the determination is final. Except for a ruling which is or amounts to a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed.[181]

28–14. Arguments

a. Final arguments in general. At the conclusion of evidence on the merits, the trial counsel is permitted to open the argument, the defense counsel is permitted to reply, and the trial counsel may then be permitted to argue in rebuttal.[182] Arguments may properly include any reasonable comment upon the evidence in the case, including inferences drawn from the evidence which supports a party's theory of the case. Arguments properly include comment upon the testimony, motives, conduct, interests, and bias of witnesses. Counsel may treat the testimony of their witnesses as conclusively establishing the facts related by them.[183] The Rules for Courts-Martial provide that failure to object to an improper argument before the military judge begins to instruct the court members on findings constitutes a waiver of the objection.[184]

b. Waiver of final argument. While trial counsel may freely waive closing argument, the defense counsel should consider doing so only in a very unusual case. The final argument is a critical stage of the proceedings and an accused may be denied the effective assistance of counsel by the failure of the defense counsel to make a closing argument.[185]

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[171] United States v. Oppenheimer, 242 U.S. 85 (1916); United States v. Smith, 15 C.M.R. 369 (C.M.A. 1954).
[172] United States v. Marks, 45 C.M.R. at 59.
[173] United States v. Underwood, 15 C.M.R. 487 (A.B.R. 1954).
[174] United States v. Hooten, 30 C.M.R. 339 (C.M.A. 1961).
[175] *Id.* at 342, 30 C.M.R. at 342.
[176] R.C.M. 905(g).
[177] United States v. Doughty, 34 C.M.R. 320 (C.M.A. 1964).
[178] United States v. Schwarz, 45 C.M.R. 852 (N.C.M.R. 1971).
[179] 16 M.J. 52 (C.M.A. 1983).
[180] This rationale permits the paradoxical conclusions of the Army Court of Military Review in United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978), where two individuals were convicted of the same crime.
[181] R.C.M. 905(g) discussion.
[182] R.C.M. 919(a).
[183] R.C.M. 919(b).
[184] R.C.M. 919(c); *but see* United States v. Hoen, 9 M.J. 429 (C.M.A. 1980); United States v. Rutherford, 29 M.J. 1030 (A.C.M.R. 1990) (military judge has sua sponte duty to stop improper argument and give a curative instruction).
[185] United States v. McMahan, 21 C.M.R. 31 (C.M.A. 1956); United States v. Sadler, 16 M.J. 982 (A.C.M.R. 1983). The Supreme Court standard for ineffective assistance is set out in Strickland v. Washington, 104 S. Ct. 2052 (1984).

c. Limitations on final argument. The military judge has authority to limit argument, but such limitations placed on counsel will be closely scrutinized by the appellate courts.[186] The military judge may properly limit argument which is trivial or repetitious.[187]

d. Content of final argument.

(1) Comment. Counsel may make any reasonable comment on the evidence and may draw such inferences as will support their theory of the case. Counsel may comment on the conduct, motives, and evidence of malice of the witnesses. Counsel may argue as though their witnesses conclusively establish the facts related by them. Comments may be direct and forceful so long as they are fair and not unfairly prejudicial.[188]

(2) Characterizing a witness or the accused.

(a) Comment upon a witness' motives for testifying. The Air Force Court of Military Review has held that it was proper for a defense counsel to characterize a Government informant, who was under a suspended sentence to confinement at hard labor, as a snitch who was testifying, not because he was a "good guy", but rather out of fear that he would go to jail if he did not please the Government.[189] Where an accused was charged with making false official statements, it was proper for trial counsel to characterize him as a "liar." To hold otherwise, the Court of Military Appeals stated, would require the trial counsel to characterize such offenses only in the loftiest of terms. The court stated that this was not an expression by the trial counsel as to the truth or falsity of the testimony of the accused.[190] It is unprofessional conduct for counsel to express personal beliefs as to the truth or falsity of any evidence or testimony.[191] Argument need not be sterile, and it is proper to argue that testimony of the accused was false under circumstances where the accused would have known the truth. It is, however, error to encourage court members to react emotionally to the falsehood told by the accused rather than reaching a conclusion as to the probative value of the testimony.[192]

(b) Citing legal authority. While it is proper to cite legal authorities to the military judge during argument on a motion or upon findings in a bench trial, it is error to cite legal authorities to the members.[193] The only exception to the rule is that the members may be told, in sentencing argument, the maximum punishment provided by law,[194] though the members may not be informed of the maximum punishment provided in the MCM if that exceeds the jurisdictional limit of the court.[195]

(c) Arguing facts not in evidence. It is error to argue facts to the judge or members that are not properly before the court as evidence.[196] Counsel may, however, argue the ordinary experience of mankind and other matters which are common knowledge.[197] It is error to argue matters that have no foundation in the record, such as to argue that the Army is having more disciplinary problems with soldiers in a particular grade than with any other single group.[198] Similarly, counsel may not refer to witnesses who were not called to testify, as such comments invite the members to consider possibly corroborating evidence outside the record.[199] Misstating facts which are in evidence may also result in prejudicial error.[200] It is improper for counsel to use evidence in his or her argument for a purpose other than the one for which it was admitted,[201] and arguing inadmissible evidence improperly admitted by the military judge may convert a harmless error into a reversible one.[202] Counsel may not attribute to an accused a specific criminal intent, neither admitted by the accused nor provided by the evidence, of a more serious nature than encompassed by the charges.[203] Trial counsel may not associate the accused with offensive conduct or persons without justification of evidence in the record.[204] Similarly, it is improper to argue factual situations which exists or existed in other cases; to do so would invite the court to render its verdict on the basis of evidence not before them and would obscure the real

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[186] United States v. Gravitt, 17 C.M.R. 249 (C.M.A. 1954); United States v. Sizemore, 10 C.M.R. 70 (C.M.A. 1953); United States v. Dock, 20 M.J. 556 (A.C.M.R. 1985).
[187] R.C.M. 801(a)(3).
[188] *See* R.C.M. 919 disussion; United States v. Zeigler, 14 M.J. 860 (A.C.M.R. 1982).
[189] United States v. Anderson, 12 M.J. 959 (A.F.C.M.R. 1982).
[190] United States v. Doctor, 21 C.M.R. 252, 260 (C.M.A. 1956).
[191] United States v. Clifton, 15 M.J. 26 (C.M.A. 1983).
[192] United States v. Turner, 17 M.J. 997 (A.C.M.R. 1984).
[193] United States v. McCauley, 25 C.M.R. 327 (C.M.A. 1958).
[194] United States v. Delp, 11 M.J. 836 (A.C.M.R. 1981).
[195] United States v. Capps, 1 M.J. 1184 (A.F.C.M.R. 1976).
[196] United States v. Simmons, 14 M.J. 832 (A.C.M.R. 1982).
[197] United States v. Jones, 11 M.J. 829 (A.F.C.M.R. 1981) (trial counsel referred to Benedict Arnold and Richard Nixon).
[198] United States v. Adkinson, 40 C.M.R. 341 (A.B.R. 1968).
[199] United States v. Swoape, 21 M.J. 414 (C.M.A. 1986); United States v. Tackett, 36 C.M.R. 382 (C.M.A. 1966); United States v. Simmons, 14 M.J. 832 (A.C.M.R. 1982); United States v. Tawes, 49 C.M.R. 590 (A.C.M.R. 1974).
[200] United States v. Shows, 5 M.J. 892 (A.F.C.M.R. 1978); United States v. Gifford, 41 C.M.R. 537 (A.C.M.R. 1969).
[201] United States v. Young, 8 M.J. 676 (A.C.M.R. 1980); United States v. Lewis, 7 M.J. 958 (A.F.C.M.R. 1979); United States v. Collins, 3 M.J. 518 (A.F.C.M.R. 1977); United States v. Salisbury, 50 C.M.R. 175 (A.C.M.R. 1975).
[202] United States v. Boles, 11 M.J. 195 (C.M.A. 1981) (improper sentencing argument).
[203] United States v. Bethea, 3 M.J. 526 (A.F.C.M.R. 1977).
[204] United States v. Nelson, 1 M.J. 235 (C.M.A. 1975) (trial counsel likened defense witness to Adolf Hitler).

issues in the case.[205]

(d) Arguing personal belief of counsel. It is improper for counsel to state personal belief or to indicate a personal evaluation of the case or any evidence.[206] Counsel who expresses such an opinion in effect testify without being subject to cross-examination.[207]

(e) Commenting on the accused's failure to testify. It is improper for trial counsel to comment upon the accused's silence.[208] Likewise, it is error to argue that the Government's evidence is"uncontroverted" when the only witness who could possibly contradict the evidence is the accused. In such a situation the statement that the evidence is uncontradicted would be a comment upon the accused's silence.[209] It is, however, proper for the trial counsel to review the evidence presented and remind the court members that they must decide the case only on the evidence before them.[210] It is also proper, when the accused testifies at trial, to cross-examine him or her as to his or her presence at the article 32 investigation, etc., not to show that the accused exercised the right to remain silent, but rather to show the amount of time he or she knew of the Government's evidence and the amount of time that he or she had to plan and prepare his or her testimony. In such a situation, the trial counsel is not commenting upon pretrial silence, but rather is commenting upon the accused's opportunity for recent fabrication.[211]

(f) Comment on military-civilian relations. Counsel may not place undue emphasis on the effect the outcome of the case may have on civilian-military relations. Such references are often unsupported by any evidence and operate as a "one-way street against the accused."[212]

(g) Urging court members to place themselves in the place of the victim. To urge court members to place themselves in the position of the victim or a relative of the victim is error because the accused is entitled to have the case determined by persons free from any connection with the case. To so urge the court members invites them to cast aside their impartiality and view the case from the perspective of personal interest.[213]

e. Sentencing arguments.

(1) Commenting upon the accused's election to make an unsworn statement on his or her behalf in extenuation and mitigation. While the trial counsel may not comment upon the accused's election of the right to remain silent, even at the sentencing phase of trial, if the accused elects to make an unsworn statement, the trial counsel may comment upon that election in sentencing argument. Trial counsel may draw attention to the fact that an unsworn statement was made by the accused and may contrast that statement with the testimony of other witnesses who subjected themselves to cross-examination. Trial counsel may argue as to the weight to be given the unsworn statement, but may not invite the court to disregard the statement solely because it is unsworn or to draw an adverse inference as to its truth merely because it is unsworn.[214]

(2) Command policies. There should be no command policies concerning sentencing at courts-martial. It is error to mention command policies, and the military judge has a duty to sua sponte interrupt and stop such argument,[215] regardless by whom initiated.

(3) General deterrence. Trial counsel may argue that deterrence of others should be considered in adjudging a sentence, but may not argue this to the exclusion of all other sentencing factors.[216] Court members should not be urged to over-react or over-sentence in the belief that a harsh or unjustified sentence would constitute any greater deterrence than would a proper sentence for the offense concerned.

(4) Defense counsel arguing to the prejudice of the client. Conceding the accused's guilt in a contested trial is certainly an invitation to allegations of ineffective assistance of counsel.[217] Military courts, however, have recognized that in limited circumstances it is not error for counsel to concede guilt as to some charges in order to more effectively contest other charges at trial.[218] Military courts have also long viewed the imposition of a punitive discharge as one of the most severe punishments that can be adjudged by a court-martial. The Court of Military Appeals decided that it was proper for a defense counsel to argue for a punitive discharge, without other punishment, when the accused's

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[205] United States v. Bouie, 26 C.M.R. 8 (C.M.A. 1958).

[206] *See* United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977).

[207] United States v. Barnack, 10 M.J. 799 (A.F.C.M.R. 1981); United States v. Tanksley, 7 M.J. 573 (A.C.M.R. 1979). Similarly, counsel cannot claim to speak for the convening authority. R.C.M. 1001.

[208] Griffin v. California, 380 U.S. 609 (1965). *Cf.* United States v. Robinson, 108 S. Ct. 864, 99 L.Ed.2d 23 (1988) (comment proper when made in response to argument that defendant was not allowed to tell his side of story).

[209] United States v. Cazenave, 28 C.M.R. 536 (A.B.R. 1959).

[210] United States v. Zeigler, 14 M.J. 860 (A.C.M.R. 1982).

[211] United States v. Reiner, 15 M.J. 38 (C.M.A. 1983).

[212] United States v. Boberg, 38 C.M.R. 199 (C.M.A. 1968); *see also* United States v. Cook, 28 C.M.R. 323 (C.M.A. 1959); United States v. Hurt, 27 C.M.R. 3 (C.M.A. 1958); United States v. Poteet, 50 C.M.R. 73 (N.C.M.R. 1975).

[213] United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976); *see also* United States v. Wood, 40 C.M.R. 3 (C.M.A. 1969); United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1983); United States v. Begley, 38 C.M.R. 488 (A.B.R. 1967).

[214] United States v. Breese, 11 M.J. 17 (C.M.A. 1981); United States v. Cain, 5 M.J. 844 (A.C.M.R. 1978).

[215] United States v. Grady, 15 M.J. 275 (C.M.A. 1983). *See* United States v. Brown, 19 M.J. 826 (N.M.C.M.R. 1984).

[216] United States v. Lania, 9 M.J. 100 (C.M.A. 1980).

[217] *See* United States v. Burwell, 50 C.M.R. 192 (A.C.M.R. 1975).

[218] United States v. Caldwell, 9 M.J. 534 (A.C.M.R. 1980).

desires were clear from the record.[219] When counsel do argue for a punitive discharge, that argument should be for only the less serious of the punitive discharges, the bad conduct discharge (BCD).[220] Even if the accused desires to be discharged from the service, defense counsel has an obligation to caution the accused of the serious and lasting consequences of the punitive discharge. When defense counsel argues in such a manner, the military judge must determine that it is the accused's desire that he or she be discharged. The military judge should inquire of the counsel as to the client's consent to such argument, and unless the record leaves no doubt of the accused's desires, the defense counsel may not concede that a punitive discharge is appropriate.[221] In the rare case when the charges are such that there is no realistic alternative to a punitive discharge, the Court of Military Appeals has held that it is a permissible tactic to argue that a BCD is more appropriate than a dishonorable discharge (DD), even when the accused wants to remain in the Army.[222] While recognizing that counsel is most effective when proposing reasonable sentencing alternatives, the court made clear that this applies only when the choice is between a BCD and a DD, and that such argument is improper when the accused faces only the possibility of a BCD.[223]

(5) Counsel proposing specific sentences. Trial counsel may argue for the maximum sentence, or may argue for a specific sentence which is less than the maximum authorized by law.[224] It is error, however, to imply that such a suggestion in argument is the personal opinion of the trial counsel or that it reflects in any way the views of the convening authority.[225]

(6) Effect of pretrial agreement. The military courts have viewed the pretrial bargaining process in the military as an arm's length transaction between the convening authority and the accused. It is separate from the process of adjudging an appropriate sentence at court-martial. Consequently, both trial counsel and defense counsel may argue for sentences which they know cannot be approved as a result of a pretrial agreement.[226]

(7) Effect of the accused's false testimony on the merits. The Supreme Court has held that the fact that the accused testified falsely in his or her own defense could be used to enhance the sentence if the judge determined that the testimony was willfully and materially false.[227] The Court of Military Appeals held that this applied to military courts and that counsel could argue it to the court members on sentence. The military judge will instruct the court members that they are not to consider this in sentencing unless they determine that: the accused lied under oath; the lie was willful and material; and if so, they may consider it only in determining, along with other factors, the accused's potential for rehabilitation.[228] Not every case which results in a conviction after the accused has testified raises the specter of false testimony by the accused. The falsehood must be both willful and material.[229] A military judge should be reluctant to give such an instruction over the objection of the defense counsel even when the trial counsel makes such an argument.[230]

f. Correction and remedy of improper arguments.

(1) Trial level. If counsel are making improper arguments, the military judge may sua sponte interrupt and stop such argument.[231] The military judge is required to do so when command policies are being argued on sentence, regardless of whether it is trial or defense counsel who makes such an argument.[232] The judge may then give a curative instruction to the court members to disregard the improper portions of the argument.[233] The military judge may also require the offending attorney to retract the objectionable argument in open court.[234] Finally, if the error is serious enough and cannot be cured by any or all of the above remedies, the military judge may declare a mistrial.[235]

(2) Appellate level. Appellate courts examine the record for instances of error prejudicial to the substantial rights of the accused.[236] The courts will review the record to determine whether a proper finding or sentence has been reached

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[219] United States v. Weatherford, 42 C.M.R. 26 (C.M.A. 1970).
[220] United States v. Dodson, 9 M.J. 542 (A.C.M.R. 1980); United States v. McMillan, 42 C.M.R. 601 (A.C.M.R. 1970).
[221] United States v. Holcomb, 43 C.M.R. 149 (C.M.A. 1971). The record should contain some evidence that the accused understands that only punitive discharges may be given by a court-martial to avoid any confusion with administrative eliminations. *See* United States v. Williams, 21 M.J. 524 (A.C.M.R. 1985) (argument urging discharge presumed prejudicial unless accused consents).
[222] United States v. Volmar, 15 M.J. 339 (C.M.A. 1983).
[223] United States v. McNally, 16 M.J. 32 (C.M.A. 1983).
[224] R.C.M. 1001(g).
[225] United States v. Simpson, 12 M.J. 732 (A.F.C.M.R. 1981) (trial counsel argument that referral to special court-martial indicated clemency by convening authority, therefore, maximum sentence should be given, held improper).
[226] United States v. Rich, 12 M.J. 661 (A.C.M.R. 1981); United States v. Rivera, 49 C.M.R. 838 (A.C.M.R. 1975).
[227] United States v. Grayson, 438 U.S. 41 (1978).
[228] United States v. Warren, 13 M.J. 278 (C.M.A. 1982). The Army Court of Review has held that under the MCM, 1984, trial counsel may argue that the accused lied under oath during the providence inquiry. United States v. Holt, 22 M.J. 53 (A.C.M.R. 1986).
[229] United States v. Cabebe, 13 M.J. 303 (C.M.A. 1982).
[230] *Id.*
[231] United States v. Nelson, 3 M.J. 518 (A.F.C.M.R. 1977).
[232] United States v. Grady, 15 M.J. 275 (C.M.A. 1983).
[233] United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Carpenter, 29 C.M.R. 234 (C.M.A. 1960).
[234] United States v. Lackey, 25 C.M.R. 222 (C.M.A. 1958).
[235] United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976); United States v. O'Neal, 36 C.M.R. 189 (C.M.A. 1966); United States v. Shamlian, 25 C.M.R. 290 (C.M.A. 1958).
[236] United States v. Gerlach, 27 C.M.R. 3 (C.M.A. 1966).

or whether the evidence is compelling. If the error is harmless, no further action will be taken.[237] If the accused waived objection to the argument at trial level, the court may deny relief on appeal.[238] Appellate courts will not deny relief if invoking waiver would result in a miscarriage of justice, or if the defense failure to object was a "flagrant oversight."[239] Failure of counsel to object is usually considered an indication that the counsel did not view the argument as improper or prejudicial and is a persuasive inducement to an appellate court to evaluate the argument in the same light.[240] The Rules for Courts-Martial provide that, if an objection to an improper argument is not made before the military judge begins to instruct the members, the error is waived.[241] Under the rules it is not necessary for counsel to interrupt opposing counsel's argument, or even to make an objection in the presence of the members. Any error is preserved for appeal so long as the objection is made before the military judge begins giving the instructions. If prejudice has resulted, the appellate court may grant relief in the form of a rehearing as to sentence, a complete rehearing, reassessment of the sentence, or dismissal of the charges.[242]

28–15. Instructions

a. Procedures for preparing instructions. After the counsel conclude their closing arguments, the military judge instructs the court members on the law governing the case.[243] The instructions are a common source of error at the trial level. The military judge should prepare the instructions very carefully.

The judge may prepare the instructions in advance of trial. Before preparing the initial draft, the judge may examine the pretrial file of the case.[244] An examination of the file could help the judge to identify the substantive, procedural, and evidentiary issues that are likely to arise during the trial. Having identified the probable issues, the judge can research the issues and prepare a tentative draft.

During the trial, counsel may submit proposed instructions to the judge.[245] All proposed instructions are marked as appellate exhibits and appended to the record.[246] The judge studies both the draft and the proposed instructions, and modifies the draft as necessary. Then the judge conducts an out-of-court hearing on instructions.[247] The judge usually conducts the session after both parties have rested but before the arguments. At this session the judge can inform counsel of the instructions he or she intends to deliver to the court members. The judge affords counsel an opportunity to object, comment, argue, and propose additional instructions. The judge reaches a final decision upon the instructions, and informs the counsel of the instructions he or she will deliver to the court members. The counsel then present their final arguments. The judge then delivers the instructions in open court in the presence of the accused and counsel for both sides. In addition to the oral instructions, written copies of the instructions or, if all parties concur, part of the instructions, may be given to the members for their use during deliberations.[248] In drafting instructions, the judge must avoid two possible sources of error. First, rather than using generalized, form instructions, the instructions must be tailored to fit the evidence in the case.[249] The Court of Military Appeals has stressed that the military judge must tailor the instructions to the specific facts of the particular case.[250] In United States v. O'Hara,[251] the court stated that:

> If the legal rules are not related to the evidence in the case, generalizations, although correct in the abstract, may mislead the court… We have, on occasion, called attention to the obligation of the law officer to revise the standard forms of instruction found in service pamphlets to make them more pertinent to the evidence in the case.[252]

Second, in phrasing his or her instructions, the presiding officer must be careful not to shift the burden of proof to

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[237] United States v. Delp, 11 M.J. 836 (A.C.M.R. 1981).
[238] United States v. Grandy, 11 M.J. 270 (C.M.A. 1981).
[239] United States v. Boberg, 38 C.M.R. 199 (C.M.A. 1968); United States v. Russell, 35 C.M.R. 48 (C.M.A. 1964).
[240] United States v. Poteet, 50 C.M.R. 73 (N.C.M.R. 1975).
[241] R.C.M. 919(c); R.C.M. 1001(g).
[242] United States v. Turner, 17 M.J. 997 (A.C.M.R. 1984); United States v. Barnack, 10 M.J. 799 (A.F.C.M.R. 1981).
[243] R.C.M. 920(a). "Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings." *Id.* discussion.
[244] United States v. Paulin, 6 M.J. 38 (C.M.A. 1978) (although troubled by review of pretrial data before trial, the court held the military judge had not lost his mantle of impartiality); United States v. Mitchell, 36 C.M.R. 14 (C.M.A. 1965), *overruling* United States v. Fry, 23 C.M.R. 146 (C.M.A. 1951). *Fry* indicated that the military judge should not consult the pretrial file. The *Fry* prohibition still applies to the president of a court without a judge. It should be noted that in *Mitchell* the judge was sitting with members.
[245] R.C.M. 920(c). The military judge may require that such requested instructions be submitted in writing.
[246] *Id.* discussion. The military judge should not identify the source of instructions when addressing the members. The military judge need not use the precise language proposed by counsel even if the language is a correct statement of the law. The presiding officer may modify the language as long as he or she instructs clearly, fairly, and completely. United States v. Beasley, 11 C.M.R. 111 (C.M.A. 1953).
[247] R.C.M. 920(c) and discussion; United States v. Sadler, 29 M.J. 370, n.3 (C.M.A. 1990) (discussion of instructions should be conducted on the record, rather than during a R.C.M. 802 conference).
[248] R.C.M. 920(d).
[249] R.C.M. 920(a) discussion; United States v. Wilson, 26 M.J. 10 (C.M.A. 1988); United States v. Smith, 25 M.J. 785 (A.C.M.R. 1988).
[250] *See, e.g.*, United States v. Smith, 33 C.M.R. 3 (C.M.A. 1963).
[251] 33 C.M.R. 379 (C.M.A. 1963).
[252] *Id.* at 169, 33 C.M.R. at 381.

the accused.[253] The courts have distinguished between shifting the burden of production to the accused as distinguished from any impermissible attempts to shift the burden of proof.[254]

b. The military judge's duty to instruct. The court members are lay persons, unfamiliar with legal terminology and rules. To reach the findings in their case, however, the members must understand the legal terminology and rules which govern the case. Thus, the military judge must be an instructor: he or she must teach the members the definitions and rules they must know to reach findings or sentence.

If the case involves any legal terms with special meanings, the judge must explain the applicable definitions to the court members.[255] The members' understanding of a single term can affect the outcome of the trial. For example, if the accused is charged with negligent homicide, the military judge must ensure that the members understand the legal meaning of the term "negligence."

In contested cases, the judge must always instruct the members on the elements of the charged offenses.[256] If the members are unaware of one of the elements, there is a serious risk of an unjust conviction.

If in issue, the judge must instruct the members on a lesser offense included in the charged offense.[257] A matter is "in issue" when some evidence, no matter how much or whether it is credible, has been presented which the members might choose to rely upon.[258]

The judge must also instruct on any affirmative defenses under R.C.M. 916 which are in issue.[259] By its nature, an affirmative defense, also called a special defense, does not negate any element of the offense; rather the defense sets up an additional fact or facts which avoid criminal liability.[260] If the court members focus solely on the elements of the offense, they might overlook a complete defense. The judge must call their attention to the evidence raising the defense and instruct them of the principles to be used to determine whether the defense exists in the particular case.

The members must also be cautioned to consider only matters properly before the court.[261] Other concepts fundamental to our system of justice including the presumption of innocence, reasonable doubt, and the burden of proof, must be explained to the members.[262] Finally, the members must be properly instructed on the procedures to be used in their deliberations and voting.[263] The procedural instructions, of course, must be tailored carefully to the number of members.

The judge can also assist the court members by summarizing or commenting upon the evidence.[264] The court members might misunderstand the effect of a particular item of evidence. Under the doctrine of limited admissibility, the judge can admit evidence for a limited purpose; the court members should then consider the evidence for only that purpose. The judge can protect the integrity of the fact-finding process by commenting on the items of evidence which the court members are likely to misuse.

If a given instruction embodies a mandatory legal rule and will materially assist the court members in evaluating the evidence, the instruction itself is proper. The critical issue becomes whether the judge must give the instruction sua sponte. If not, the judge must deliver the instruction only if counsel requests it. The preceding paragraphs discuss generally the instructions the military judge must give sua sponte. The following paragraphs give more detail as to required instructions, and those instructions required only when specifically requested by counsel.

(1) Instructions which must be given sua sponte. The UCMJ specifically requires instructions on the elements of the offense, lesser included offenses, burden of proof, the presumption of innocence, and reasonable doubt.[265] The Court of Military Appeals has held that an instruction may be required by law even if the UCMJ does not require the instruction.[266] The court has held that the judge must give the following instructions sua sponte:

(a) The definition of legal words of art. As previously stated, if the court members misunderstand an important legal term involved in a case, there is a serious risk of a miscarriage of justice. On the other hand, many legal terms are also words of general usage which lay persons already understand. The courts have had to decide which terms have such special, legal connotations that on his or her own motion the judge must define for the court members.

The courts have required sua sponte definitions of relatively few terms. The courts have stated it was error not to give the definition of: "dishonorably" in an article 134 specification for failing to place funds in a bank to cover a

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[253] United States v. Holmes, CM 439512 (A.C.M.R. 2 Feb. 1981) (unpub.); United States v. Fussell, 42 C.M.R. 723 (A.C.M.R. 1970).
[254] United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981).
[255] R.C.M. 920(e)(7).
[256] R.C.M. 920(e)(1).
[257] R.C.M. 920(e)(2); United States v. Johnson, 1 M.J. 137 (C.M.A. 1976).
[258] R.C.M. 920(e) discussion.
[259] R.C.M. 920(e)(3); United States v. Mathis, 35 C.M.R. 102 (C.M.A. 1964); United States v. Lawton, 19 M.J. 886 (A.C.M.R. 1985); United States v. Mathews, 108 S. Ct. 883 (1988); *cf.* United States v. Wilson, 26 M.J. 10 (C.M.A. 1988) (erroneous self-defense instruction).
[260] R.C.M. 916(a).
[261] R.C.M. 920(e)(4).
[262] R.C.M. 920(e)(5).
[263] R.C.M. 920(e)(6).
[264] R.C.M. 920(e) discussion. The comments must be fair and impartial. United States v. King, 37 C.M.R. 281 (C.M.A. 1967); United States v. Nickoson, 35 C.M.R. 312 (C.M.A. 1965); United States v. Miller, 20 C.M.R. 211 (C.M.A. 1955).
[265] UCMJ art. 51 and R.C.M. 920(e) list required instructions.
[266] *See infra* (e) through (i) of this para.

check;[267] "movement" and"design" in an article 87 specification for designedly missing movement;[268] and "accountability" in a specification for accepting bribes in connection with duties concerning property for which the accused had accountability.[269] In United States v. Cobb,[270] the Court of Military Appeals indicated that the judge should have defined the phrase,"culpable negligence," but found the error nonprejudicial.

In most cases, the courts have held that the judge must define a term only if counsel requests the definition.[271] The Court of Military Appeals has declared that "[I]nstructions defining words of common usage, military terms and phrases well known in the services, and matters in clarification, or amplification, need not be given without a request on the part of the accused."[272] Applying this rule the Court of Military Appeals has held that the judge need not define the term "premeditation" sua sponte.[273] The court has stated that the terms"malice aforethought" and "premeditation" are "not words which are known only to lawyers or members of the legal profession."[274]

Unfortunately, the courts have not enunciated a definite test to determine which terms require sua sponte definition. The courts have encouraged judges to be liberal in defining terms. The courts also have cautioned that, even if a term is one of general usage,"a slight variation in application of the terms might arise under some factual situations which might make their definitions necessary."[275] In a particular case, if the judge has any doubt whether the term requires a definition, he or she would be wise to resolve the doubt in favor of giving the instruction.

(b) The elements of the charged offense. The judge must instruct the court members on the elements of the charged offense.[276] If the judge omits entirely an element of the offense, the error is per se prejudicial, but if the judge adequately identifies the element, but gives an erroneous instruction on the element, the error may be tested for prejudice.[277] If the charge is under article 134, the judge must instruct the members that to convict the accused, they must find that the conduct was prejudicial to good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.[278] If the prosecution charges the violation of a state statute under article 134 as service discrediting conduct, the military judge is required to instruct on the elements of the crime prohibited by the state statute.[279] If the charge is assault with intent to commit another offense, the judge must instruct the members on the elements of both assault and the offense the accused allegedly intended to commit.[280]

(c) Lesser included offenses. The Court of Military Appeals has held that the judge must instruct the members that, if they have a reasonable doubt about the degree of guilt, any finding of guilt must be of a lesser included offense of which there is no reasonable doubt.[281] In turn, this instruction necessitates that the judge instruct the court members on the elements of the lesser included offenses; the court members must know what are the lesser degrees of guilt. The judge must give these instructions before the members retire to deliberate on findings.

The judge must instruct on lesser included offenses only if the record contains some evidence reasonably raising the issue.[282] Standing by itself, the accused's own, unsupported testimony may require an instruction on the lesser included offense.[283]

The accused may be able to waive the right to instructions on the lesser included offenses if the Government does not object and a lack of such an instruction is not, under the circumstances, plain error.[284] The defense counsel's failure to request such instructions may not, however, amount to a waiver.[285] The accused may affirmatively waive the instruction by indicating that he or she does not desire the instruction.[286] Early cases indicated that the waiver could be implied from the defense counsel's trial tactics.[287] As a precautionary measure, the judge should require that the

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[267] United States v. Barnawell, 5 C.M.R. 773 (A.F.B.R. 1952). *Accord*, United States v. Grant, 5 C.M.R. 692 (A.F.B.R. 1952).
[268] United States v. Jones, 3 C.M.R. 10 (C.M.A. 1952); United States v. Foster, 3 C.M.R. 423 (N.B.R. 1952).
[269] United States v. McCarson, 4 C.M.R. 546 (A.F.B.R. 1952), *petition denied*, 4 C.M.R. 173 (C.M.A. 1952) (the error was nonprejudicial).
[270] 8 C.M.R. 139 (C.M.A. 1953).
[271] R.C.M. 920(e)(7) also states the military judge should give such "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."
[272] United States v. McDonald, 20 C.M.R. 291, 293 (C.M.A. 1955).
[273] United States v. Felton, 10 C.M.R. 128 (C.M.A. 1953).
[274] United States v. Day, 9 C.M.R. 46, 52 (C.M.A. 1953).
[275] *Id.*
[276] R.C.M. 920(e)(1).
[277] United States v. Mance, 26 M.J. 244 (C.M.A. 1988).
[278] United States v. Keiser, 43 C.M.R. 553 (A.C.M.R. 1970).
[279] United States v. Sadler, 29 M.J. 370 (C.M.A. 1990).
[280] United States v. Floyd, 6 C.M.R. 59 (C.M.A. 1953).
[281] United States v. Jackson, 12 M.J. 163 (C.M.A. 1981); United States v. Clark, 2 C.M.R. 107 (C.M.A. 1952); R.C.M. 920(e)(5)(C).
[282] United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985); United States v. Johnson, 1 M.J. 137 (C.M.A. 1976). If the members receive instructions on a lesser included offense that is *not* in issue, the error may result in a reversal. *See* United States v. Waldron, 11 M.J. 36 (C.M.A. 1981).
[283] United States v. Jackson, 12 M.J. 163 (C.M.A. 1981); United States v. Roman, 40 C.M.R. 561 (A.B.R. 1969).
[284] United States v. McCray, 15 M.J. 1086 (A.C.M.R. 1983); United States v. Waldron, 9 M.J. 811, 81 n.12 (N.C.M.R. 1980) (opinion adopted by J. Fletcher in United States v. Waldron, 11 M.J. 36 (C.M.A. 1981)).*See generally* Cooper, *The Military Judge: More Than a Mere Referee*, The Army Lawyer, Aug., 1976 at 1; Hilliard, *The Waiver Doctrine: Is It Still Viable*?, 18 A.F.L. Rev. 45 (1976).
[285] United States v. Moore, 31 C.M.R. 282 (C.M.A. 1962); United States v. Clay, 26 C.M.R. 362 (C.M.A. 1958); United States v. Williams, 2 C.M.R. 92 (C.M.A. 1952).
[286] United States v. Mundy, 9 C.M.R. 130 (C.M.A. 1953); *but see* United States v. Johnson, 1 M.J. 137 (C.M.A. 1976).
[287] United States v. Bowers, 14 C.M.R. 33 (C.M.A. 1954).

defense specifically and unequivocally waive the instruction.[288]

The judge need not acquiesce in the defense's waiver. If the prosecution's case does not prove the charged offense but proves a lesser included offense, the defense might waive lesser included offense instructions and gamble on an "all or nothing" verdict. In such instances the accused may not deserve complete acquittal. In the interests of justice, the judge may instruct on lesser included offenses over the accused's objection.[289]

(d) Affirmative defenses. Instructions on affirmative or special defenses are just as important as instructions on lesser included offenses. The Court of Military Appeals has stated: "[T]here is as much necessity, in a proper case, for instructions as to circumstances which will reduce murder to excusable homicide as there is for instructions as to circumstances that will reduce murder to manslaughter or negligent homicide."[290]

The judge must instruct on any defense the evidence reasonably raises.[291] The test for determining whether the evidence raises the issue is if "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."[292] The accused can be the sole source of the evidence raising the issue.[293] The court members must decide whether the testimony is credible.[294]

In a case involving both lesser included offenses and affirmative defenses, the judge must instruct the court members on the relationship of the defenses to the lesser included offenses.[295] If the defense is available against the lesser included offense as well as the charged offense, the judge must instruct the court members to that effect.[296]

(2) Other instructions.

(a) The limited effect of evidence of uncharged misconduct. The accused might have committed acts of misconduct other than those with which he or she is charged. The general rule is that the trial counsel may not introduce evidence of these acts to show that the accused is a criminal character with a propensity to commit anti-social acts.[297] Evidence of the acts can be admitted for numerous limited purposes such as proof of the accused's mens rea, however.[298] When evidence is admitted for a limited purpose, the court members should consider the evidence for only that purpose.[299] The question arises whether the judge must sua sponte instruct the court members that evidence of the accused's uncharged misconduct must be considered only for the limited purpose for which the judge admitted the evidence.

In 1954, the Court of Military Appeals first addressed this question in United States v. Haimson. The court then held that the presiding officer had no duty to instruct sua sponte upon the evidence's limited admissibility.[300]

In 1961, the court changed its position. In United States v. Bryant,[301] the judge admitted evidence of uncharged misconduct by the accused. The judge did not instruct on the limited effect of the evidence. The court held that his failure to do so was error and ordered a rehearing. The court stated that the language in Haimson was not intended to be a definite statement of the rule.

Later in 1961, the court decided United States v. Hoy.[302] In Hoy, another presiding officer failed to instruct expressly on the limited admissibility of uncharged misconduct. The majority stated that the instruction must be given sua sponte in some cases but that a sua sponte instruction is not required as a rule of "absolute and undeviating application."[303]

In United States v. Grunden,[304] the military judge complied with a defense request not to give the instruction. The Court of Military Appeals set aside the findings, saying "No evidence can so fester in the minds of court members as to the guilt or innocence of the crime charged as the evidence of uncharged misconduct."[305]

Since Grunden, the court has retreated somewhat from the apparent mandatory nature of that opinion. Uncharged misconduct that is "part and parcel" of the crime charged, or part of the chain of events leading to the crime needs no limiting instruction.[306] Later in 1980, the court recognized that there may be legitimate reasons for the defense counsel to request that no uncharged misconduct instruction be given,[307] and that it disparages the role of defense counsel not

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[288] United States v. Wilson, 23 C.M.R. 177 (C.M.A. 1957); United States v. Head, 6 M.J. 840 (N.C.M.R. 1979).
[289] United States v. Johnson, 1 M.J. 137 (C.M.A. 1975); United States v. Wilson, 23 C.M.R. 177 (C.M.A. 1957); United States v. Wade, 28 C.M.R. 704 (C.G.B.R. 1959).
[290] United States v. Ginn, 4 C.M.R. 45, 48 (C.M.A. 1952). *See* United States v. Lawton, 19 M.J. 886 (A.C.M.R. 1981); United States v. Franklin, 4 M.J. 635 (A.F.C.M.R. 1977).
[291] United States v. Jones, 7 M.J. 441 (C.M.A. 1979); United States v. Mathis, 35 C.M.R. 102 (C.M.A. 1964).
[292] R.C.M. 920(e) discussion. United States v. Tan, 43 C.M.R. 636, 637 (A.C.M.R. 1971).
[293] United States v. Stewart, 43 C.M.R. 140 (C.M.A. 1971).
[294] *Id.*
[295] United States v. Taylor, 39 C.M.R. 358 (A.B.R. 1968).
[296] *Id.*; United States v. Schreiner, 40 C.M.R. 379 (A.B.R. 1968).
[297] Mil. R. Evid. 404(b); I. Munster & M. Larkin, Military Evidence, § 5.4b (1959).
[298] *Id.*
[299] Mil. R. Evid. 105.
[300] 17 C.M.R. 208 (C.M.A. 1954).
[301] 30 C.M.R. 111 (C.M.A. 1961).
[302] 31 C.M.R. 140 (C.M.A. 1961).
[303] *Id.* at 143.
[304] 2 M.J. 116 (C.M.A. 1977).
[305] *Id.* at 119.
[306] United States v. James, 5 M.J. 382 (C.M.A. 1978).
[307] United States v. Fowler, 9 M.J. 149 (C.M.A. 1980).

to accede to such a request.[308] Military Rule of Evidence 105 now states that the military judge, upon request, shall instruct the members concerning evidence which is admissible for one purpose, but not for another purpose.[309]

(b) A pretrial statement by the accused. The military judge makes the final determination of the voluntariness of any pretrial statement of the accused.[310] The members shall be instructed "to give such weight to the statement as it deserves under all the circumstances."[311]

(c) The credibility of witnesses. The judge should instruct sua sponte on the credibility of witnesses if "the evidence is virtually in equipoise."[312]

(d) Cautionary instruction where some, but not all joint accused plead guilty. If some, but not all, joint accused who are tried together intend to plead guilty, a severance is warranted.[313] If a severance is not granted, the judge must at least instruct the court members that one accused's guilty plea should not affect the determination of another accused's guilt or innocence.[314]

(e) The untrustworthiness of accomplice testimony. Generally, the accomplice instruction must be requested. If the testimony, however, is of"vital,"[315] "pivotal,"[316] or"critical"[317] importance, then the military judge must instruct sua sponte. An accomplice is any person criminally liable for the same crime as the accused. An undercover agent[318] or a paid informant[319] would not be an accomplice since they are not criminally liable. The instruction may be used to caution the members about the testimony of a Government witness or a defense witness who is an accomplice.[320]

(3) Instructions which must be given upon request. The courts are hesitant to hold that the judge must instruct sua sponte on issues. Given adequate counsel in an adversary system, the courts understandably expect counsel to request beneficial instructions. If counsel requests an instruction, the courts often require the judge to give the instruction.[321] The courts are liberal in determining whether counsel has requested an instruction. Even if a request is incorrect,[322] inaccurate,[323] or a misstatement of the law,[324] the request can put the judge on notice that counsel desires an instruction concerning a particular matter. As long as counsel gives the judge fair notice that he or she desires a charge on a particular issue, the courts will hold that counsel requested an instruction upon that issue.[325]

The counsel's failure to request an instruction generally precludes the appellate court from holding that omitting the instruction was error.[326] The"plain error" doctrine, however, is an exception.[327] In effect, the courts have adopted Federal Rule of Criminal Procedure 52: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[328] The Court of Military Appeals occasionally invokes this doctrine.[329] For example, the court has held that, in the specific circumstances of a particular case, the omission of an instruction may be error even though counsel did not request the instruction and the instruction is not of the sort the judge must always instruct upon sua sponte.[330] The following paragraphs discuss the principal types of instructions which the military judge must give upon request.

(a) The definition of common legal terms. As previously stated, the courts require the judge to define sua sponte relatively few terms. When counsel has requested a definition, however, the courts have been inclined to require the judge to grant the request. Clarifying and amplifying definitions can often assist court members to evaluate the evidence. The courts have required that, upon request, the judge define, inter alia, the following terms: "apprehension" in a desertion case;[331] "abandon" in a specification of AWOL alleging that the accused did abandon a

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[308] United States v. Wray, 9 M.J. 361 (C.M.A. 1980),*but see* United States v. Thomas, 11 M.J. 388 (C.M.A. 1981), where the court *in dicta* said that MCM, 1969, para. 138g was substantially unchanged by Mil. R. Evid. 404(b), so there may still be some sua sponte duty to instruct.

[309] *But see* United States v. McIntosh, 27 M.J. 204 (C.M.A. 1988) (military judge required to instruct on limited use of uncharged misconduct absent defense waiver).

[310] Mil. R. Evid. 304(e).

[311] Mil. R. Evid. 304(e)(2).

[312] United States v. Chase, 43 C.M.R. 693, 694 (A.C.M.R. 1971); United States v. Combest, 14 M.J. 927 (A.C.M.R. 1982) (absence of request for instruction on credibility precludes consideration on appeal).

[313] R.C.M. 812 discussion; R.C.M. 906(b)(9).

[314] United States v. Baca, 33 C.M.R. 288 (C.M.A. 1963).

[315] United States v. Stephen, 35 C.M.R. 286 (C.M.A. 1965).

[316] United States v. DuBose, 19 M.J. 877 (A.F.C.M.R. 1985); United States v. Young, 11 M.J. 634 (A.F.C.M.R. 1981).

[317] United States v. Lee, 6 M.J. 96 (C.M.A. 1978); United States v. McFarlin, 19 M.J. 790 (A.C.M.R. 1985).

[318] United States v. Hand, 8 M.J. 701 (A.F.C.M.R. 1980), *rev'd on other grounds*, 11 M.J. 321 (C.M.A. 1981).

[319] United States v. Combest, 14 M.J. 927 (A.C.M.R. 1982).

[320] In United States v. Moore, CM 434716 (A.C.M.R.),*petition denied*, 9 M.J. 426 (C.M.A. 1980), the court reasoned that an accomplice has just as much reason to lie for a friend as for the Government.

[321] R.C.M. 920(c) discussion; United States v. Rowe, 11 M.J. 11 (C.M.A. 1981).

[322] United States v. Walker, 23 C.M.R. 133 (C.M.A. 1957).

[323] United States v. Sellers, 30 C.M.R. 262 (C.M.A. 1961).

[324] United States v. Burden, 10 C.M.R. 45 (C.M.A. 1953).

[325] United States v. Robinson, 20 C.M.R. 424 (A.B.R. 1955).

[326] United States v. Shreiber, 18 C.M.R. 226 (C.M.A. 1955); R.C.M. 920(f); R.C.M. 1005(f).

[327] United States v. Stephen, 35 C.M.R. 286 (C.M.A. 1965); R.C.M. 920(f); R.C.M. 1005(f).

[328] Fed. R. Crim. P. 52.

[329] *See* United States v. Fisher, 21 M.J. 327 (C.M.A. 1986); United States v. Pond, 38 C.M.R. 17 (C.M.A. 1967).

[330] *Id.*

[331] United States v. McDonald, 20 C.M.R. 291 (C.M.A. 1955).

watch;[332] "fraudulent" and "intent to defraud" in a specification for fraudulently uttering worthless checks and obtaining money by means of the checks;[333] "carnal knowledge" in a rape case;[334] "unnatural copulation" in a sodomy case;[335] "negligence" in a specification of negligent homicide;[336] "reckless" in a specification of reckless driving;[337] "disorderly conduct" and "public place" in a specification of disorderly conduct in a public place;[338] "grievous" in a specification of assault inflicting grievous bodily harm;[339] "premeditation" in a murder case;[340] "culpable negligence" in a specification of involuntary manslaughter;[341] "possession" in a specification of wrongful possession of narcotics;[342] "official" in a specification of false swearing;[343] "human being" in a specification of murder of a child;[344] and"reasonable doubt."[345]

(b) Evidence of the accused's good character. Upon request, the judge must instruct the members upon the weight they may attach to evidence of the accused's good character.[346]

(c) The accused's failure to testify. Upon request, the judge must instruct the court members that they may not draw any adverse inference from the accused's invocation of the privilege against self- incrimination.[347]

(d) The weight to be attached to accomplice testimony. As mentioned earlier in the chapter, the judge, upon request, must instruct the court members that, even though apparently credible[348] or partially corroborated,[349] accomplice testimony is of doubtful integrity and should be considered with great caution. In an appropriate case the judge also must instruct that the members cannot base a finding of guilty upon an accomplice's uncorroborated testimony if the testimony is self-contradictory, uncertain, or improbable.[350]

(4) Past sexual behavior of nonconsensual sex victim. The past sexual behavior of a victim is generally inadmissible. Under very limited circumstances, the Manual's "rape shield" rule[351] allows some such evidence to be admitted. When such evidence is admitted, the military judge should instruct the members on the limited purpose for which they may use that evidence.

The above paragraphs discuss instructions which the judge must give sua sponte or upon request. Especially when counsel have requested instructions, the courts have been liberal in requiring the judge to instruct. Nevertheless, the judge still has some discretion to refuse to instruct. The judge need not give instructions that would attach unwarranted importance to a particular item of evidence[352] or if the matter is adequately covered elsewhere in the instructions.[353] It is the judge's prerogative to comment upon the evidence.[354]

c. Delivery of the instructions to the court members. Ordinarily the judge orally delivers his or her instructions to the court members. In addition, written copies of all the instructions may also be given to the members.[355] If both parties concur, the members may receive copies of certain selected and agreed upon instructions.[356] Any instruction that is given to the members in writing should also be appended to the record as an appellate exhibit.[357]

d. The effect of an erroneous failure or refusal to instruct. The judge's failure or refusal to give an instruction he or she should have given constitutes error.[358] The Air Force Court of Review has stated that the Court of Military Appeals laid down a threefold test for determining whether the refusal to give a defense requested instruction is error: "(1)

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[332] United States v. Kukola, 7 C.M.R. 112 (A.B.R. 1952).
[333] United States v. Witney, 3 C.M.R. 714 (A.F.B.R. 1952).
[334] United States v. Parker, 12 C.M.R. 28 (C.M.A. 1953).
[335] United States v. Phillips, 11 C.M.R. 137 (C.M.A. 1953).
[336] United States v. Ritcheson, 3 C.M.R. 759 (A.F.B.R. 1952).
[337] United States v. Eagleson, 14 C.M.R. 103 (C.M.A. 1954).
[338] United States v. Akins, 4 C.M.R. 364 (A.B.R. 1952) (desirable to define these items, but not required).
[339] United States v. Dejewski, 11 C.M.R. 53 (C.M.A. 1953).
[340] United States v. Day, 9 C.M.R. 46 (C.M.A. 1953).
[341] United States v. Felton, 10 C.M.R. 128 (C.M.A. 1953).
[342] United States v. Hughes, 16 C.M.R. 559 (A.F.B.R. 1954).
[343] United States v. Galloway, 8 C.M.R. 323 (A.B.R. 1952), *aff'd*, 9 C.M.R. 63 (C.M.A. 1953).
[344] United States v. Gibson, 17 C.M.R. 911 (A.F.B.R. 1954) (the deceased was a newborn baby).
[345] United States v. Gay, 16 M.J. 475 (C.M.A. 1983); United States v. Offley, 12 C.M.R. 32 (C.M.A. 1953).
[346] United States v. Phillips, 11 C.M.R. 137 (C.M.A. 1953).
[347] Mil. R. Evid. 301(g) (defense counsel's election is binding on the military judge except when the instruction is required in the interests of justice).*See also* Lakeside v. Oregon, 435 U.S. 333 (1978); United States v. Charlette, 15 M.J. 197 (C.M.A. 1983); United States v. Mallow, 21 C.M.R. 242 (C.M.A. 1956).
[348] United States v. Bey, 16 C.M.R. 239 (C.M.A. 1954).
[349] United States v. Robinson, 20 C.M.R. 424 (A.B.R. 1955).
[350] Benchbook, para. 7–10.
[351] Mil. R. Evid. 412.
[352] United States v. Harris, 21 C.M.R. 58 (C.M.A. 1956).
[353] United States v. Rowe, 11 M.J. 11 (C.M.A. 1981); United States v. DuBose, 19 M.J. 877 (A.F.C.M.R. 1985).
[354] R.C.M. 920(e) discussion. Any summary or comment on the evidence should be fair and accurate. *See, e.g.*, United States v. Grandy, 11 M.J. 270, 277 (C.M.A. 1981), where the court reversed due to the judge's"marshaling of the evidence in favor of the government [which] would do credit to a prosecutor's argument."
[355] R.C.M. 920(d).
[356] *Id.*
[357] *Id.* discussion.
[358] United States v. Rowe, 11 M.J. 11 (C.M.A. 1981).

whether the requested instruction is in itself a correct charge; (2) it is not substantially covered in the main charge; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation."[359]

If there is error, the court must then decide whether the error is prejudicial. The courts often find instructional errors to be nonprejudicial. The judge's erroneous instruction on an unnecessary matter may be held nonprejudicial.[360] If the issue was not raised, a defective instruction on the issue is nonprejudicial unless the instruction misled the court members.[361] Even an inexact instruction can be held to be nonprejudicial if it is highly unlikely that the instruction misled the members.[362] If an instruction includes two inconsistent standards, one correct and the other incorrect, the error may be prejudicial because it is impossible to tell which standard the court members used.[363]

In addition to arguing that a complete failure or refusal to instruct was error, the defense counsel might argue that the judge's failure to repeat the instruction was error. The judge will deliver many instructions during the case in chief. The Court of Military Appeals has stated that, if the judge does so, the better practice is to repeat the instruction in the final charge.[364] Generally, however, the judge must repeat such instruction only if counsel requests a repetition.[365] The judge has already instructed upon the matter once, and a failure to repeat the instruction sua sponte should constitute error in only exceptional cases.

[359] United States v. Aker, 19 M.J. 733, 734 (A.F.C.M.R. 1984). *See* United States v. Rusterholz, 39 C.M.R. 903, 906 (A.F.B.R. 1968).
[360] United States v. Duke, 37 C.M.R. 80 (C.M.A. 1966); United States v. Williams, 26 M.J. 644 (A.C.M.R. 1988).
[361] United States v. Soriano, 20 M.J. 337 (C.M.A. 1985); United States v. Duckworth, 33 C.M.R. 47 (C.M.A. 1953).
[362] United States v. Clark, 7 M.J. 178 (C.M.A. 1979); United States v. Cotton, 32 C.M.R. 176 (C.M.A. 1962).
[363] United States v. Williams, 3 M.J. 12 (C.M.A. 1977); United States v. Burse, 36 C.M.R. 218 (C.M.A. 1966).
[364] United States v. Williams, 32 C.M.R. 208 (C.M.A. 1962).
[365] *Id.*

Chapter 29
Government Appeals

29–1. Introduction

Article 62, UCMJ[1] as amended by the Military Justice Act of 1983,[2] and implemented by Rule for Courts-Martial 908, Manual for Courts-Martial, United States, 1984,[3] authorizes the Government to appeal many adverse rulings by military judges in courts-martial. The appeal, if taken, must be filed at the United States Army Court of Military Review. The frequency of such appeals in Army court-martial practice was not expected to be high; that expectation has proven correct. The drafters' analysis to the MCM, 1984, notes that frequent appeals would clog appellate courts' dockets, interfere with trial court dockets, and possibly disrupt military operations.[4] The statutory limitations on the Government's right to appeal, as well as prudential considerations, account for the relatively small number of Government appeals.

29–2. Background

Codification of the Government's right to appeal culminates a process set in motion in 1976. Prior to that time, the President interpreted the forerunner of the current version of article 62 to require a military judge to accede to the ruling of the court-martial convening authority as to questions of law.[5] In effect, the convening authority was an intermediate appellate court for review of legal issues. In United States v. Ware,[6] the Court of Military Appeals held that article 62 only authorized the convening authority to request but not require reconsideration of a legal ruling by the judge. Thus, after the decision in Ware, the Government had no way to require a review of a military trial judge's legal ruling.

In Dettinger v. United States,[7] the court recognized this situation was "unhealthy from a judicial administration standpoint."[8] The Court of Military Appeals held that the Government was entitled to petition the military appellate courts for extraordinary relief seeking reversal of a military judge's trial ruling in some cases (see chapter 36, Extraordinary Writs). The remedy provided in Dettinger was cumbersome and relief difficult to obtain. The appellate courts imposed the high standard of review customarily applied in extraordinary writ proceedings before granting such relief. The continuing absence of an effective remedy for erroneous rulings by military judges prompted the development of the current Government appeals provision in article 62 and R.C.M. 908.

29–3. Civil precedent

The legislative history of article 62 states that the provision is intended to parallel 18 U.S.C. 3731, which provides for Government interlocutory appeals in Federal criminal prosecutions.[9] The courts have looked to Federal precedent for guidance in employing the provisions of R.C.M. 908.

Counsel considering a Government appeal should first determine whether the order or ruling is appealable. The language of article 62 is repeated in R.C.M. 908. In order to qualify for an appeal, the order or ruling must be one "that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings."[10] In Federal civilian practice, dismissals based on preindictment delay,[11] unavailability of a witness,[12] Government failure to comply with disclosure orders[13] and insufficiency of the indictment[14] have all been held to be appealable orders.[15]

Rulings suppressing evidence are also appealable in most instances. In Federal civilian practice, 3731 has been interpreted broadly to authorize review of rulings or orders that have the effect of suppressing evidence.[16] While exclusion of evidence based on fourth amendment grounds is the most common scenario for a Government appeal,[17] orders or rulings excluding evidence on other grounds have been considered on appeal.[18] For example, Government

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[1] Uniform Code of Military Justice art. 62, 10 U.S.C. § 862 (1982) [hereinafter cited as UCMJ].
[2] Pub. L. No. 98–209, 97 Stat. 1393 (1983).
[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 908 [hereinafter cited as MCM, 1984, and R.C.M., respectively].
[4] R.C.M. 908 analysis.
[5] Manual for Courts-Martial, United States 1969 (rev. ed.), para. 67f [hereinafter cited as MCM, 1969].
[6] 1 M.J. 283 (C.M.A. 1976).
[7] 7 M.J. 216 (C.M.A. 1979).
[8] 7 M.J. at 221 (citing United States v. Rowel, 1 M.J. 289, 291 (C.M.A. 1978) (Fletcher, C.J., concurring)).
[9] S. Rep. No. 98-53, 98th Cong. 1st Sess. 23 (1983).
[10] UCMJ art. 62(a); R.C.M. 908.
[11] United States v. Wilson, 420 U.S. 332 (1975).
[12] United States v. Gonzales, 617 F.2d 1358 (9th Cir. 1980).
[13] United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975).
[14] United States v. Pecora, 484 F.2d 1298 (3d Cir. (1973).
[15] *See generally Government Appeals Under R.C.M. 908,* Trial Counsel Forum, Aug. 1984, at 2.
[16] *See* United States v. Beck, 483 F.2d 203 (3d Cir. 1973).
[17] *See, e.g.,*United States v. Valenzuela, 24 M.J. 934 (A.C.M.R. 1987) (urinalysis test suppressed); United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985) (urinalysis test suppressed).
[18] *See, e.g.,*United States v. Derrick, 21 M.J. 903 (N.M.C.M.R.) (Jencks Act violation).*See also* United States v. McClelland, 26 M.J. 504 (A.C.M.R. 1988) (suppression of a confession).

appeals have been used to challenge orders excluding testimony due to the Government's failure to make appropriate disclosure,[19] barring the testimony of prospective prosecution witnesses,[20] excluding Government witnesses' testimony unless defense requested witnesses were given immunity,[21] and excluding evidence of other offenses committed by the defendant.[22]

In United States v. Kane,[23] the court commented on the two major policy considerations inherent in limiting the scope of the Government appeals power in civilian practice: judicial economy and protection of a defendant's speedy trial right. Both considerations are applicable to military practice as well. A Government appeal halts trial for a substantial period of time, requiring the Government to reassemble the witnesses at some unknown future date. Moreover, preparation and authentication of the record consume clerical resources and the time of all counsel and the military judge. The speedy trial problem is resolved by article 62(c), UCMJ, which provides:

> Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.[24]

Change five to the MCM, 1984, provided additional clarification to speedy trial issues. R.C.M. 707(c) now provides for a new 120-day speedy trial clock for all charges not proceeded on or severed.[25] Moreover, unlike the language of 18 U.S.C. 3731, which calls for liberal construction of the provisions providing for Government appeals, the Manual for Courts-Martial specifically cautions against profligate use of the Government appeal.[26]

29–4. Required forum

In addition to a "qualifying" ruling, the Government must satisfy two requirements regarding the trial forum. The Government may appeal only from cases in which a military judge presides over the court and the court must be authorized to adjudge a punitive discharge.[27]

29–5. Nature of ruling appealed under R.C.M. 908

Two categories of orders or rulings under R.C.M. 908 qualify for appeal: those which terminate the proceedings as to a charge or specification and those which exclude evidence probative of a material fact. The categorization is critical, of course, because the statute specifically limits this review authority. In Federal civilian practice, the "trial judge's characterization of his own action cannot control the classification of the action… " on appeal.[28] This same conclusion has been adopted in military practice.[29] Otherwise, judges could insulate rulings from review by mere artful labeling. When allowed to examine the issues, however, reviewing appellate courts have had little trouble in penetrating such artful labeling and recognizing trial actions which may properly be appealed.

An order within the first category, that is, an"order or ruling that terminates the proceedings with respect to a charge or specification," will usually be a dismissal. Rulings on most common pretrial motions seeking dismissals as remedies are subject to review. Lack of jurisdiction,[30] denial of speedy trial,[31] failure to state an offense,[32] abatement orders,[33] unlawful command influence, and former punishment are examples of motions that have been or may be considered on appeal.

The Government may also appeal from a ruling which suppresses evidence that is "substantial proof of a fact material in the proceedings."[34] The Federal statute puts no similar limitations on Government appeals. The language seems only to serve the purpose of further reducing the range of cases that may be subject to appeal in court-martial

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[19] United States v. Battisti, 480 F.2d 961 (6th Cir. 1973).
[20] United States v. Cannone, 528 F.2d 296 (2d Cir. 1975).
[21] United States v. Horowitz, 622 F.2d 1101 (2d Cir. 1980).
[22] United States v. Martinez, 681 F.2d 1248 (10th Cir. 1983).
[23] 646 F.2d 4 (1st Cir. 1981).
[24] UCMJ art. 62(c).
[25] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707(c) (C5, 15 November 1991).
[26] R.C.M. 908 analysis.
[27] UCMJ art. 62(a)(1).
[28] United States v. Scott, 437 U.S. 82, 96 (1978) and cases cited therein.
[29] *See* United States v. True, 28 M.J. 1 (C.M.A. 1989).
[30] Solorio v. United States, 107 S. Ct. 2924 (1987); United States v. Abell, 23 M.J. 99 (C.M.A. 1986); United States v. Howard, 20 M.J. 353 (C.M.A. 1985); United States v. Clarke, 23 M.J. 519 (A.F.C.M.R. 1986)*aff'd*, 23 M.J. 352 (C.M.A. 1987).
[31] United States v. Bradford, 25 M.J. 181 (C.M.A. 1987); United States v. Turk, 24 M.J. 277 (C.M.A. 1987); United States v. Burris, 21 M.J. 140 (C.M.A. 1985); United States v. Harvey, 22 M.J. 904 (N.M.C.M.R. 1986), *rev'd*, 23 M.J. 280 (C.M.A. 1986).
[32] United States v. Ermitano, 19 M.J. 626 (N.M.C.M.R. 1984).
[33] United States v. True, 28 M.J. 1 (C.M.A. 1989).
[34] R.C.M. 908(a).

practice. It should be noted that while the concepts of substantial and material do define the scope of appellate review, those words do not simultaneously restrict the prosecutor's choice of proof. The fact that other evidence may be available to prove a certain point should not preclude a Government appeal on an exclusion order.[35] Finally, the exclusion need not be made on constitutional grounds. If the order precludes the admission of some otherwise qualifying evidence, it may be appealed by the Government.[36]

The Government may also appeal an order or ruling that is the "functional equivalent" of either a ruling that terminates the proceedings with respect to a charge or specification or that suppresses evidence which is substantial proof of a material fact. In United States v. True,[37] the Court of Military Appeals held that the military judge's abatement order was the "functional equivalent" of a ruling that terminated the proceedings.[38] Arguably, this"functional equivalent" analysis could also be applied to article 62 appeals of evidence exclusion.

29–6. Appeal prohibited

The language of the UCMJ and the Manual prohibits appeals as to orders or rulings that are, or amount to, findings of not guilty as to a charge or specification. The principal concern in this area is the scope of the double jeopardy clause of the Constitution. Careful scrutiny must be made of the order or ruling and the circumstances under which it was entered.[39]

In United States v. Scott,[40] the Supreme Court adopted a two-prong test to define the limits of double jeopardy in the context of a Government appeal. First, an appeal may lie without bar to a retrial where the ruling involved is based "on any ground other than the insufficiency of the evidence." Second, where the accused elects "to seek termination of the trial on grounds unrelated to guilt or innocence" retrial following a successful Government appeal is not barred. Of course, any acquittal bars retrial without regard to whether the verdict is factually or legally correct.[41]

In United States v. Browers,[42] the trial judge refused to grant a Government-requested continuance under R.C.M. 908 to obtain the presence of its witnesses and compelled the trial counsel to put on the prosecution's case in chief. Thereafter, the judge entered findings of not guilty. On appeal, the Government argued that any trial proceedings after the prosecutor requested a delay under R.C.M. 908 were a nullity. The Army Court of Military Review agreed.[43] Ordinarily, jeopardy attaches in a trial by military judge alone when evidence on the merits is first heard.[44] According to the plain language of R.C.M. 908, however, trial counsel's request interrupts the proceedings while the Government considers whether to file an appeal.[45] Thus, the Army Court of Military Review deemed the proceedings on the merits a nullity and the verdict without legal effect. The Court of Military Appeals reversed this decision.[46] The court determined that a judge's denial of a continuance did not amount to an exclusion or suppression of evidence within the meaning of article 62.[47]

29–7. Procedure

After an appealable ruling or order by the military judge, trial counsel is entitled to a continuance of no more than 72 hours.[48] During the continuance, the general court-martial convening authority or staff judge advocate must decide whether to file a notice of appeal.[49] The decision to appeal must be reflected in a written notice of appeal, which is filed with the military judge within 72 hours of the ruling.[50] The effect of a request for reconsideration and a ruling

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[35] *See* United States v. Scholz, 19 M.J. 837, 841 (N.M.C.M.R. 1984) ("It is sufficient that the petitioner believes that the evidence is significant enough to seek reversal. …"). But cf. United States v. Browers, 20 M.J. 356, 361 (C.M.A. 1985) (Cox, J., concurring) ('A mere weakening of the Government's case [as a result of an order suppressing evidence] is not sufficient to create an appealable issue'). Judge Cox's opinion is not supported by the language of the rule but is rather prudential in nature.

[36] Compare United States v. Postle, 20 M.J. 632, 636 (N.M.C.M.R. 1985) (suppression on constitutional grounds) *with* United States v. Peterson, 20 M.J. 806 (N.M.C.M.R. 1985) (exclusion of evidence under the Military Rules of Evidence).

[37] 28 M.J. 1 (C.M.A. 1989).

[38] *Id.* at 2.

[39] *See, e.g.*, United States v. Kinner, 7 M.J. 974 (N.C.M.R. 1979) (military judge's order dismissing the charge and its specification amounted to finding of not guilty).

[40] 437 U.S. 82 (1978).

[41] *Id.* at 91.

[42] 20 M.J. 542 (A.C.M.R. 1985).

[43] *Id.* at 553.

[44] *Id.* at 552.

[45] R.C.M. 908(b)(1) provides, in part: After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule.

[46] 20 M.J. 356 (C.M.A. 1985).

[47] For another example of a nonappealable order, *see* United States v. Penn, 21 M.J. 907 (N.M.C.M.R. 1986) (order for a new article 32 investigation was not appealable). An unresolved issue is the effect of the"functional equivalence" test of United States v. True, 28 M.J. 1 (C.M.A. 1989) on cases like *Browers*and *Penn.*

[48] R.C.M. 908(b)(1); *Browers*, 20 M.J. at 551.

[49] AR 27–10, para. 13–3*a.*

[50] R.C.M. 908(b)(2); United States v. Mayer, 21 M.J. 504, 506 (A.F.C.M.R. 1985) ("We find nothing in the pertinent statutory and Manual provisions authorizing any extension of the time to file a written notice of appeal.").

thereon are not addressed by the Manual or the UCMJ. Until there is a body of litigation defining this and related issues, counsel should strictly follow the letter of the law.[51]

The notice of appeal filed with the trial judge must contain certain information. The notice must identify the ruling or order being appealed. It must designate the charges and specifications affected by the ruling and the appeal. The notice must contain a certification by the trial counsel that the appeal is not being taken to delay the proceedings. Finally, where the ruling being appealed excludes evidence, the trial counsel must also certify that the excluded evidence is "substantial proof of a fact material in the proceeding."[52]

Delivery of this written notice to the judge in a timely fashion stays the court-martial proceeding until the appeal is disposed of by the Army Court of Military Review.[53] Trial proceedings may continue only as to unaffected charges and specifications. For example, this exception permits litigation of other motions. If the case has not reached the merits, charges may be severed at the request of all parties. Likewise, if the merits have not been reached, the accused may request a severance of charges and it might be appropriate to grant it in order to prevent manifest injustice. Additionally, if trial on the merits has begun, the military judge has discretion to grant a party's request that further evidence be presented on the merits of the unaffected charges or specifications.[54]

Upon filing a written notice of appeal, the trial counsel must also cause a verbatim record of the proceedings to be transcribed. It must be sufficiently complete in scope to resolve the issues on appeal. It must be prepared in accordance with R.C.M. 1103(g) (number of copies), (h) (security classification), and (i) (examination by parties), and authenticated under R.C.M. 1104(a). The Army Court of Military Review or the military judge may direct that additional portions of the record of trial be produced.[55]

After filing the notice of appeal with the military judge, the trial counsel must promptly forward the appeal to the Chief, Government Appellate Division, United States Army Legal Services Agency. The appeal packet must include an original record of trial and three copies, a copy of the notice of appeal served on the military judge and a statement of the issues appealed. This material, by regulation and Courts of Military Review Court Rule 21, must reach the Chief of the Government Appellate Division within 20 days after the judge's ruling or order in question.[56]

The Chief of the Government Appellate Division, after coordination with the Assistant Judge Advocate General for Military Law, will decide whether to file the appeal with the Army Court of Military Review. If an appeal that has been forwarded is not filed, the trial counsel must promptly notify the military judge and the defense.

29–8. Appellate proceeding

The parties are represented in the appellate courts by counsel from the appellate divisions of the United States Army Legal Services Agency. Government counsel are directed to prosecute the appeal"diligently."[57] The Army Court of Military Review will, whenever practicable, give an appeal filed by the Government priority over other proceedings pending on its calendar.[58] The Army Court of Military Review may act only with respect to matters of law in deciding Government appeals.[59] Because the court cannot call upon its fact-finding authority under article 66, UCMJ, it is incumbent on counsel to make a clear factual record during trial litigation on issues that may be subject to appeal.[60] It is likewise incumbent on military judges to render essential factual findings and detailed legal rulings so as to facilitate review.

Following determination of the issue on appeal, the accused may petition for review by the United States Court of Military Appeals or The Judge Advocate General of the Army may certify a question to the United States Court of Military Appeals.[61] The accused must be notified of an adverse decision by the Army Court of Military Review and

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[51] The Navy-Marine Corps Court of Military Review addressed this issue in United States v. Tucker, 20 M.J. 602 (N.M.C.M.R. 1985). There the court held that the trial judge erred in refusing to grant the Government's request to reconsider his earlier ruling which then became the subject of an appeal under R.C.M. 908. Citing the inherent powers of a trial judge, the intent of the rules drafters, and the common sense purpose of the rules, the court advised trial judges to tailor reconsideration hearings appropriately but nonetheless, obtain all proper matters crucial to a determination of the issue under reconsideration. 20 M.J. at 604. In doing so, the Navy-Marine Corps Court of Military Review also suggested that the judge may consider new evidence presented by the parties before reconsidering the decision. In United States v. Harrison, 20 M.J. 55, 57 (C.M.A. 1985), Judge Cox gave strong support for such a broad view of a trial judge's powers on reconsideration to consider additional evidence. *But see* Chief Judge Everett's concurring opinion which expresses his view that such reconsideration powers are more limited.

[52] R.C.M. 908 (b)(3).

[53] *Browers, supra. See also* R.C.M. 908(b)(4) as amended in Change 5 to the MCM, 1984.

[54] R.C.M. 908(b)(4).

[55] R.C.M. 908(b)(5).

[56] R.C.M. 908(b)(6); AR 27–10, para. 13–3*c*; Courts of Military Review Court Rule 21. *See* United States v. Snyder, 30 M.J. 662 (A.F.C.M.R. 1990) (Government failed to get authenticated record of trial to A.F.C.M.R. within 20 days. Accused had remained in pretrial confinement pending resolution of the Government appeal. The A.F.C.M.R. held that "the right to liberty is too fundamental to apply an 'almost good enough' standard to the government's actions.").

[57] UCMJ art. 62(a)(3).

[58] UCMJ art. 62(b).

[59] *See* United States v. Postle, 20 M.J. 632, 636 (N.M.C.M.R. 1985) ("We … must accept and adopt [the trial judge's] findings of fact … unless the facts found are clearly erroneous"); United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985) ("The factual basis for a ruling should not be reinterpreted on review [by the CMR.").

[60] *See* United States v. Vangelisti, 30 M.J. 234 (C.M.A. 1990).

[61] UCMJ art. 62(b); R.C.M. 908(c)(3).

advised of the right to petition the United States Court of Military Appeals. The trial proceedings may continue after the Army Court of Military Review's decision unless the United States Court of Military Appeals or the United States Supreme Court issues a stay order.[62]

29–9. Standard of review

The statutory and Manual provisions address the standard of review to be employed in deciding Government appeals only by implication. Article 62(b) provides that "the Court of Military Review may act only with respect to matters of law… " The Courts of Military Review have not agreed on the meaning of this mandate. They have reversed military judges because they have "erred,"[63] abused their discretion,[64] or "erred as a matter of law."[65] Insofar as the last formulation tracks the language of the statute, it should prove adequate in practice.

[62] *Id.*

[63] United States v. Howard 19 M.J. 795 (A.C.M.R. 1985).

[64] United States v. Browers, *supra.*

[65] *See* United States v. St. Clair, 19 M.J. 833 (N.M.C.M.R. 1984); United States v. Leonard, 20 M.J. 589 (N.M.C.M.R. 1985); United States v. Poduszczak, 20 M.J. 627 (A.C.M.R. 1985).

Chapter 30
Findings

30–1. General

After the military judge instructs the court members, they retire to deliberate on their findings. During their deliberations the court members vote on the accused's guilt or innocence. When they have reached findings, they return to the courtroom and announce the verdict. The only permissible findings at a trial by court-martial are "guilty," "not guilty,""guilty with exceptions" (with or without substitutions), and "not guilty only by reason of lack of mental responsibility."[1]

30–2. Matters which may be considered

a. Evidence received in open court. Only matters properly before the court as a whole may be considered when the court members retire to deliberate on findings.[2] The accused's rights to confrontation and cross-examination would be meaningless if the court members could base their verdict on evidence outside the record.

The members are free to evaluate the evidence presented in court by drawing on their knowledge of human nature and the ways of the world.[3] The members may consider individual knowledge only to the extent it is shared in common.[4] They may not use any specialized knowledge about facts in issue to become, in effect, a witness for either side.[5]

b. Instructions. In addition to evidence before them, the court members must also consider the instructions which the military judge has given them.[6] There is a preference for oral instructions.[7] The judge may, in his or her discretion, provide a written copy of all, or part of, the oral instructions, but the judge must ensure that they are in fact read by the court members, and they should be attached to the record for appellate review.[8] The trial judge can present a portion of the instructions in writing unless one of the parties object.[9]

The Manual and other legal texts may not be used during deliberations.[10] If outside legal authority is consulted, appellate courts will apply a general prejudice test.[11]

c. Materials taken into the deliberation room.

(1) *Items admitted into evidence.* Because no item of evidence should receive undue emphasis, the determination to allow admitted exhibits in the deliberation room is a matter committed to the sound discretion of the military judge.[12] Depositions,[13] stipulations of expected testimony,[14] and writings used as past recollection recorded[15] may be read into evidence but may not be taken into the deliberation room.

(2) *Notes of the court members made during the trial.* During the course of the trial, the court members may take individual notes.[16] These notes may be used during deliberations as an individual reference.[17] No one court member's notes may be regarded as an "official" or "controlling"authority regarding what evidence was presented at trial.[18] If a

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[1] R.C.M. 918(a)(1). The military does not recognize findings of "guilty but insane" or "not guilty by reason of insanity."

[2] R.C.M. 918(c).

[3] R.C.M. 918(c) discussion.

[4] *See, e.g.*, United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983) (court member's improper visit to the crime scene during a recess was not reversible error because the crime occurred at an area familiar to all other court members.); United States v. Conley, 4 M.J. 327 (C.M.A. 1978) (military judge could not consider his personal expertise as a documents examiner in arriving at a verdict in a case where the authorship of signatures on checks was an issue).

[5] United States v. Ivey, 37 C.M.R. 626 (A.B.R. 1967) (court member impermissibly used his special expertise as a gun collector in questioning witness to disprove the defense theory of the case); United States v. Worrell, 3 M.J. 817 (A.F.C.M.R. 1977) (on facts of the case, a court member did not impermissibly use his medical expertise in questioning a defense psychiatrist-witness); United States v. Johnson, 23 M.J. 327 (C.M.A. 1987) (court member did not impermissibly use his martial arts expertise to aid the prosecution).

[6] Benchbook, para. 2–24, provides that the military judge instruct "you are required to follow my instructions on the law." Although the court members are so instructed, it is not necessarily reversible error if the court members fail to follow the military judge's instructions. *See infra* para. 24–6.

[7] R.C.M. 920(d).

[8] R.C.M. 920(d) discussion; United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979); United States v. Porta, 14 M.J. 622 (A.F.C.M.R. 1982).

[9] R.C.M. 920(d).

[10] United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957); United States v. Hawks, 19 M.J. 736 (A.F.C.M.R. 1984) (Military judge abused his discretion in not granting a challenge for cause against a court member who consulted the Manual during a recess in the trial. Although the appellate court refused to announce a per se rule of exclusion, the court member's assurance that he could disregard what he read was given little weight in light of the fact that the court member disregarded the judge's preliminary instructions by consulting the Manual in the first place.).

[11] United States v. Dobbs, 29 C.M.R. 144 (C.M.A. 1960). *But* see United States v. Lewandowski, 37 C.M.R. 315 (C.M.A. 1967) (a court member's reading of the trial counsel's Manual during an open session of the court-martial did not amount to a "use of the Manual").

[12] R.C.M. 921 (b); United States v. Hurt, 27 C.M.R. 3 (C.M.A. 1958).

[13] United States v. Jakaitis, 27 C.M.R. 115 (C.M.A. 1958). The requirements of Mil. R. Evid. 804(b)(1) must be satisfied before a deposition may be read into evidence if the basis of admissibility is the unavailability of the declarant.

[14] United States v. Schmitt, 25 C.M.R. 822 (A.F.B.R. 1958).

[15] Mil. R. Evid. 803(5).

[16] United States v. Christensen, 30 C.M.R. 959 (A.F.B.R. 1961).

[17] R.C.M. 921(b).

[18] United States v. Caldwell, 29 C.M.R. 73 (C.M.A. 1960) (it was error for the president of the court-martial to designate one member as the official recorder of the panel, charged with taking down a verbatim transcript of the instructions to be used during deliberations).

disagreement exists among court members as to the testimony presented, or the law instructed on, clarification must be provided by the military judge in open session.[19]

(3) *Findings worksheet.* In a court-martial before members, the trial counsel will ordinarily prepare a findings worksheet tailored to the evidence adduced at trial.[20] The military judge and the defense counsel examine the worksheet at an article 39(a) session when the proposed instructions are discussed.[21] During deliberations, the court members use the findings worksheet as a guide to assist them in putting their findings in proper form.[22] The worksheet is marked as an appellate exhibit and attached to the record of trial.[23]

30–3. Voting procedure

a. Discussion. After all the evidence has been presented, counsel have made their closing arguments, and the military judge has instructed on the law, the court members retire as a unit to deliberate on the findings.[24] During deliberations, the members act as a unit.[25] It is error if the members reach a verdict in a manner other than in a formal, closed session with all members present. No one may intrude upon the closed deliberations.[26]

Before voting, the members should enter into a full and free discussion of the evidence.[27] They may ask for additional evidence if it appears that they have insufficient evidence for a proper determination or if it appears they have not received all available admissible evidence.[28]

A request by members does not constitute an acquittal[29] and does not obligate the court to provide additional evidence.[30] The military judge decides the issues as an interlocutory matter considering, among other things, the difficulty in obtaining the witness, the delay engendered, the materiality of the testimony, the likelihood that the testimony will be subject to a claim of privilege, and the objections of the parties.[31]

In civilian jurisdictions the judge may choose to sequester the jury when deliberations extend overnight.[32] The military generally has not followed this practice. The normal military practice is to suspend deliberations, open the court, and formally adjourn overnight.[33] The military judge should instruct the court members not to discuss the case during the adjournment.[34] In an exceptional case, the military judge would presumably be justified in ordering the court members to be kept isolated in facilities provided by the convening authority.

b. Balloting. When the court members have completed their discussions, they must vote by secret written ballot.[35] A failure to vote by secret written ballot is presumptively prejudicial error.[36]

If there are several charges involved, the president of the court determines the order of balloting.[37] The members vote first on the specification and then the charge.[38] If the accused is acquitted of a charged offense, the court members then vote on lesser included offenses, in order of severity beginning with the most severe.[39]

In most situations the concurrence of two-thirds of the members present is required to find the accused guilty of an

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[19] R.C.M. 921(b). Whether to actually provide clarification by calling additional witnesses, reading portions of the transcript, or providing additional instructions is a matter within the sound discretion of the military judge.

[20] R.C.M. 921(d) discussion. For an example of a findings worksheet *see* MCM, 1984, app. 10.

[21] R.C.M. 921(a) discussion.

[22] *See, e.g.*, United States v. Barclay, 6 M.J. 785 (A.C.M.R. 1978) (It is desirable that the format for acquittal precede the formats for conviction. If the accused pleads guilty to a charge, or a lesser included offense, it is not error to omit the formats inapplicable for acquittal.).

[23] Benchbook, para. 2–30.

[24] R.C.M. 921(b).

[25] *Id.*

[26] UCMJ art. 39(b); United States v. Solak, 28 C.M.R. 6 (C.M.A. 1959) (unauthorized communications between the law officer and the president of the court during a"recess in deliberations" created a presumption of prejudice which led to reversal).

[27] Full deliberations are encouraged as a matter of policy and are afforded a general privilege against disclosure. *See, e.g.*, Mil. R. Evid. 509; Mil. R. Evid. 606.

[28] R.C.M. 921(b). *See*United States v. Lents, 32 M.J. 636 (A.C.M.R. 1991) (Military Judge abused his discretion in summarily denying members' request for additional evidence. Military Judge should analyze the request using the following factors: "Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that the witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the objections of the parties to reopening the evidence." *See also*United States v. Lampani, 14 M.J. 22, 26 (C.M.A. 1982). Note that in requesting additional evidence, the court members may not become partisan advocates or evince a propensity to convict. United States v. Domenech, 40 C.M.R. 26 (C.M.A. 1969).

[29] United States v. Parker, 21 C.M.R. 308 (C.M.A. 1956) (the court members' request for additional evidence was made pursuant to their regulatory right to make such a request and did not by its terms evince an intent to acquit).

[30] R.C.M. 921(b). Granting the court member's request for additional evidence is a matter within the military judge's discretion.

[31] United States v. Lampani, 14 M.J. 22 (C.M.A. 1982).

[32] *See, e.g.*, Byrne,*Remedies for Prejudicial Publicity*, Criminal Defense Techniques para. 9.08 (R. Cipes ed. 1980).

[33] Benchbook, para. 2–30.

[34] Benchbook, para. 2–26.

[35] UCMJ art. 51(a); R.C.M. 92(c)(1).

[36] United States v. Martinez, 17 M.J. 916 (N.M.C.M.R. 1984). *See also* United States v. Boland, 42 C.M.R. 275 (C.M.A. 1970) (the requirement for a secret written ballot on findings also applies to votes on reconsideration of findings).

[37] R.C.M. 921 (c)(5)(A) (the president's determination of the order for balloting can be overruled if a majority of the court members object).

[38] R.C.M. 921(c)(5)(A).

[39] R.C.M. 921(c)(4).

offense.[40] A vote of less than the required two-thirds amounts to an acquittal.[41] In computing the number of votes required, fractions are counted as one.[42] The military judge should instruct the members on the specific number of votes required for a conviction.[43]

In cases where the death penalty is mandatory, all members must concur in a finding of guilty.[44]

Although the Manual clearly contemplates that only one final ballot be taken to determine guilt or innocence of a specification, "straw polls" are not specifically prohibited[45] so long as they are clearly identified to all members as preliminary votes used to aid deliberations, and provided they are in no way used by senior members to exert superiority of rank over junior members.[46]

The junior court member collects and counts the ballots.[47] The count is then checked by the president who then informs the entire panel of the result of the balloting.[48] After a ballot is taken, the members can properly reballot only by following proper reconsideration procedures.[49]

A failure on the part of the court to reach a finding is the equivalent in legal effect to a finding of not guilty.[50]

c. Announcement of the verdict. A court-martial is required to announce its findings as soon as they are determined.[51] "Announcement" occurs when the president of the court reads, in open court, the verdict which was actually reached by the court during its deliberations.[52] While a failure to formally announce findings may not be fatal,[53] failure to announce any findings as to a specification is the equivalent of no finding.[54]

Prior to announcement of the verdict, the military judge should review the findings worksheet to ensure that the verdict is in a proper form.[55] Examination of the findings worksheet[56] or oral clarification of the worksheet[57] do not constitute an announcement of the findings.

If the president of the court incorrectly states the actual findings of the court this"slip of the tongue"does not constitute an announcement of the verdict.[58] A"slip of the tongue"concerning the court's findings can be corrected anytime prior to adjournment [59] without resort to formal reconsideration procedures.[60]

In announcing the findings, the president of the court need not state that the verdict was reached by secret written ballot[61] or that two-thirds of the members concurred in the finding of guilty.[62] The actual number of members (or fraction of the panel) that voted for a guilty finding should not be announced.[63] The exception to this rule is in capital

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[40] UCMJ art. 52(a)(2). The constitutionality of the two-thirds vote has been upheld. *See* United States v. Sievers, 9 M.J. 612 (A.C.M.R. 1980); United States v. Guilford, 8 M.J. 598 (A.C.M.R. 1979).

[41] R.C.M. 921(c)(3).

[42] R.C.M. 921(c)(2)(B) discussion. For example, a court composed of 10 members would require 6 and ⅔ votes for a two-thirds concurrence. This is rounded up to require seven members' concurrence for a finding of guilty.

[43] R.C.M. 921(c)(2)(B) discussion; United States v. Bryant, 50 C.M.R. 40 (N.C.M.R. 1974) (sentencing procedures were fatally deficient when the judge correctly instructed a five-member panel that they needed two-thirds concurrence for a sentence including 10 years' (or less) confinement and they needed three-fourths concurrence for a sentence including more than 10 years' confinement *but* the military judge failed to indicate the actual number of votes those fractions translated into).

[44] UCMJ art. 52(a)(1). UCMJ art. 106, spying, is the only offense for which the death penalty is mandatory. In cases when a finding of guilty carries a mandatory sentence over 10 years' confinement (e.g. premeditated murder which carries mandatory life imprisonment when referred noncapital), the Government only needs a two-thirds concurrence for a finding of guilty even though the mandatory sentence requires a three-fourths concurrence during deliberations on the sentence. United States v. Morphis, 23 C.M.R. 212 (C.M.A. 1957).

[45] United States v. Lawson, 16 M.J. 38 (C.M.A. 1983) (Although "informal, nonbinding" votes are not specifically prohibited by the UCMJ or the Manual, the Court of Military Appeals discouraged the practice. The trial judge should not invite the members to engage in a "straw poll" and if the members inquire about the propriety of a "straw poll" they should be advised of the dangers inherent in such a procedure.).

[46] R.C.M. 921(a) ("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"); United States v. Lawson, 16 M.J. 38 (C.M.A. 1983); United States v. Nash, 18 C.M.R. 174 (C.M.A. 1955) (the decision to conduct multiple ballots is not a matter within the president of the court's discretion).

[47] UCMJ art. 51(a); R.C.M. 921(c)(5)(B). See also United States v. Llewellyn, 32 M.J. 803 (A.C.M.R. 1991) (counting the votes is a ministerial act).

[48] UCMJ art. 51(a); R.C.M. 921(c)(5)(B).

[49] *See generally infra* para. 24–4.

[50] United States v. Francis, 15 M.J. 424 (C.M.A. 1983). In military practice, there is no provision for a "hung jury" on findings. *But see infra* n.80.

[51] UCMJ art. 53; R.C.M. 922(a).

[52] *See, e.g.*, United States v. Justice, 3 M.J. 451 (C.M.A. 1977) (military judge's examination of the worksheet did not constitute "announcement"); United States v. Downs, 15 C.M.R. 8 (C.M.A. 1954) (the president of the court's erroneous reading of the findings, which did not reflect the true findings agreed upon by the court, did not constitute an"announcement"). *See also* United States v. Read, 29 M.J. 690 (A.C.M.R. 1990).

[53] *See, e.g.*, United States v. Johnson, 22 M.J. 945 (A.C.M.R. 1986) (although there had been no formal announcement of findings as to the charge of adultery,"lining out" of the portion of the worksheet relating to adultery was tantamount to finding of not guilty); United States v. Moser, 23 M.J. 568 (A.C.M.R. 1986) (failure of the military judge to formally announce findings was not fatal where judge's statements during the trial—"Okay, now Specialist Moser, now that you have been convicted," and "I have entered findings of guilty pursuant to that plea"—were tantamount to announcement of findings of guilty). *See also* United States v. Timmerman, 28 M.J. 531 (A.F.C.M.R. 1989), and United States v. Read, 29 M.J. 690 (A.C.M.R. 1990).

[54] *See* United States v. Dilday, 47 C.M.R. 172 (A.C.M.R. 1973).

[55] R.C.M. 921(d).

[56] R.C.M. 921(d); United States v. Justice, 3 M.J. 451 (C.M.A. 1977).

[57] R.C.M. 921(d); United States v. Justice, 3 M.J. 451 (C.M.A. 1977).

[58] R.C.M. 922(d); United States v. Downs, 15 C.M.R. 8 (C.M.A. 1954).

[59] R.C.M. 922(d).

[60] *See* United States v. Baker, 30 M.J. 594 (A.C.M.R. 1990). For a discussion of reconsideration procedures*see generally infra* para. 30–4.

[61] *See* United States v. Martinez, 17 M.J. 916 (N.M.C.M.R. 1984).

[62] *See generally* MCM, 1984, app. 10 and R.C.M. 922(a) analysis.

[63] R.C.M. 921(d) discussion.

cases, if there is a unanimous finding as to a capital offense, the president announces that the finding is unanimous.[64] If the accused is acquitted, no reference should be made to the number of votes for or against acquittal.[65]

The president should announce findings as to each specification and to each charge,[66] but the failure to specifically announce findings as to the charge is not reversible error.[67]

If the court's oral announcement of a verdict is legal and unambiguous, a conflicting worksheet does not affect the validity of the findings.[68]

30–4. Reconsideration of findings

a. General. After a final ballot is taken by the court members as to any specification or charge there can be a reballoting only if done pursuant to proper reconsideration procedures.[69] A military judge presiding over a trial by military judge alone may also reconsider a verdict if done in accordance with proper procedures.[70]

b. Timing limitations. A finding of guilty can be reconsidered anytime before a sentence is announced.[71] A finding of not guilty can only be reconsidered before that finding is announced in open court.[72] A finding of not guilty can only be reconsidered before that finding is announced in open court.[73] If the military judge grants a defense motion for a finding of not guilty[74] the announcement of this ruling is not interlocutory and may not be reconsidered.[75]

c. Procedure for reconsideration. As a general rule the military judge does not instruct the court members on reconsideration procedures absent a specific request for the instruction. [76] The court members are generally instructed that instructions on reconsideration are available should any member propose a reballoting.[77] Erroneous instructions on the procedure for reconsidering findings are presumptively prejudicial.[78]

Once a timely proposal for reconsideration is made by one of the court members, the entire panel must vote on whether they wish to reballot.[79] Voting must be by secret written ballot.[80] A finding of guilty may be reconsidered if more than one-third of the members vote to reballot.[81] A finding of not guilty may be reconsidered if a majority of the members vote for reconsideration.[82] Table 30-1 shows the number of votes required for reconsideration of verdicts by various size panels.

Although the voting procedure on findings in courts-martial does not provide for a "hung jury," such a result is possible if the court members misuse the reconsideration procedure.[83]

The military judge bears the responsibility for ensuring the reconsideration procedure is not used to circumvent the UCMJ's intended one-ballot voting procedure.[84]

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[64] R.C.M. 924(b)(2).

[65] *Id.*

[66] United States v. Logan, 15 M.J. 1084 (A.F.C.M.R. 1983); United States v. Giermek, 3 M.J. 1013 (C.G.C.M.R. 1977); United States v. Dilday, 47 C.M.R. 172 (A.C.M.R. 1973).

[67] United States v. Logan, 15 M.J. 1084 (A.F.C.M.R. 1983); United States v. Giermek, 3 M.J. 1013 (C.G.C.M.R. 1977); United States v. Dilday, 47 C.M.R. 172 (A.C.M.R. 1973). The accused's criminality is determined by the findings as to the specifications, not the charge.

[68] United States v. Donnelly, 12 M.J. 503 (A.F.C.M.R. 1981).

[69] *See generally* R.C.M. 924.

[70] R.C.M. 924(c).

[71] R.C.M. 924(a). For a discussion of what constitutes "announcement" *see infra* para. 30–3c.

[72] *Id.*

[73] United States v. Boswell, 23 C.M.R. 369 (C.M.A. 1957). In *Boswell*, the accused was charged with desertion. The court returned a verdict of "not guilty of desertion but guilty of escape from confinement."Because escape from confinement was not a charged offense and was not a lesser included offense of desertion, that portion of the finding was without effect. The military judge instructed the court that they could reconsider their findings with a view towards voting on the lesser included offense of absent without leave. This instruction was erroneous. The announced finding of not guilty to the desertion charge barred subsequent reconsideration of lesser included offenses.

[74] *See* generally R.C.M. 917.

[75] UCMJ art. 51(b); R.C.M. 917(f); United States v. Hitchcock, 6 M.J. 188 (C.M.A. 1979); United States v. Birch, 13 M.J. 847 (C.G.C.M.R. 1982). R.C.M. 917(f) states that a military judge may reconsider a denial of a motion for a finding of not guilty anytime before the announcement of general findings in the case. Nonetheless, in United States v. Griffith, 27 M.J. 42 (C.M.A. 1988), the Court of Military Appeals held that even after members announce findings, the military judge has the power to dismiss charges or specifications.

[76] Benchbook, para. 2–30.

[77] Benchbook, para. 2–30 provides the following standard instruction:

> [A]fter you vote, if any member expresses a desire to reconsider any finding, open court and I'll give you specific further instructions on how to go about doing that. If that should occur, when the court has assembled, the president will NOT announce the findings reached but will announce only that reconsideration of a finding has been proposed. Do not state (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved.

[78] *See* United States v. Jones, 15 M.J. 967 (A.C.M.R. 1983).

[79] R.C.M. 924(b).

[80] United States v. McAllister, 42 C.M.R. 22 (C.M.A. 1970); United States v. Boland, 42 C.M.R. 275 (C.M.A. 1970); R.C.M. 924(b) discussion.

[81] UCMJ art. 52(c) (a finding of guilty can be reconsidered if "not opposed by the number of votes required for that finding"); R.C.M. 924(b).

[82] R.C.M. 924(b).

[83] For example, with an eight-member panel a vote of"5-guilty, 3-not guilty" would result in an acquittal. The five members voting for conviction constitute a majority and can force reconsideration of the not guilty finding. Conceivably this five-member majority could force repeated voting and reconsiderations until one of the members finally changed their vote or the military judge interceded.

[84] United States v. Wilson, 18 M.J. 204 (C.M.A. 1984) (the military judge may properly use "protective instructions" to ensure that the court members do not use reconsideration procedures to evade codal voting requirements).

Table 30–1
Votes required for reconsideration of verdicts, by various size courts-martial panels

Number of court members	Reconsider finding of not guilty	Reconsider finding of guilty
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5
13	7	5
14	8	5

30–5. Defective findings

a. Variance between the findings and the charged offenses. If the court members return a verdict of guilty by exceptions (or by exceptions and substitutions), the military judge must decide the verdict's validity. If the exceptions or substitutions differ too greatly from the original specification, there is a fatal variance resulting in acquittal.[85] The variance is fatal if the defense was prejudiced in its ability to adequately prepare for trial or if the accused is not adequately protected against another prosecution for the same offense.[86]

b. Ambiguous or illegal findings. Normally, ambiguities or illegalities in the findings should be detected by the military judge when the findings worksheet is examined prior to announcement of the verdict.[87] After announcement, the military judge has the authority to seek a clarification of the verdict anytime prior to adjournment.[88] Ambiguities in findings are resolved by an examination of the entire record of the case.[89] Generally, a liberal rule is followed in interpreting jury verdicts.[90] Information or inaccuracies in a verdict are immaterial if the intention is evident from the record;[91] however, in resolving ambiguities, the accused must be given the benefit of all uncertainties.[92]

c. Inconsistent findings. Inconsistent findings are generally permissible in military practice.[93] When a court renders a verdict finding the accused guilty of one offense and not guilty of another based on facts which would suggest an "all or nothing" verdict, their verdict may well be a product of sympathy for the accused.[94] The appellate courts are thus inclined to uphold inconsistent verdicts unless the findings are so inconsistent that they are mutually exclusive.[95] Where apparently inconsistent findings were rendered by a military judge, the case will be reversed only if no rational basis can be discerned for the inconsistency.[96]

d. Judgment notwithstanding the verdict. Although there is no provision in the UCMJ or the Manual for the military

[85] United States v. Lee, 1 M.J. 15 (C.M.A. 1975); United States v. Daye, 17 M.J. 555 (A.C.M.R. 1983). For a discussion of the "pleadings-proof-findings" variance triangle, *see* United States v. Leslie, 9 M.J. 646 (N.C.M.R. 1980).

[86] *See, e.g.*, United States v. Lee, 1 M.J. 15 (C.M.A. 1975) (conviction for possession of marijuana plants not fatally defective where possession of hashish was pleaded); United States v. Long, 2 M.J. 1054 (A.C.M.R. 1976) (conviction for delivery of drugs not fatally defective where sale of drugs was pleaded); United States v. Gore, 14 M.J. 945 (A.C.M.R. 1982) (conviction for "unlawfully striking the victim on the chest" was not fatally defective where the accused was charged with "indecent assault by fondling the victim's breasts").

[87] R.C.M. 921(d). The military judge may assist the court members in putting their findings in proper form.

[88] R.C.M. 922(b) discussion.

[89] United States v. Simmons, 3 M.J. 398 (C.M.A. 1977); United States v. Nedeau, 23 C.M.R. 182 (C.M.A. 1957); United States v. Darden, 1 M.J. 574 (A.C.M.R. 1975).

[90] United States v. Darden, 1 M.J. 574 (A.C.M.R. 1975). *See also* United States v. Timmerman, 28 M.J. 531 (A.F.C.M.R. 1989); United States v. Read, 29 M.J. 690 (A.C.M.R. 1990).

[91] *See* United States v. McCready, 17 C.M.R. 449 (A.B.R. 1954); United States v. Johnson, 22 M.J. 945 (A.C.M.R. 1986); United States v. Moser, 23 M.J. 568 (A.C.M.R. 1986); United States v. Boone, 24 M.J. 680 (A.C.M.R. 1987).

[92] United States v. Simmons, 3 M.J. 398 (C.M.A. 1977).

[93] United States v. Snipes, 18 M.J. 172 (C.M.A. 1984); United States v. Gaeta, 14 M.J. 383, 381 n.10 (C.M.A. 1983); United States v. Ferguson, 44 C.M.R. 254 (C.M.A. 1972).

[94] *See, e.g.*, United States v. Snipes, 18 M.J. 172, 175 n.4 (C.M.A. 1984).

[95] *See, e.g.*, United States v. Clark, 42 C.M.R. 332 (C.M.A. 1970) (findings of guilty as to bribery and larceny by false pretenses were mutually exclusive as it was not possible for the accused to "actually intend to have his action influenced" and at the same time"falsely represent what he intended to do").

[96] United States v. Snipes, 18 M.J. 172 (C.M.A. 1984); United States v. Perry, 22 M.J. 669 (A.C.M.R. 1986).

judge to enter a judgment notwithstanding the verdict, the military judge may permissibly enter contrary findings of not guilty if the findings of the court members are incorrect as a matter of law.[97]

30–6. Impeachment of findings

a. General. Once a verdict has been reached by the court members, it is very difficult for the parties to collaterally attack the procedures used in reaching the verdict. The sanctity of the deliberative process is protected by a deliberative privilege[98] designed to provide finality to proceedings and to promote full and free discussions during deliberations.[99] The general rule is that the court will not consider testimony or affidavits from court members[100] or third parties[101] offered to attack the internal procedures of the jury unless the party attacking the verdict alleges that the verdict was tainted: by (1) outside influence; (2) extraneous prejudicial information; or (3) unlawful command influence.[102]

Although the rules against impeaching verdicts expressly cover verdicts reached by court members, the same limitations apply when one of the parties to the trial seeks to impeach the verdict in a trial by military judge alone.[103]

(1) *Outside influence.* Outside influence probably is limited to direct influences on court members such as threats to members of the panel, bribery of court members, or threats to a member's family.[104]

(2) *Extraneous prejudicial information.* "Extraneous prejudicial information" includes consideration of any matters not properly presented for consideration during the trial such as improper referral to the Manual or other legal authority;[105] an unauthorized visit to the crime scene;[106] private conversations between a witness and a court member;[107] and prejudicial remarks by the bailiff to a court member.[108]

(3) *Unlawful command influence.* Unlawful command influence includes both the illegal use of superiority of rank by a senior court member to influence a junior court member,[109] and improper direct and indirect influences brought to bear on a court member by other senior officers such as the convening authority or the court member's commanding officer.[110]

b. Procedure. Allegations that a verdict was illegally arrived at should be resolved by the military judge.[111] The military judge should first determine whether the allegations fit within one of the three exceptions to the deliberative privilege.[112] If so, the judge may receive testimony and affidavits of court members in support of the allegations.[113]

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[97] UCMJ art. 51(b); United States v. Kelly, 12 M.J. 509 (A.C.M.R. 1981) (when the court members returned a verdict of guilty to a charge of conspiracy but a verdict of not guilty to the charge of sale of marijuana, which was the only overt act alleged with respect to the conspiracy, the military judge properly entered a finding of not guilty with respect to the conspiracy charges). *See also* United States v. Scaff, 29 M.J. 60 (C.M.A. 1989) (Until the military judge authenticates the record of trial, the military judge may conduct a post-trial session to consider newly discovered evidence, and in proper cases may set aside findings of guilty and the sentence).

[98] *See generally* R.C.M. 923; Mil. R. Evid. 509; Mil. R. Evid. 606; Dean, *The Deliberative Privilege Under M.R.E. 509*, The Army Lawyer, Nov. 1981, at 1.

[99] *See, e.g.*, United States v. Harris, 32 C.M.R. 878 (A.F.B.R. 1962); Dean, *The Deliberative Privilege Under M.R.E. 509*, The Army Lawyer, Nov. 1981, at 1.

[100] Mil. R. Evid. 606.

[101] Although Mil. R. Evid. 606 expressly applies only to the testimony/affidavits of members, case law extends the privilege to third persons who "intrude"upon the deliberative process. *See, e.g.*, United States v. Perez-Pagan, 47 C.M.R. 719 (A.C.M.R. 1973) (the court reporter); United States v. Harris, 32 C.M.R. 878 (A.F.B.R. 1962) (affidavit by the accused who overheard the jury's deliberations); United States v. Stone, 23 M.J. 772 (A.F.C.M.R. 1987) (affidavit from the accused's father who overheard deliberations).

[102] Mil. R. Evid. 606. Procedural irregularities, failure to follow the military judge's instructions, or"second thoughts" by the court members are not grounds for impeachment of the verdict. *See generally* United States v. Higdon, 2 M.J. 445 (A.C.M.R. 1975); United States v. Hance, 10 M.J. 622 (A.C.M.R. 1980).

[103] United States v. Rice, 20 M.J. 764 (A.F.C.M.R. 1985) (allegations that the trial judge may have misunderstood the evidence presented at trial could not constitute a basis for impeaching the military judge's verdict because the allegation did not fall within one of the three exceptions in Mil. R. Evid. 606).

[104] *See generally* J. Weinstein & M. Berger, Weinstein's Evidence 606 (1978).

[105] United States v. Dobbs, 29 C.M.R. 144 (C.M.A. 1960); United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957).

[106] United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983); United States v. Davis, 19 M.J. 689 (A.C.M.R. 1984).

[107] United States v. Elmore, 33 M.J. 387 (C.M.A. 1991). United States v. Almeida, 19 M.J. 874 (A.F.C.M.R. 1985).

[108] *See* Parker v. Gladden, 385 U.S. 363 (1966).

[109] Prior to the Military Rules of Evidence, appellate courts disagreed as to whether in-court command influence was an exception to the deliberative privilege. *Compare* United States v. Lil, 15 C.M.R. 472 (A.B.R. 1954) *with* United States v. Connors, 23 C.M.R. 636 (A.B.R. 1957). After the Military Rules of Evidence, there was still some disagreement. Although the drafters of the Military Rules of Evidence clearly intended in-court command influence to be a ground for impeaching the verdict, MCM, 1984, Mil. R. Evid. 606 (1980 analysis); the first post-Mil. R. Evid. appellate decision disagreed with the drafters. *See* United States v. Accordino, 15 M.J. 825 (A.F.C.M.R. 1983). The Court of Military Appeals resolved this issue in United States v. Carr, 18 M.J. 297 (C.M.A. 1984) and United States v. Accordino, 20 M.J. 102 (C.M.A. 1985), holding that use of superiority of rank was improper and was a ground for impeaching a verdict pursuant to Mil. R. Evid. 606.

[110] Mil. R. Evid. 606.

[111] R.C.M. 923 discussion; United States v. Martinez, 17 M.J. 916 (N.M.C.M.R. 1984); United States v. Davis, 19 M.J. 689 (A.C.M.R. 1984) (when post-trial allegations were made that some court members had impermissibly visited the crime scene during a recess in the trial, the military judge should have conducted a limited hearing to determine whether the accused had been prejudiced by the viewing); United States v. Stone, 23 M.J. 772 (A.F.C.M.R. 1987) (letter from the accused's father alleging improprieties at trial should have been turned over to the military judge and not handled by the commander to whom it was addressed).

[112] Mil. R. Evid. 606.

[113] *Id.*

The court may inquire into objective facts supporting or refuting the allegations but the court members cannot be asked to disclose their vote,[114] their mental process used to arrive at their verdict,[115] or their subjective evaluation of whether the alleged impermissible influence affected their vote.[116] The polling of court members is expressly prohibited.[117]

[114] R.C.M. 922(e).
[115] Mil. R. Evid. 606.
[116] United States v. Martinez, 17 M.J. 916 (N.M.C.M.R. 1984).
[117] R.C.M. 922(e).

Chapter 31
Sentencing

31–1. General

When the court returns a finding of not guilty, the accused is acquitted and the proceedings terminate. When the court returns a finding of guilty, the court-martial proceeds to the sentencing phase. During the sentencing phase, the trial counsel has the first opportunity to present the "case in aggravation." Then the defense counsel has an opportunity to present a"case in extenuation and mitigation." Thereafter, counsel for both sides present their case in rebuttal and surrebuttal as appropriate. At the conclusion of the evidence and counsel arguments, the military judge announces the sentence (trial by military judge alone); or the military judge instructs the court members who then deliberate, vote, and announce their sentence (trial with court members).

31–2. Evidence admitted during the trial on the merits

Evidence admitted during the trial on the merits,[1] and reasonable inferences which can be drawn from that evidence,[2] may be considered by the sentencing authority in arriving at an appropriate sentence if it constitutes aggravating circumstances per R.C.M. 1001(b)(4).[3]

31–3. Providence inquiry (guilty plea case)

Information elicited from the accused during the military judge's providence inquiry may be argued by the trial counsel and can be considered by the military judge in arriving at an appropriate sentence[4] once the guilty plea is accepted as provident.[5] Before considering the accused's statements, the military judge must conclude that the statement fits within the scope of permissible aggravation[6] or rebuttal evidence[7] and must determine that the evidence should not be excluded under the balancing test of Military Rule of Evidence 403.[8]

In United States v. Holt,[9] the Court of Military Appeals determined that prior military practice of not taking sworn testimony from an accused during a providence inquiry[10] or allowing reference to such testimony at sentencing[11] was changed by the Manual for Courts-Martial, United States, 1984. The prior practice was based upon the rationale that a free flow of information between the accused and the military judge was a necessity during the providence inquiry. It was believed that an oath might have a dampening effect on this process.[12]

However, in Holt the court found that the administration of an oath to the accused under the 1984 Manual puts the accused "on notice that his answers may be used adversely to him. Accordingly, the use of sworn testimony in connection with sentencing is not contrary to any reasonable expectation on his part."[13]

The court determined that such use would not deter the free flow of information,[14] nor would it have a "chilling

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[1] R.C.M. 1001(f)(2). *Butsee* United States v. Wingart, 27 M.J. 128 (C.M.A. 1988).

[2] United States v. Stevens, 21 M.J. 649 (A.C.M.R. 1985). In *Stevens*, the accused, stationed in Panama, was convicted of larceny of one-half pound of TNT. The accused tried to detonate the TNT by rigging it to a roadside traffic sign and stretching a trip wire across the road. As rigged, the TNT was incapable of detonating. The court held that the trial counsel could argue, and the sentencing authority could consider, that serious injury might have occurred to a passerby if the TNT had exploded as the accused intended. This argument was "illustrative of the outer limits of reasonable inferences to be drawn from the facts" of the case. The court held that it was error for the sentencing authority to consider that "members of the American community in Panama might have assumed that the explosion was the work of terrorists" and"would have been terrified 'for weeks and maybe for months' by the fear of a mad bomber." This conjecture went beyond the outer limits of reasonable inferences to be drawn from the evidence presented at trial.*Stevens*, 21 M.J. at 652.

[3] United States v. Wingart, 27 M.J. 128 (C.M.A. 1988).

[4] United States v. Holt, 27 M.J. 57 (C.M.A. 1988).

[5] If the guilty plea is withdrawn by the accused or declared improvident by the military judge, any statements the accused made during the providence inquiry are inadmissible at subsequent proceedings. Mil. R. Evid. 410 provides:

> [E]vidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:
> (1) a plea of guilty which was later withdrawn;
> (2) a plea of nolo contendere;
> (3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas …

[6] *See generally* R.C.M. 1001(b).

[7] *See generally*R.C.M. 1001(d).

[8] Mil. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[9] Holt, 27 M.J. at 61.

[10] United States v. Simpson, 37 C.M.R. 308, 310 (C.M.A. 1967).

[11] United States v. Richardson, 6 M.J. 654 (N.M.C.M.R. 1978), *pet. denied*, 6 M.J. 280 (C.M.A. 1979). The Navy Court of Military Review relied on policy considerations to hold that providence inquiry statements could not be considered during sentencing. They reasoned that the providence inquiry required the accused's full cooperation and this full cooperation could be achieved only if there were no risk that the providence inquiry could later be used against the accused.

[12] Holt, 27 M.J. at 58.

[13] *Id.* at 59.

[14] *Id.* at 59.

effect" on the accused's choice of forum.[15] The statements of the accused may be considered not only by the military judge, but also by the court members. "[S]uch testimony can be received as an admission by the accused and can be provided either by a properly authenticated transcript or by the testimony of a court reporter or other persons who heard what the accused said during the providence hearing."[16]

31–4. Stipulation of fact (guilty plea cases)

As a precondition to entering into a pretrial agreement, the Government may require the defense to enter into a stipulation of fact.[17] This stipulation normally includes a factual summary of the accused's conduct establishing guilt, but may also properly include aggravating circumstances relating to the accused's offenses.[18]

In United States v. Glazier,[19] the Court of Military Appeals held that the Government can negotiate with an accused in the plea bargain process to have otherwise inadmissable evidence included in a stipulation of fact. This can be accomplished by including in stipulations of fact a statement that"counsel and the accused agree not only to the truth of the matters stipulated but that such matters are admissible in evidence against the accused."[20] This statement ensures full agreement and understanding of the parties. Recognizing a need to prevent overreaching by the Government, the court also held that military judges have a responsibility to act on defense objections to stipulations to ensure "the interests of justice."[21]

31–5. The case in aggravation

a. General. The trial counsel's case in aggravation consists of matters which the sentencing authority may consider in arriving at an appropriate sentence. These matters can be presented by the trial counsel, and can be considered by the sentencing authority, regardless of what the defense counsel decides to present during the case in extenuation and mitigation.[22] The Government's right to present presentencing evidence is the same in a contested case as it is in a guilty plea case.[23]

The key to understanding presentencing evidence lies in appreciating the fact that the military relies on an adversarial presentation of evidence to the sentencing authority. Although some judges[24] and commentators[25] analogize military sentencing evidence to the Federal presentencing report,[26] such generalizations are not especially useful. The Manual for Courts-Martial expressly limits the type of sentencing evidence which can be presented by the Government.[27] The case in aggravation consists of five enumerated categories of information—

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[15] *Id.* at 60.

[16] *Id.* at 61. *But see* United States v. Dukes, 30 M.J. 793 (N.M.C.M.R. 1990) (accused must be given notice of what matters will be used against him and an opportunity to object). An additional alternative would be a stipulation of testimony with the accused's consent. Testimony by the trial counsel will generally not be an alternative. *See* DA Pam 27–26, Rule 3.7 (31 Dec. 1987).

[17] R.C.M.705(c)(2)(A).

[18] United States v. Silva, 21 M.J. 336 C.M.A. 1986); United States v. Martin, 20 M.J. 227 (C.M.A. 1985); United States v. Marsh, 19 M.J. 657 (A.C.M.R. 1984) (The Government can require the accused to stipulate to matters which are explanatory of the charged offense); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984) (where the accused was convicted of wrongfully possessing drug paraphernalia, .44 grams of heroin, 1.0 grams of hashish, and 5.0 grams of marijuana, the Government could require the accused to stipulate that he intended to distribute the heroin and that when he was apprehended he possessed 1.342 grams of heroin, .84 grams of hashish, 4.83 grams of marijuana, two lockblade knives, and a pocket knife, both with marijuana residue on them, $284.00, and Deutsch Mark (DM) 680).

[19] 26 M.J. 268 (C.M.A. 1988).

[20] *Id.* at 270.

[21] *Id.* at 270. *See also* R.C.M. 811(b); United States v. DeYoung, 29 M.J. 78 (C.M.A. 1989); United States v. Mullens, 29 M.J. 398 (C.M.A. 1990); United States v. Vargas, 29 M.J. 968 (A.C.M.R. 1990); United States v. Robinson, 30 M.J. 548 (A.C.M.R. 1990); United States v. Jackson, 30 M.J. 565 (A.C.M.R. 1990).

[22] *See generally* R.C.M. 1001.

[23] United States v. Vickers, 13 M.J. 403 (C.M.A. 1982). In *Vickers* the accused was convicted in a contested case, of disobeying a commissioned officer's order to leave the scene of a disturbance. During presentencing the trial counsel introduced aggravation evidence that the accused's disobedience actually agitated the disturbance and caused the company commander to lose control of the situation. On appeal the defense urged that aggravation evidence was admissible only in guilty plea cases. The defense argument relied in part on the fact that para. 75, MCM, 1969, did not expressly authorize aggravation evidence in contested cases but did contain a provision authorizing aggravation evidence after a finding of guilty upon a plea of guilty.

The court held that "regardless of the plea, the prosecution after findings of guilty may present evidence which is directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority." *Vickers*, 13 M.J. at 406.

R.C.M. 1001 resolves the issue by expressly authorizing the presentation of aggravation evidence after any "findings of guilty".

[24] *See, e.g.*, United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986); United States v. Hanes, 21 M.J. 647 (A.C.M.R. 1985); United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985). In *Harrod*, the Army Court of Military Review outlined its liberal sentencing philosophy as follows:

> [I]t is clear that in promulgating the … 1984 Manual … the President intended to greatly expand the types of information that could be presented to a court-martial during the adversarial presentencing proceeding … [W]e believe that military judges and court members are intended to have access to substantially the same amount of aggravating evidence during the presentencing procedure as is available to federal district judges in presentencing reports.

Harrod, 20 M.J. at 779. *But see*United States v. Wingart, 27 M.J. 128, 136 (C.M.A. 1988) ("A presentence report prepared by a probation officer for use by a Federal district judge in sentencing might well encompass information which would not be admissible in a court-martia l under R.C.M. 1001.")

[25] *See, e.g.*, R.C.M. 1001 analysis (the presentencing provisions are intended to permit "the presentation of much of the same information to the court-martial as would be contained in a presentence report, but it does so within the protections of an adversarial proceeding").

[26] *See generally* Fed. R. Crim. P. 32(c).

(1) service data relating to the accused taken from the charge sheet;

(2) 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;

(3) evidence of prior convictions, military or civilian;

(4) evidence of aggravation; and

(5) evidence of rehabilitative potential.[28]

All evidence offered by the trial counsel during the case in aggravation must be "pigeonholed" into one of the five enumerated categories.

These categories are further defined by the Manual,[29] department regulations,[30] and case law. Evidence offered from each of these categories must also be admissible under the Military Rules of Evidence.[31] Despite some dicta in case law to the contrary,[32] the Military Rules of Evidence are not relaxed for the Government during the case in aggravation.[33]

b. Data from the charge sheet. As a preliminary matter on sentencing the trial counsel provides the sentencing authority with the personal data on the charge sheet[34] concerning the accused's pay, time in service, and prior restraint.[35] The trial counsel should verify the accuracy of the data with the defense counsel.[36] While the normal practice is for trial counsel to read this data into the record,[37] a data sheet is also acceptable.[38]

c. Personnel records reflecting the past military efficiency, conduct, performance, and history of the accused. The admissibility of personnel records should be analyzed using the same three-step methodology generally applicable to the admission of other aggravation evidence.[39] First, the evidence must fit within one of the five categories of aggravation evidence enumerated in R.C.M. 1001(b). Second, the document must be in a form admissible under the Military Rules of Evidence. Third, the evidence must meet the Military Rule of Evidence 403 balancing test.[40]

R.C.M. 1001(b)(2) authorizes the admission of personnel records as aggravation evidence if: (1) they are offered in documentary form;[41] (2) they reflect the past military efficiency, conduct, performance, or history of the accused,[42] and (3) they are prepared and maintained in accordance with service regulations.[43]

Although the rule specifies "personnel records," documents do not have to actually be maintained in a personnel file to be admissible as aggravation.[44] The service secretaries have the authority to determine which personnel records are

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[27] R.C.M. 1001.

[28] R.C.M. 1001(a)(1)(A).

[29] *See generally* R.C.M. 1001(b).

[30] *See generally* AR 27–10, para. 5–2.

[31] Mil. R. Evid. 1101(a).

[32] *See, e.g.*, United States v. Martin, 20 M.J. 227 (C.M.A. 1985).

[33] Mil. R. Evid. 1101(c) provides that the rules evidence may be relaxed pursuant to R.C.M. 1001. R.C.M. 1001(c)(3) provides that the "military judge may, *with respect to matters in extenuation or mitigation* or both, relax the rules of evidence" (emphasis supplied). R.C.M. 1001(d) provides that *if* the rules of evidence are relaxed for the defense during the case in extenuation or mitigation, then the rules may be relaxed to the same degree during the prosecution case in rebuttal. Nowhere does R.C.M. 1001 authorize relaxation of the rules of evidence during the government case in aggravation.

[34] DD Form 458; MCM, 1984, app. 4.

[35] R.C.M. 1001(b)(1).

[36] The defense counsel may object to data which is materially inaccurate or incomplete. R.C.M. 1001(b)(1).

[37] DA Pam 27–9, para. 2–34 (1 May 1982) (C3, 15 Feb. 1989).

[38] R.C.M. 1001(b)(1) (the trial counsel, at the judge's discretion, may provide the data in the form of a written statement).

[39] *Seesupra* note 51.

[40] See United States v. Bennett, 28 M.J. 985 (A.F.C.M.R. 1989) ("Seasoned trial counsel probably will not press the outer limits of where no prosecutor has dared to go before by offering controversial evidence or expanded sentencing arguments until the dust settles a bit and the rules become more clear.").

[41] R.C.M. 1001(b)(2) provides that the "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" (emphasis added).

[42] R.C.M. 1001(b)(2) defines "personnel records of the accused" as "all those records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused.".

[43] *Id. See also* AR 27–10, para. 5–25.

[44] R.C.M. 1001(b)(2); AR 27–10, para. 5–25. *See,e.g.*, United States v. Green, 21 M.J. 633 (A.C.M.R. 1985) (finance records admissible); United States v. Shears, 27 M.J. 509 (A.C.M.R. 1988) (Unit Personnel/"SMIF" files admissible); United States v. Perry, 20 M.J. 1026 (A.C.M.R. 1985) (confinement file document admissible). *But see* United States v. Lund, 7 M.J. 903 (A.F.C.M.R. 1979); and United States v. Newbill, 4 M.J. 541 (A.F.C.M.R. 1977). In *Lund* the trial counsel introduced a letter which the accused's unit commander received from a noncommissioned officer. The letter alleged that the accused had been involved in misconduct and recommended action be taken against the accused. Although this letter was properly maintained in the records of the unit orderly room the Air Force Court of Military Review held that it should have been excluded from evidence. Without further analysis the court held that just because the letter was contained in an authorized file it was not necessarily a "personnel record" within the meaning and intent of para. 75*d*, MCM, 1969.

In *Newbill* the court held that an administrative discharge board packet was not a "personnel record"contemplated by Air Force regulations.

admissible.[45] Army Regulation 27-10 provides the following guidance for Army courts-martial:

> Personal data and character of prior service of the accused. Trial counsel may, in his or her discretion, present to the military judge (for use by the court-martial members or military judge sitting alone) copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations. Examples of personnel records that may be presented include—
>
> (1) DA Form 2 (Personnel Qualification Record—Part 1) and DA Form 2-1 (Personnel Qualification Record—Part 2).
>
> (2) Promotion, assignment, and qualification orders, if material.
>
> (3) Award orders and other citations and commendations.
>
> (4) Except for summarized records of proceedings under Article 15 (DA Form 2627-1), records of punishment under Article 15, UCMJ, from any file in which the record is properly maintained by regulation.
>
> (5) Written reprimands or admonitions required by regulation to be maintained in the MPRJ or OMPF of the accused.
>
> (6) Reductions for inefficiency or misconduct.
>
> (7) Bars to reenlistment.
>
> (8) Evidence of civilian convictions entered in official military files.
>
> (9) Officer and enlisted efficiency reports.
>
> (10) DA Form 3180 (Personnel Screening and Evaluation Record).

These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law or other regulation.[46] Such records may not, however, include DA Form 2627-1 (Summarized Record of Proceedings under Article 15, UCMJ).[47]

Prudent trial and defense counsel should do a complete review of all documents contained in the accused's personnel files and should not limit their investigation to the documents enumerated in AR 27-10."Other documents" not listed in AR 27-10 may be admissible in aggravation if they reflect the character of the accused's prior service and otherwise meet evidentiary foundation requirements.[48] Documents which are not admissible in aggravation, such as records of summarized article 15 or the accused's enlistment forms,[49] may nevertheless be a valuable source of information and

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[45] R.C.M. 1001(b)(2).

[46] The intent of the Army regulation is to be liberal in admitting personnel documents during sentencing. There is no specific limit as to the source of the record ("or located elsewhere"). The Army Court of Military Review has been liberal in interpreting this provision—for example in holding that documents contained in the restrictive fiche of the OMPF are admissible during sentencing. In United States v. Pace, CM 446150 (A.C.M.R. 28 June 1985) and United States v. Taylor, SPCM 19179 (A.C.M.R. 30 Jan. 1984) the court reasoned that the purpose of the restrictive fiche is to protect the soldier against adverse effects on favorable personnel actions at Department of the Army level. When a record, such as a record of nonjudicial punishment, is filed in the restrictive fiche *and* in the local unit file there is a regulatory intent that the document be available for future use in adverse disciplinary proceedings at unit level.

If a conflicting regulation makes a personnel document "confidential" by specifically restricting its use the document is not admissible as aggravation evidence. United States v. Cottle, 11 M.J. 572 (A.F.C.M.R. 1981) (information which is confidential under applicable drug abuse regulations cannot be admitted as aggravation evidence); United States v. Cruzado-Rodriquez, 9 M.J. 908 (A.F.C.M.R. 1980) (Air Force Form 1612, Notification of Drug-Abuse Information, showing that the accused entered a drug-abuse prevention program should not have been admitted on sentencing because of the confidentiality provisions of Dep't of Air Force Reg. No. 30–2, Social Action Programs, para. IIb (8 Nov. 1976)).

[47] AR 27–10, para. 5–25.

[48] *See, e.g.*, United States v. Haslam, CM 446000 (A.C.M.R. 26 Nov. 1984) (documents reflecting the accused's removal from the Personnel Reliability Program for recurrent use of marijuana are admissible as "other personnel documents").

[49] Summarized article 15 records are the only personnel documents specifically excluded by Army regulation. AR 27–10, para. 5–25; United States v. Carmack, SPCM 21072 (A.C.M.R. 18 June 1985).

Enlistment forms are not admissible as personnel documents because they don't reflect past *military*efficiency, conduct, performance, or history of the accused. United States v. Peyton, SPCM 19880 (A.C.M.R. 31 July 1984) (DD Form 1966/2–8 extract of Army Enlistment Application, which contained entries concerning the accused's preservice experimentation with marijuana and resulting discharge from the Air Force Delayed Entry Program was inadmissible as aggravation evidence); United States v. Honeycutt, 6 M.J. 751 (N.C.M.R. 1978) (a page from the accused's enlistment application showing that the accused was fined $50.00 for possession of marijuana while a juvenile was not admissible); United States v. Martin, 5 M.J. 888 (N.C.M.R. 1978) (enlistment records showing an enlistment waiver because of preservice drug use were not admissible.); United States v. Galloway, NMCM 76 1677 (N.C.M.R. 14 Sept. 1976) (Enlistment records showing an enlistment waiver because of preservice juvenile adjudications were not admissible because they did not reflect past military behavior).

In *Galloway* the court provided the following rationale for the military service limitation on the admissibility of personnel records:

> We also consider it appropriate that past derelictions, especially juvenile offenses, should not follow a member into military service. Once a member qualifies for entry, his past misdeeds should not be held against him and he should be able to start off with a clear slate. Unless … the circumstances constitute a proper matter of rebuttal, the conditions of enlistment would not appear to be relevant in a court-martial proceeding.

Galloway, slip op. at 3.

may contain information useful during the Government case in rebuttal.[50]

Because "personnel records" are not limited to documents contained in files officially designated as"personnel files," counsel should also examine other files such as the accused's finance records,[51] reenlistment records,[52] and confinement records.[53]

R.C.M. 1001(b)(2) only sanctions evidence in documentary form.[54] If a proffered document is incomplete or illegible the trial counsel can correct the deficiency or establish a foundation for the admissibility of the document by presenting the live testimony of witnesses who have firsthand knowledge about the document or the procedures used to generate the document.[55] The trial counsel must offer a document into evidence. The Government may not present evidence of the personnel action solely through the use of witness testimony.[56] Trial counsel should also ensure that copies of documents substituted in the record for originals used at trial are legible because the appellate courts must decide admissibility issues based on the authenticated record of trial.[57]

The primary Manual limitation on the admissibility of personnel documents is that the record introduced must be prepared and maintained in accordance with service regulations.[58] Document preparation has been challenged on three

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[50] Documents which are not admissible because they are defective or improperly maintained should also be obtained from the files in case the opportunity to use them as impeachment or rebuttal arises during the course of trial.

For a good example of how personnel documents can be effectively used for impeachment *see* United States v. Owens, 21 M.J. 117 (C.M.A. 1985) (trial counsel could impeach the accused's sworn testimony on the merits by cross-examining the accused about omissions from his or her sworn warrant officer application form).

For a good example of how otherwise inadmissible documents can become admissible in rebuttal *see Strong*, 17 M.J. 263 (C.M.A. 1984). In *Strong* a record of nonjudicial punishment which was inadmissible during aggravation because it was over 2 years old (in contravention of applicable Air Force regulations) nevertheless became admissible in rebuttal once the defense introduced evidence that he had received a good conduct medal and an honorable discharge during a prior enlistment. Although it is not entirely clear when the defense has opened the door to such rebuttal it is clearly admissible when the defense puts on directly contradictory testimony *e.g.*, the accused testifies"I've never received an Article 15" opens the door for the trial counsel to introduce evidence of an otherwise inadmissible article 15. The defense can't use the rules of evidence as a sword to put on false evidence. In *Strong* the court went further and admitted the nonjudicial punishment to rebut inferences created by the defense evidence. The defense evidence about receiving a good conduct medal and an honorable discharge during a prior enlistment created the impression that the accused's prior term of service was flawless. Evidence that the accused also received nonjudicial punishment during the prior enlistment was admitted to rebut this inference. *But see* United States v. Strong, 17 M.J. 263, 267 (C.M.A. 1984) (Everett, C.J., dissenting) (rebuttal by otherwise inadmissible nonjudicial punishment should be permitted only when the accused has falsely testified). *See also* United States v. Irvin, NMCM 84 3149 (N.M.C.M.R. 30 Oct. 1984) (trial counsel rebuttal could properly include references to nonjudicial punishment which failed to comply with the requirements of United States v. Booker).

[51] *See, e.g.*, United States v. Green, 21 M.J. 633 (A.C.M.R. 1985) (DD Form 139, Pay Adjustment Authorization, maintained in the accused's finance records qualified as a "personnel document" admissible under R.C.M. 1001(b)(2)). Other relevant documents contained in the finance records include records of nonjudicial punishment, pay allotments, and statements of charges.

[52] The reenlistment file may demonstrate that the accused's current desire to make the Army a career is of recent origin.

[53] *See, e.g.*, United States v. Perry, 20 M.J. 1026 (A.C.M.R. 1985) (DD Form 508, which documented an approved recommendation for disciplinary action against the accused for disobeying a lawful order while the accused was in pretrial confinement, was admissible as a personnel record reflecting past military conduct).

[54] R.C.M. 1001(b)(2) provides that"the trial counsel may obtain and introduce from the personnel records of the accused evidence of …"; United States v. Yong, 17 M.J. 671 (A.C.M.R. 1983). The trial counsel cannot prove the existence of records of nonjudicial punishment solely through the oral testimony of the company commander who imposed the punishment. The Manual limitation on the admissibility of personnel records to actual documents insures that the accused is fairly on notice regarding what can be used at trial.

But see United States v. Albritton, SPCM 18914 (A.C.M.R. 28 Dec. 1983). The trial counsel can prove the accused received nonjudicial punishment solely by oral testimony so long as that testimony is reliable and trustworthy. The "personnel record" could properly be established by the testimony of the commander who imposed the punishment.

"Documentary evidence" necessarily includes only enclosures or attachments which are maintained with the document in accordance with applicable regulations. United States v. Dalton, 19 M.J. 718 (A.F.C.M.R. 1984).

[55] United States v. Mack, 9 M.J. 300, 324 (C.M.A. 1980) (trial counsel must establish admissibility of the document through independent evidence). In determining the admissibility of a document the military trial judge is not limited to evidence admissible under the Military Rules of Evidence. Mil. R. Evid. 104(e). *But see* United States v. Donohue, 30 M.J. 734 (A.F.C.M.R. 1990) (Government seeks to introduce adverse document that does not comply with Air Force Regulation 111–1 requiring *evidence on the document or attached thereto* that accused received a copy and had an opportunity to respond. A.F.C.M.R. holds that the Government may not cure the defect with live testimony.). *See also* United States v. McGill, 15 M.J. 242 (C.M.A. 1983) (foundation for admissibility of record of nonjudicial punishment offered during prosecution case-in-rebuttal could not be established by CID witness who lacked firsthand knowledge about the nonjudicial punishment proceedings).

Trial counsel should not approach the accused ex parte in an attempt to have the accused cure defects in the documents. United States v. Sauer, 15 M.J. 113 (C.M.A. 1983). In *Sauer* the trial counsel wanted to introduce portions of the accused's service record which were incomplete because they lacked the accused's written acknowledgement of his substandard ratings. On the second day of the accused's court-martial the trial counsel contacted the accused ex parte and procured the entries necessary to complete the documents. The Court of Military Appeals held that the trial counsel's conduct impermissibly eroded the accused's right to counsel.

[56] *Compare* United States v. Yong, 17 M.J. 671 (A.C.M.R. 1983) (restricting evidence of personnel records to the presentation of documents contained in official files ensures that the accused is on notice of what evidence may be considered against him or her) *with* United States v. Albritton, SPCM 18914 (A.C.M.R. 28 Dec. 1983) (proving an article 15 through oral testimony alone was permissible so long as the testimony was reliable and established all necessary foundational requirements).

[57] *See, e.g.*, United States v. Haynes, 10 M.J. 694 (A.C.M.. 1981).

[58] R.C.M. 1001(b)(2); AR 27–10; para. 5–25. *See, e.g.*, United States v. Adams, CM 442178 (A.C.M.R. 24 Aug. 1984). Private First Class Adams was convicted at a rehearing held at Fort Leavenworth, Kansas. At sentencing the trial counsel introduced several reports of disciplinary infractions taken from the accused's correctional treatment file maintained at the United States Disciplinary Barracks where the accused had been confined since his original court-martial. The Court of Military Review held that it was error to admit this evidence over defense objection without some showing that these documents were prepared and maintained in accordance with service regulations.

grounds. First, that the official who took the underlying personnel action was incorrect in reaching the conclusion that the accused deserved adverse administrative action (for example, the accused did not deserve the letter of reprimand, or the accused was innocent of the charge for which nonjudicial punishment was issued). While the accused may deny they committed the underlying misconduct[59] the courts should not allow the accused to relitigate the issue during the court-martial sentencing proceeding.[60] Second, the defense counsel can challenge the procedures that were used to impose the personnel action. The courts will presume that procedural prerequisites for taking the personnel action were complied with absent some evidence to the contrary.[61] Evidence to the contrary may be apparent on the face of the document itself[62] or may be demonstrated through independent evidence.[63]

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[59] United States v. Mack, 9 M.J. 300, 323 (C.M.A. 1980) (after the prosecution introduces a record of nonjudicial punishment "the accused remains free to deny his guilt of the misconduct for which nonjudicial punishment was imposed or to offer whatever explanation for the offense he may choose"). *Cf.* United States v. Balcom, 20 M.J. 558 (A.C.M.R. 1985) In *Balcom* the Army Court of Military Review reassessed the sentence when post-trial evidence cast doubt on the validity of a record of nonjudicial punishment introduced in aggravation by the prosecution. At trial the trial counsel introduced a record of nonjudicial punishment alleging that the accused had wrongfully used marijuana. The evidentiary basis for the article 15 was the positive results of a urinalysis. During extenuation and mitigation the accused denied the misconduct and attempted to explain "the erroneous positive results." Three months after trial Army authorities issued a statement that the urinalysis "did not meet all scientific or legal requirements for use in disciplinary or administrative actions." The appellate court determined that under the circumstances sentence relief was appropriate.

[60] United States v. Hood, 16 M.J. 557 (A.C.M.R. 1983) Accused could not challenge letter of reprimand introduced during aggravation by attempting to sho that he did not commit the misconduct for hich the reprimand as issued. The accused had the opportunity to respond to the reprimand before it as given and the court could consider those ritten matters hich the accused submitted in rebuttal to the reprimand. Additionally, the accused may mitigate or explain the letter of reprimand during the defense case in extenuation and mitigation. Further litigation concerning the merits of the reprimand is too collateral.

[61] *See, e.g.*, United States v. Wheaton, 18 M.J. 159 (C.M.A. 1984); United States v. Covington, 10 M.J. 64 (C.M.A. 1980); United States v. Larkins, 21 M.J. 654 (A.C.M.R. 1985).

In *Wheaton* the trial counsel sought to admit a record of nonjudicial punishment which did not contain any written election regarding the right to consult with counsel or the right to demand trial by court-martial. The trial counsel did offer a rights advice form which was used to inform the accused that he had the right to consult with counsel and the right to demand trial by court-martial. The court concluded that"if an accused is given written advice that he is entitled to consult counsel, then it can be presumed that counsel was made available to him. A subsidiary presumption is that, if the right to counsel was not exercised, the accused made an informed decision not to exercise the right." *Wheaton*, 18 M.J. at 160. This same type of presumption of regularity was applied to the right to demand trial by court-martial. "[I]f nonjudicial punishment was imposed after the accused was advised of his right to trial by court-martial, he must have decided not to exercise that right."

Wheaton, 18 M.J. at 161.

In *Covington* the court held that minimum due process necessary for a proper vacation of suspended nonjudicial punishment must include notice of the basis for the proposed vacation and an opportunity for the respondent to reply. The trial counsel offered documentary evidence that the accused had received a vacation of suspended nonjudicial punishment. Although the document (DA Form 2627) did not indicate whether any due process was afforded, the court presumed that the vacation was done properly.

Finally, in *Larkins* the record of non judicial punishment offered at trial failed to include matters submitted on appeal. The court took the presumption of regularity one step further by presuming not only that the commander and judge advocate did their jobs properly in considering the matters submitted but they also presumed that since the appeal was denied the matters submitted must have been of limited significance.

[62] *Compare* United States v. Moan, SPCM 21582 (A.C.M.R. 28 Feb. 1986) *with* United States v. Goldring, CM 447817 (A.C.M.R. 28 Feb. 1986).

In *Moan* the trial counsel introduced a DA Form 2627, Record of Proceedings under Article 15, UCMJ, which indicated that the accused elected not to appeal his punishment. Contrary to clear regulatory requirements the election not to appeal was dated 1 day before punishment was actually imposed. Although this discrepancy may actually have been a clerical mistake in dating the form the Government could not rely on a presumption of regularity in establishing that the disciplinary action was taken in accordance with service regulations.

In *Goldring* the DA Form 2627 indicated that the accused desired to appeal and intended to submit matters in support of the appeal. The document introduced at trial did not contain any attached matters submitted on appeal and it indicated that the accused's appeal was denied 3 days after punishment was imposed. The court held that even though the regulation afforded the accused 5 days to submit an appeal the fact that the appeal was denied before the full 5 days had elapsed was not an error which would deprive the document of its presumption of regularity. Instead the court presumed the accused submitted matters early and the appellate authority duly considered the appellate submissions before denying the appeal.

The most common deficiencies apparent on the face of the document are omissions where required entries or signatures are supposed to be made. *See, e.g.*, United States v. Dyke, 16 M.J. 426 (C.M.A. 1983); United States v. Blair, 10 M.J. 54 (C.M.A. 1980); United States v. Guerrero, 10 M.J. 52 (C.M.A. 1980); United States v. Carmans, 10 M.J. 50 (C.M.A. 1980); United States v. Burl, 10 M.J. 48 (C.M.A. 1980); United States v. Cross, 10 M.J. 34 (C.M.A. 1980); United States v. Mack, 9 M.J. 300 (C.M.A. 1980); United States v. Haynes, 10 M.J. 694 (A.C.M.R. 1981).

[63] The accused is the most logical source of independent evidence concerning procedures used to impose adverse personnel actions. United States v. Mack, 9 M.J. 30, 323 (C.M.A. 198) (even if the personnel document is perfect on its face the defense can present independent evidence, such as the testimony of the accused, to persuade the court that proper regulatory procedures were not followed).

The independent evidence may come before the court in the form of inconsistent documentary entries. *See, e.g.*, United States v. Kline, 14 M.J. 64 (C.M.A. 1982). In*Kline* the trial counsel introduced the "Enlisted Performance" portion of the accused's naval service record. This documentary evidence reflecting substandard performance was complete and regular on its face. The trial counsel also introduced other exhibits from the service record including sections where specific entries were required whenever a sailor received adverse ratings. These additional documents did not contain the required entries. The court held that these additional documents were inadmissible because of their facial deficiencies *and* they negated the presumption of regularity which otherwise would have been afforded the "Enlisted Performance" document. *Kline*, 14 M.J. at 66.

Personnel records are inadmissible due to procedural irregularity if the administrative action was taken solely to increase the court-martial sentence rather than for a legitimate regulatory purpose.[64] They are also inadmissible if the

[64] United States v. Williams, 27 M.J. 529 (A.F.C.M.R. 1988) (error for military judge to grant a Government delay to process a letter of reprimand written specifically for aggravation evidence); United States v. Boles, 11 M.J. 195 (C.M.A. 1981) (Administrative reprimand hurriedly prepared specifically for use in a court-martial sentencing proceeding violated applicable regulatory provisions which defined reprimands as"corrective management tools"); United States v. Brown, 11 M.J. 263 (C.M.A. 1981) (where a record of conviction was inadmissible because it was not "final" the trial counsel could not introduce a bar to reenlistment referencing that conviction; allowing such backdoor circumventions of specific proscriptions on the admissibility of evidence in a court-martial "would be to invite the distortion and manipulation of legitimate administrative record-keeping functions"); United States v. Hill, 13 M.J. 948 (A.F.C.M.R. 1982) (Letter of Reprimand given for bad check offenses was inadmissible on aggravation; the court concluded that the reprimand did not perform any legitimate correction or management function because the subject offenses occurred 60 days before—at the same time as other bad check offenses which were now the basis of the accused's court-martial charges); United States v. Dodds, 11 M.J. 520, 522 n.3 (A.F.C.M.R. 1981) ("The fact that a matter is properly entered into the accused's personnel records ... does not necessarily mean that the entry is also admissible in a court-martial. The military judge should exercise sound discretion in electing whether or not to admit such material ... For example, matters may, on balance, seem too remote to be probative; appear to have been 'manufactured', after the accuser had knowledge of the offenses charged by those zealous to portray the accused as unfit; or be so insignificant as to suggest that the accused is not receiving even handed treatment."). *Accord* United States v. Sauer, 15 M.J. 113 (C.M.A. 1983). In *Sauer* the trial counsel wanted to introduce portions of the accused's service record reflecting sub-standard duty performance during two different periods of time. The service records were incomplete because the accused's written acknowledgement of these ratings was absent from the document. On the second day of the accused's court-martial the trial counsel contacted the accused ex parte and procured the entries necessary to make the document admissible. The Court of Military Appeals condemned the trial counsel's conduct in part because of their "disapproval of the deliberate preparation of administrative records to influence a sentence in a court-martial." *Sauer*, 15 M.J. at 118. *Cf.* United States v. Hood, 16 M.J. 557 (A.F.C.M.R. 1983); United States v. Hagy, 12 M.J. 739 (A.F.C.M.R. 1981). In*Hood,* the accused received a letter of reprimand for writing a letter to the spouse of one of the Government witnesses. The letter written by the accused alleged that the witness had committed adultery and contracted a venereal disease. The Air Force Court of Military Review affirmed the principle that the letter of reprimand would be inadmissible if it was prepared*solely* to influence the accused's sentence at his pending court-martial but refused to adopt a mechanical approach in determining the actual purpose of the administrative action. The court specifically rejected the argument that all disciplinary actions taken after preferral of charges should be automatically excluded. Instead the court looked at the facts and determined that the commander's action fulfilled the regulatory corrective and management purpose by putting the accused on notice about his misconduct and informing him that future misconduct would be dealt with more severely. In *Hagy*, the court held that filing a letter of reprimand on the day of trial did not affect admissibility so long as the subject matter of the letter was appropriate and the reprimand served a legitimate disciplinary purpose as defined by applicable regulations.

accused was denied a substantial procedural right affecting the validity of the administrative process.[65]

Finally, the defense counsel may allege that the document itself was not prepared in accordance with applicable regulations.[66] A document which has no irregularities apparent on its face carries with it a presumption that the document was prepared in accordance with procedures required by applicable regulations.[67] This presumption is lost

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[65] The line between a substantial procedural right and a minor procedural defect is not always easy to determine. The courts provide many specific examples but no real standards whereby a case of first impression could be judged. If the procedural defect relates directly to regulatory based due process rights such as notice of the contemplated action, opportunity to respond, opportunity to consult with counsel, opportunity to be represented by counsel, or opportunity to appeal then the defect is substantial and the personnel record recording that deficient personnel action is inadmissible. On the other hand, defects in recording what occurred at the proceeding which are superfluous to traditional due process rights are generally not going to make the personnel record inadmissible unless the reliability or validity of the document itself is called into question. Although these standards have never been specifically articulated by the appellate courts an analysis of cases dealing with records of nonjudicial punishment leads to these conclusions.

As already indicated, there is a presumption that procedures used to administer a personnel action, such as imposition of nonjudicial punishment, were proper absent some evidence to the contrary. This contrary evidence can consist of defense testimony concerning irregularities, inconsistencies apparent from conflicting documents, or as is most often the case, omissions and inaccuracies concerning entries made on the personnel document itself. Records of nonjudicial punishment which contain the following deficiencies are inadmissible because they indicate the accused was denied a substantial procedural right.

(1) The block on DA Form 2627 which indicates whether trial by court-martial is or is not demanded is not checked. United States v. Mack, 9 M.J. 300, 324 (C.M.A. 1980); United States v. Cross, 10 M.J. 34 (C.M.A. 1980); United States v. Coleman, SPCM 18289 (A.C.M.R. 5 Aug. 1983).

But see United States v. Wheaton, 18 M.J. 159 (C.M.A. 1984) for a discussion how this defect can be cured by presenting evidence that advice concerning the right was given to the accused.

(2) The DA Form 2627 fails to inform the soldiers that they have the right to consult with counsel prior to determining whether to demand trial by court-martial. United States v. Mack, 9 M.J. 300 (C.M.A. 1981).

(3) The DA Form 2627 fails to properly apprise the soldier how to exercise the right to consult with counsel because no location of counsel or time to consult is designated on the form. United States v. Mack, 9 M.J. 300, 321 (C.M.A. 1980) (the soldier must be supplied enough information about how to exercise the right to consult with counsel to make the right meaningful; if the form itself fails to supply the information the trial counsel must present other evidence to show the accused had a reasonable opportunity to consult with counsel and either exercised or voluntarily waived the right).

(4) The block on DA Form 2627 which indicates whether or not the accused intends to appeal is not checked. United States v. Mack, 9 M.J. 300, 324 (C.M.A. 1980); United States v. Rabago, SPCM 20782 (A.C.M.R. 4 Oct. 1984).

(5) The DA Form 2627 indicates that the accused appealed the punishment but there is no indication on the form what action was taken on the appeal. United States v. Burl, 10 M.J. 48 (C.M.A. 1980); United States v. Mack, 9 M.J. 300, 324 (C.M.A. 1980).

(6) The DA Form 2627 indicates that the accused appealed the punishment and the punishment imposed was of a type requiring legal review but there is no indication on the form that the matter was referred to a judge advocate for review. United States v. Guerrero, 10 M.J. 52 (C.M.A. 1980); United States v. Mack, 9 M.J. 300, 324 (C.M.A. 1980).

(7) The DA Form 2627 indicated that the accused elected not to appeal the imposition of the nonjudicial punishment before the punishment was ever actually imposed. United States v. Moan, SPCM 21582 (A.C.M.R. 28 Feb. 1986).

The clear trend of the courts is to attempt to preserve admissibility of the personnel record whenever possible. The following cases held that records of nonjudicial punishment were admissible even though there was evidence of some procedural irregularity.

(1) The DA Form 2627 failed to state the alleged offense in a form which would be legally sufficient for a specification preferred as a court-martial charge. United States v. Nichols, 13 M.J. 154 (C.M.A. 1982) (article 15 for"possession of a controlled substance" was not too indefinite to provide the accused with adequate notice of the alleged offense); United States v. Atchison, 13 M.J. 798 (A.C.M.R. 1982) (article 15 for "failure to repair" was adequate despite the fact the place of duty was not identified with any precision); United States v. Eberhardt, 13 M.J. 772 (A.C.M.R. 1982) (article 15 for absence without authority was admissible even though the allegation on the DA Form 2627 omitted the words "without authority"and failed to specify the location of the accused's place of duty).

(2) The copy of the DA Form 2627 procured from the Military Personnel Record Jacket (MPRJ) and introduced at trial was a reproduced duplicate of the original rather than the designated carbon copy which the regulation specified for filing in the MPRJ. United States v. Moan, SPCM 21582 (A.C.M.R. 28 Feb. 1986) The Army Court of Military Review took judicial notice of the fact that many units substitute duplicate originals for carbon copies because they are more legible. The court went on to opine that this was the type of minor deviation from regulatory procedures which does not cast doubt on the reliability of the procedures used to impose nonjudicial punishment. See also United States v. King, CM 447976 (A.C.M.R. 19 Mar. 1986); United States v. Hufnagel, SPCM 21479 (A.C.M.R. 20 Nov. 1985).

(3) The DA Form 2627 failed to include the accused's acknowledgement of the action taken on his appeal. United States v. Carmans, 10 M.J. 50 (C.M.A. 1980).

(4) The DA Form 2627 failed to indicate how much time the accused had to submit an appeal. United States v. Blair, 10 M.J. 54 (C.M.A. 1980).

(5) The DA Form 2627 failed to indicate whether the accused requested an open hearing. United States v. Haynes, 10 M.J. 694, 697 (A.C.M.R. 1981) (since an open hearing is not an absolute procedural right and can properly be denied by the commander it is not a material entry on the DA Form 2627; putting the accused's election on the document is merely a way to facilitate making the request).

(6) The DA Form 2627 failed to indicate whether the accused requested the presence of a spokesman. United States v. Haynes, 10 M.J. 694, 697 n.3 (A.C.M.R. 1981) (the DA Form 2627 is merely a vehicle by which the accused can request a spokesman; there is no due process right to have a spokesman present).

(7) The DA Form 2627 failed to indicate whether the accused intended to present matters in defense and/or extenuation. United States v. Haynes, 10 M.J. 694, 697 n.3 (A.C.M.R. 1981) (what the soldier actually presents at the hearing is not controlled by entries on the DA Form 2627; the right to present matters for consideration is exercised at the hearing, not on the form).

(8) The DA Form 2627 failed to include the date the accused was notified of the intent to impose nonjudicial punishment. United States v. Haynes, 10 M.J. 694, 697 (A.C.M.R. 1981) (absent some other indication of impropriety or some specific defense allegation that the time between notification and imposition of punishment deprived the soldier of procedural rights, the date of notification is immaterial).

[66] Distinguish this objection from an objection that improper procedures were followed in implementing the adverse administrative action. While defects in the document preparation and defects in administrative procedure are usually interrelated, they are not necessarily one in the same. It is possible that one official properly took the action but a second official improperly recorded the action on the personnel documents

See, e.g., United States v. Moan, SPCM 21582 (A.C.M.R. 28 Feb. 1986). In *Moan* the DA Form 2627 indicated that the accused elected not to appeal the imposition of nonjudicial punishment the day before the punishment was ever actually imposed. The trial judge presumed that a clerical mistake was made in dating the form and put the burden on the accused to demonstrate that proper administrative procedures were not used. The Army Court of Military Review held that the trial judge's presumption was improper. The court should presume that the document was prepared correctly. Because this presumption was unrebutted by other evidence at trial the document evidenced an irregularity in the procedures used to complete the nonjudicial punishment proceeding.

[67] *See, e.g.*, United States v. Steinruck, 11 M.J. 322 (C.M.A. 1981) (DA Form 2627 entitled to a presumption of regularity even where a required signature was illegible but still visible).

when required entries on the document are omitted, incomplete, illegible, or inaccurate;[68] or when the wrong person prepared the document.[69] The proffered document should be excluded if the irregularity undermines confidence in the reliability of the document or indicates that required procedures were not followed in taking the personnel action.[70] If the irregularity is minor or involves a clerical error in recording matters, the document should be admitted.[71]

If the personnel document is regular on its face and there is no other evidence of irregularity before the court, the defense counsel must object with specificity at trial or appellate review of admissibility is waived.[72] If the document is irregular on its face or other evidence before the court makes it apparent the document is defective, defense counsel's failure to object will normally waive appellate review[73] although the trial judge's failure to sua sponte exclude the

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[68] *See, e.g.*, United States v. Dyke, 16 M.J. 426 (C.M.A. 1983); United States v. Cross, 10 M.J. 34 (C.M.A. 1980); United States v. Negrone, 9 M.J. 171 (C.M.A. 1980); United States v. Brown, CM 442140 (A.C.M.R. 19 Oct. 1984). These cases involved DA Form 2627 and the omission of signatures, dates, and checked blocks. *See also* United States v. Stewart, 12 M.J. 143 (C.M.A. 1981) (lack of legible commander signature on vacation of suspension of nonudicial punishment); United States v. Messer, SPCM 21203 (A.C.M.R. 17 June 1985) (failure to introduce continuation sheet with the DA Form 2627); United States v. Wilson, SPCM 20126 (A.C.M.R. 13 Apr. 1984) (record of supplementary action vacating suspension of nonudicial punishment contained no check in block indicating the accused was afforded an opportunity to respond at the vacation proceeding).

[69] *See, e.g.*, United States v. Johnson, 14 M.J. 566 (N.M.C.M.R. 1982) (improper for the trial counsel to fill in missing information).

[70] *See* United States v. Wheaton, 18 M.J. 159 (C.M.A. 1984).

[71] *Id. See also*United States v. Casey, SPCM 21905 (A.C.M.R. 13 Jan. 86). In *Casey* the trial judge sustained a defense objection to a DA Form 2627 because the grade of the commander was missing from the block containing his name and organization. Although no issue involving sentencing was raised on appeal the Army Court of Military Review opined *in dicta* that the military judge erroneously sustained the objection, elevating form over substance.

[72] Mil. R. Evid. 103 (defense counsel must make a"timely objection" with "the specific ground" therefor). R.C.M. 1001(b)(2) ("objections not asserted are waived"); United States v. Kline, 14 M.J. 64, 66 (C.M.A. 1982).

The courts sometime reach this result without explaining how or why waiver applies. The Military Rules of Evidence and the 1984 Manual for Courts-Martial clearly contemplate waiver of some objections when they are not raised at trial. If there are no irregularities apparent on the face of a document it makes sense to put the burden on the defense to discover defects during their preparation of the case. Waiver of appellate review is particularly appropriate when the defect raised for the first time on appeal is one which the trial counsel could have explained or cured at trial given adequate notice.

See United States v. Gordon, 10 M.J. 278 (C.M.A. 1981) (a record of nonjudicial punishment introduced during aggravation allegedly was maintained at the Air Force Manpower and Personnel Center rather than the Local Consolidated Base Personnel Office—as required by Air Force regulations; failure to object at trial waived the issue on appeal.); United States v. McLemore, 10 M.J. 238 (C.M.A. 1981) In *McLemore* the trial counsel introduced evidence of nonjudicial punishment which included advice concerning the accused's right to consult with counsel but did not contain any entry indicating whether or not the accused demanded trial by court-martial. The court held that this issue was waived by defense counsel's failure to object at trial. The court distinguished this case from other cases where a form which contained an unchecked block was introduced at trial. When the form contains an unchecked block the trial judge is on notice that there are defects in the preparation of the document and possible defects in the procedures used to administer the nonjudicial punishment. Here the document simply failed to contain all the information necessary to establish a basis for admissibility. United States v. Larkins, 21 M.J. 654 (A.C.M.R. 1985) (the DA Form 2627 did not contain matters submitted on appeal; since this is not a defect on the face of the document the issue was waived by the defense counsel's failure to object at trial); United States v. Brown, CM 442140 (A.C.M.R. 19 Oct. 1984) (defense counsel's failure to object a t trial, to three records of nonjudicial punishment waived appellate review; if there had been an objection at trial, the Government may have been able to present evidence to establish admissibility).

When there has been an objection to the document at trial, the appellate courts will review admissibility only on the basis of the specific grounds for objection raised at trial. *See, e.g.*, United States v. Goldring, CM 447817 (A.C.M.R. 28 Feb. 1986) In *Goldring* the trial counsel introduced a record of nonjudicial punishment which indicated the accused would submit matters on appeal within 5 days. The document further indicated that the appeal was denied only 3 days after punishment was imposed and no matters on appeal were attached to the DA Form 2627. At trial the defense counsel objected that the document offered into evidence was incomplete. The appellate court reviewed admissibility based on the alleged lack of completeness but held that any objection concerning an early denial of the appeal was waived by failure to cite that as a specific ground for objection at trial. United States v. Sager, SPCM 21627 (A.C.M.R. 18 Nov. 1985). In *Sager* the trial counsel introduced two records of nonjudicial punishment which were filed in the unit file but contained no copy number. The defense counsel objected that without a copy number it was impossible to tell whether the unit document custodian was the proper official to authenticate the documents. The appellate court rejected this argument but noted that one of the article 15 records was supposed to have been filed in the accused's performance fiche of the OMPF and should not have been maintained in the unit file at all. The court went on to hold that this defect was not a specified ground for objection at trial and was waived on appeal. United States v. Davis, CM 443665 (A.C.M.R. 17 Aug. 1983) In *Davis* defense counsel successfully objected at trial to a bar to reenlistment document which contained a reference to an inadmissible nonjudicial punishment. The illegal reference was redacted. On appeal the defense attempted to establish that the document was inadmissible because regulatory procedures were not followed in reviewing the document every 6 months. Failure to object at trial with specificity waived the objection. United States v. Easley, CM 442776 (A.C.M.R. 25 May 1983) In *Easley* defense counsel objected at trial to an entry on the DA Form 2-1 indicating "SM NOT RECOMMENDED FOR FURTHER SERVICE." Under applicable regulations this entry was proper if it was made pursuant to a proper bar to reenlistment. On appeal the defense contended for the first time that the entry was improper because the accused's bar to reenlistment had not been reviewed by the commander 6 months after it was imposed. The court held that his objection was waived by the defense counsel's failure to specify that ground for objection at trial where the matter could have been clarified through examination of the basic "Bar to Re-enlistment" document.

Accord United States v. Stanley, SPCM 21586 (A.C.M.R. 23 Oct. 1985) In *Stanley* trial counsel introduced a Bar to Re-enlistment, DA Form 4126-R, which improperly referenced an article 15 for wrongful use of marijuana. The defense counsel objected at trial citing the best evidence rule as the only ground for objection. The appellate court issued the following warning:

> [W]e could possibly consider this waiver of any other objection. Due to the context of this objection at trial, we will look at this in the light most favorable to appellant. However, we caution counsel about the need to state the specific ground or grounds for an objection and not rely upon the ground or grounds being apparent from the context of the transcript.

Stanley, slip op. at n.1.

[73] United States v. Larkins, 21 M.J. 654 (A.C.M.R. 1985) (defense counsel's failure to object at trial to an allegedly incomplete DA Form 2627 waived the issue on appeal); United States v. Johnson, SPCM 21232 (A.C.M.R. 16 Aug. 1985) (defense counsel's failure to object at trial to a Bar to Re-enlistment Certificate, DA Form 4126-R, which was reproduced only on one side waived the issue on appeal); United States v. Peyton, SPCM 19880 (A.C.M.R. 31 July 1984) (failure to object to an otherwise inadmissible enlistment document reflecting preservice drug experimentation waived the issue on appeal); United States v. Plissak, 15 M.J. 767 (A.F.C.M.R. 1983) (defense counsel's failure to object to letter of reprimand waived any error in its admission); United States v. McCullar, ACM S25989 (A.F.C.M.R. 1 Nov. 1983) (failure to object to record of nonjudicial punishment erroneously maintained in files longer than 2 years waived the objection on appeal).

evidence may constitute plain error.[74]

It is important for counsel to review the accused's personnel records as soon as possible. If documents in the local file are incomplete, illegible, or inaccurate, admissibility may be salvaged by getting a copy from another source,[75] by having the proponent of the document correct the defect, or by getting the defense to waive objections. If a document with irregularities on its face is offered, defense counsel may affirmatively waive all objections on the record. This avoids the possibility of having the appellate courts invoke the plain error rule.[76] Defense counsel should not waive such objection unless it is to the advantage of the client to do so.

If the personnel document is properly prepared, the next step is to ask whether the document is properly maintained in accordance with applicable regulations. If the document is not properly filed in a system of"personnel records" it is not admissible under R.C.M. 1001(b)(2).[77] Absent some evidence to the contrary, personnel documents are presumed to be maintained in accordance with regulations.[78]

Once it is determined that the offered personnel record fits within one of the enumerated categories of aggravation evidence in R.C.M. 1001(b), counsel should then ensure that the document offered into evidence is in a form admissible under the Military Rules of Evidence. Because the rules of evidence are not relaxed during the case in aggravation,[79] the document must be properly authenticated[80] and must fit within one of the recognized hearsay

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[74] Mil. R. Evid. 103 provides that:

> Error may not be predicated upon a ruling which admits … evidence unless the ruling materially prejudices a substantial right of a party, and … a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context … Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

In *United States v. Kline*, 14 M.J. 64 (C.M.A. 1982) the court held that the trial judge was obligated sua sponte to exclude a document as inadmissible hearsay where the evidence at trial put him on notice that there were procedural irregularities in preparing the document. Although *Kline* predated adoption of the Military Rules of Evidence, the same result is reached under the Rules if the error materially prejudiced substantial rights of the accused and admission of the document was"plain error." Trial counsel have an obligation to protect the record of trial but not every unobjected to error will result in appellate relief. Mil. R. Evid. 103 contemplates a two part test: (1) the error must be obvious based on the evidence introduced at trial and (2) the accused must have been substantially prejudiced. *See* United States v. Dyke, 16 M.J. 426 (C.M.A. 1983) (military judge should have excluded a record of nonjudicial punishment on his own motion where the document was a significant factor on sentencing and the document admitted at trial did not contain the signature of the commander indicating he advised the accused of his rights; the signature of the accused indicating whether he demanded trial by court-martial; the signature of the commander attesting that punishment was imposed; or the signature of the accused indicating his election regarding an appeal). *See also* United States v. James, CM 443585 (A.C.M.R. 27 Dec. 1983) (plain error to admit facially illegible and incomplete article 15); United States v. Calin, 11 M.J. 722 (A.F.C.M.R. 1981) (plain error to admit evidence that the accused "pled guilty to theft in state court" where there was no evidence that the information came from any personnel record maintained in accordance with service regulations).

In determining whether the accused was prejudiced by the admission of an obviously defective personnel document, the appellate courts look at a variety of factors to include the severity of the sentence adjudged, the sentence limitation agreed to in a pretrial agreement, the nature of the uncharged misconduct reflected in the personnel document, the quantity and quality of other aggravation evidence, and the emphasis placed on the personnel document by the trial counsel during argument or the military judge during instructions. *See, e.g.*, United States v. Dyke, 16 M.J. 426 (C.M.A. 1983) (trial counsel's reliance on the defective article 15 during sentencing argument was an indication that admission of the document prejudiced the accused); United States v. McCullar, ACM S25989 (A.F.C.M.R. 1 Nov. 1983) (not plain error to admit defective article 15 because proper admission of two other records of nonjudicial punishment and three letters of reprimand mitigated impact of inadmissible article 15 on sentence adjudged); United States v. Harms, ACM S26449 (A.F.C.M.R. 3 Oct. 1984) (not plain error to admit defective article 15 for "failing a dormitory room inspection" where the misconduct involved was insignificant compared to the drug distribution offenses which were the basis for the court-martial conviction); United States v. Beaudion, 11 M.J. 838 (A.C.M.R. 1981) (not plain error to admit defective article 15 where there was no miscarriage of justice, no impugnment of the court's integrity, and no denial of the accused's fundamental rights).

Compare United States v. Bolden, 16 M.J. 722 (A.F.C.M.R. 1983) (not plain error to admit article 15 over 2 years old where article 15 was for failure to repair and disobeying an order to empty an ashtray but the accused stood convicted of drug offenses at the court-martial) *with* United States v. Yarbrough, 15 M.J. 569 (A.F.C.M.R. 1982) (plain error to admit article 15 over 2 years old where the article 15 and the court-martial conviction were both for drug offenses. There was substantial risk that the accused was punished for a course of conduct involving drugs).

[75] For example, records of nonjudicial punishment may be filed in the accused's personnel or finance records.

[76] Appellate courts have held plain error when the defense counsel failed to object to a document after the military judge asked whether there was any objection, but none of the cases has held plain error when a specific defect was brought to the defense counsel's attention and objection was specifically waived on the record.

[77] *See, e.g.*, United States v. Yong, 17 M.J. 671 (A.C.M.R. 1983) (two article 15 records maintained by the company clerk in the company files were not admissible because they were not maintained in accordance with applicable regulations); United States v. Rust, SPCM 19017 (A.C.M.R. 14 Oct. 1983) (the trial counsel failed to affirmatively demonstrate that a record of nonjudicial punishment was maintained in compliance with applicable military regulations concerning record keeping when matters in extenuation and mitigation were not attached to the copy of the document introduced at trial); United States v. Elrod, 18 M.J. 692 (A.F.C.M.R. 1984) (article 15 filed locally at the Office of the Staff Judge Advocate was not maintained in accordance with applicable Air Force regulations); United States v. Bertalan, 18 M.J. 501 (A.F.C.M.R. 1984) (records of nonjudicial punishment were not admissible where the copy introduced at trial came from a file not authorized by Air Force regulations); United States v. Garner, ACM 24019 (A.F.C.M.R. 9 Dec. 1983) (error to admit a 7-year-old article 15 when Air Force regulations only authorized admission of article 15's which were less than 2 years old).

But see United States v. Shears, 27 M.J. 509 (A.C.M.R. 1988) (soldier's information files/"SMIF" can be the source of presentencing information if properly maintained and authenticated).

[78] *See, e.g.*, United States v. Haslam, CM 446000 (A.C.M.R. 26 Nov. 1984) (there was a presumption of regularity that Personnel Reliability Program information was properly maintained in the accused's personnel file in accordance with applicable regulations).

But see United States v. Adams, CM 442178 (A.C.M.R. 24 Aug. 1984) In *Adams* the trial counsel introduced records of disciplinary infractions from the accused's correctional treatment file at the United States Disciplinary Barracks. The defense counsel objected that there was no evidence these files were maintained in accordance with applicable regulations. The court held that once the defense objected, the Government had to affirmatively show that the proffered documents were maintained in accordance with regulations.

[79] Mil. R. Evid. 1101 (Military Rules of Evidence apply to all aspects of the court-martial except those areas specifically excluded by the Rule; Rule does not exempt the presentencing case in aggravation); United States v. Elrod, 18 M.J. 692 (A.F.C.M.R. 1984) ("There is no authority to relax the rules of evidence as to presentencing matters initially offered by the prosecution").

[80] Mil. R. Evid. sec. IX. *See, e.g.*, United States v. Bertalan, 18 M.J. 501 (A.F.C.M.R. 1984) (punishment endorsements evidencing nonjudicial punishment where inadmissible where they lacked proper authentication).

exceptions of Military Rule of Evidence 803.[81] Personnel records can be properly authenticated by testimony of a witness who has personal knowledge that the document came from personnel records[82] or by an attesting certificate of the record's custodian.[83]

Personnel records are admissible as hearsay exceptions under either Military Rule of Evidence 803(6), records of regularly conducted activity,[84] or Military Rule of Evidence 803(8), public records and reports. The trial counsel must lay foundational prerequisites.[85]

Finally, even if a personnel record fits within R.C.M. 1001(b)(2) and is in a form admissible under the Military Rules of Evidence the trial judge has broad discretion to exclude the evidence by applying the balancing test of Military Rule of Evidence 403.[86]

Records of nonjudicial punishment are admissible during the case in aggravation as "personnel records" subject to

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[81] Mil. R. Evid. 802 (hearsay is not admissible except as otherwise provided by the rules of evidence or by any Act of Congress applicable in trials by court-martial).

[82] Mil. R. Evid. 901(b)(1) (authentication can be made by the testimony of a witness who has personal knowledge that a matter is what it is claimed to be).

[83] Technically there are two different ways to support authentication by an attesting certificate depending whether the document offered is an original or a copy. If the trial counsel offers the original of the document, Mil. R. Evid. 902(4a) requires only that the document be accompanied by an attesting certificate from the custodian of the record. The attesting certificate itself requires no further authentication and need not be under seal. In practice this method of authentication should apply to duplicates of originals so long as there is no genuine question raised about the authenticity of the original. *See* Mil. R. Evid. 1001(4) (definition of "duplicate"); Mil. R. Evid. 1003 (admissibility of duplicates).

A literal reading of Mil. R. Evid. 902 and Mil. R. Evid. 1003 would lead to a different analysis for admission of duplicates (or copies) if a genuine question is raised concerning authenticity. A copy of personnel records can be authenticated by a certificate of the custodian pursuant to Mil. R. Evid. 1001(4). Mil. R. Evid. 1001(4) would require the attesting certificate to be accompanied by a certification under seal that the record custodian has official capacity and has placed a genuine signature on the attesting certificate. Mil. R. Evid. 902(2).

See United States v. Jaramillio, 1 3 M.J. 782 (A.C.M.R. 1982) (authenticating certificate was defective where it was prepared for the signature of a captain who was the actual custodian of the record but instead was signed by a warrant officer whose duty position and relationship to the document were not indicated); United States v. Elrod, 18 M.J. 692 (A.F.C.M.R. 1984) (article 15 filed at the Air Force Manpower and Personnel Center could not be proven by introducing a copy filed locally which was accompanied by a certification from the local record custodian—that it was a true copy of the original forwarded for inclusion in the accused's personnel records—combined with an electronic message from the Air Force Manpower and Personnel Center verifying that the original of the article 15 was filed in the accused's Master Personnel File).

[84] Mil. R. Evid. 803(6) provides that "records of regularly conducted activity" are admissible as exceptions to the hearsay rule even though the declarant is available as a witness. "Records of regularly conducted activity" are defined as—memorandums, reports, re cords, or data compilations, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The rule lists personnel accountability documents, service records, officer and enlisted qualification records, and unit personnel diaries as some of the documents admissible under this exception.

See, e.g., United States v. Simon, CM 447573 (A.C.M.R. 23 May 1986) in which trial counsel introduced a Department of Defense Investigative Service file extract indicating "records checked at X court showed the accused had a civilian conviction for armed robbery." The court held that this document failed to satisfy Mil. R. Evid. 803(6) because it lacked indicia of reliability and should have been excluded as inadmissible hearsay.

Mil. R. Evid. 803(8) provides that"public records and reports" are admissible as exceptions to the hearsay rule even though the declarant is available as a witness. "Public records and reports" are defined as follows:

> Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made 'pursuant to authority g ranted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph 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, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners and rosters of prisoners.

See, e.g., United States v. Simon, CM 447573 (A.C.M.R. 23 May 1986) in which trial counsel introduced a Department of Defense Investigative Service file extract indicating "records checked at X court showed the accused had a civilian conviction for armed robbery." The court held that this document failed to satisfy Mil. R. Evid. 803(8) because it lacked indicia of reliability and should have been excluded as inadmissible hearsay.). If the document offered at trial is regular and complete on its face there is a presumption of regularity concerning the foundation for either of these two exceptions. United States v. Anderten, 4 C.M.A. 354, 15 C.M.R. 354 (1954) (official records lose the presumption of regularity only if there are material omissions or defects in the document); United States v. Haynes, 10 M.J. 694 (A.C.M.R. 1981) (admissibility of an official record is not destroyed by minor mistakes or omissions which are not material to the execution of the document); United States v. Arispe, 12 M.J. 516 (N.M.C.M.R. 1981) ("A mere irregularity or omission in the entry of a fact required to be rendered in an official record does not of itself place the record outside the exception to the hearsay rule and make it incompetent. Only those irregularities or omissions material to the execution of the document would have that effect").

[85] For examples of appropriate foundations *see* E. Imwinkelried, Evidentiary Foundations, 173-176 (1980).

[86] United States v. Martin, 20 M.J. 227 (C.M.A. 1985). *See also* United States v. Kilburn, CM 448103 (A.C.M.R. 14 May 1986); United States v. Perry, 20 M.J. 1026 (A.C.M.R. 1985); United States v. Bobick, NMCM 85 0450 (N.M.C.M.R. 28 Oct. 1985).

In Kilburn the trial judge properly applied the Mil. R. Evid. 403 balancing test in admitting DA Form 2-1 (Personnel Qualifications Record—Part 2) which showed that the accused had been AWOL for 1 day.

In *Perry* the trial counsel introduced a DD Form 508 which documented an approved recommendation for disciplinary action against the accused for disobeying a lawful order while in pretrial confinement. The defense argued on appeal that as a prerequisite to admissibility some minimum due process should be required in the form of notice, opportunity for a hearing, and right to counsel. The court held that the trial judge properly admitted the document because the balancing test of Mil. R. Evid. 403 adequately protects the accused's rights to fundamental fairness.

In *Bobick* the trial counsel introduced service record entries indicating that on three occasions during a prior enlistment the accused was counseled about alleged use of marijuana and other dangerous substances. No further action was taken on the allegations due to insufficiency of evidence. The Court of Military Review held that the trial judge abused his discretion in admitting these entries over defense objection. The limited probative value of remote, unsubstantiated allegations of serious misconduct is substantially outweighed by the danger of unfair prejudice and confusion.

the same limitations as any other personnel document.[87] In addition, records of nonjudicial punishment must comply with the foundational requirements of *United States v. Booker*.[88] The accused must have been afforded the opportunity to demand trial by court-martial and must have had the opportunity to consult counsel concerning this election of rights.[89] A properly completed DA Form 2627, Record of Proceedings Under Article 15, UCMJ, carries with it a prima facie showing of compliance with these"*Booker* requirements."[90] If the DA Form 2627 is incomplete or illegible it fails to establish *Booker* compliance.[91] Trial counsel may resort to one of two alternate methods of establishing this foundation.

First, the trial counsel may establish the *Booker* requirements by presenting the live testimony of witnesses who have firsthand knowledge that the accused was afforded the opportunity to consult with counsel and demand trial by courts-martial.[92]

Second, the trial counsel may establish a presumption of *Booker* compliance by establishing through documentary evidence or witness testimony that the accused was advised of the *Booker* rights and that nonjudicial punishment was subsequently imposed.[93]

Trial counsel should be alert for *Booker* issues when presenting any personnel document which may collaterally refer to a summary court-martial conviction or nonjudicial punishment.[94] Personnel documents may not be used as a "backdoor" means of introducing otherwise inadmissible summary courts-martial convictions or records of nonjudicial punishment.[95] Although it is unclear how far the trial judge must go in ferreting out "backdoor" references[96] the safest approach is to redact all references to nonjudicial punishment or summary courts- martial from the personnel documents offered at trial unless trial counsel is prepared to establish compliance with *Booker*.[97]

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[87] AR 27-10, para. 5-25.

[88] United States v. Mack, 9 M.J. 300 (C.M.A. 1980); United States v. Booker, 5 M.J. 238 (C.M.A. 1978). These requirements do not apply to soldiers or sailors who receive nonjudicial punishment while embarked on a vessel. *Mack*, 9 M.J. at 320 n.19.

[89] The opportunity to consult with counsel must be reasonable. The accused must be notified where counsel can be located and when the consultation can take place. United States v. Mack, 9 M.J. 300, 321 (C.M.A. 1980). *See also* United States v. Wadley, SPCM 19034 (A.C.M.R. 31 May 1983) (advice to "visit TDS to consult counsel" was sufficient notice of the right to consult with counsel).

[90] United States v. Sauer, 15 M.J. 113, 115 (C.M.A. 1983) (a "record of nonjudicial punishment which on its face appears to be properly executed satisfies the conditions precedent for its admissibility"); United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

[91] United States v. Sauer, 15 M.J. 113, 115 (C.M.A. 1983); United States v. Cross, 10 M.J. 34 (C.M.A. 1980); United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

[92] The trial counsel cannot present evidence of the accused's nonjudicial punishment through a witness whose testimony is hearsay. United States v. McGill, 15 M.J. 242 (C.M.A. 1983); United States v. White, 19 M.J. 662 (C.G.C.M.R. 1984).

In *White* the trial counsel introduced a portion of the accused's service record documenting nonjudicial punishment. To establish *Booker* compliance the Government presented a military personnel officer's testimony that premast procedures, which were uniformly followed in the command, included the opportunity to consult with counsel and an opportunity to demand trial by court-martial. The Court of Military Review held that this second-hand testimony was insufficient to demonstrate compliance with the *Booker* requirements.

[93] United States v. Wheaton, 18 M.J. 159 (C.M.A. 1984). An advice form telling the accused of the right to consult with counsel and the right to demand trial by court-martial satisfies *Booker* requirements absent evidence to the contrary. In reaching this result the court engaged in a series of presumptions.

> [I]f an accused is given written advice that he is entitled to consult counsel, then it can be presumed that counsel was made available to him. A subsidiary presumption is that, if the right to counsel was not exercised, the accused made an informed decision not to exercise the right … [I]f nonjudicial punishment was imposed after the accused was advised of his right to trial by court-martial, he must have decided not to exercise that right. *Wheaton*, 18 M.J. at 160.*See also* United States v. Thompson, NMCM 85 3415 (N.M.C.M.R. 29 Nov. 1985) (Trial counsel introduced a page 13 from the accused's service record book containing a report of nonjudicial punishment and an unsigned *Booker* advisal which incorporated by reference the execution of a form containing a *Booker* advice. This evidence of rights advice together with evidence that trial by court-martial was not demanded satisfied*Booker*.).

[94] This issue most commonly arises when trial counsel offers a bar to reenlistment or letter of reprimand but even a seemingly innocuous document like the DA Form 2-1 may contain a reference to an article 15 or a summary court-martial conviction.

[95] *Compare* United States v. Brown, 11 M.J. 263 (C.M.A. 1981) (reference to three inadmissible article 15's in an otherwise admissible bar to reenlistment constituted prejudicial error) *with* United States v. Dalton, 19 M.J. 718 (A.C.M.R. 1984) (enclosures to a bar to reenlistment such as counseling statements and military police reports are admissible as part of the document). *See also* United States v. Krewson, 12 M.J. 157 (C.M.A. 1981) (if a prior conviction is inadmissible for failure to satisfy foundational requirements, references to the conviction contained in otherwise admissible personnel documents should be removed); United States v. Warren, 15 M.J. 776 (A.C.M.R. 1983) (DA Form 2-1 entry indicating the accused had been a trainee at the U.S. Army Retraining Brigade was an impermissible reference to an inadmissible summary court-martial conviction); United States v. Copeland, SPCM 20818 (A.C.M.R. 11 Jan. 1985) (error to admit a personnel document reflecting a reduction in grade occasioned by an inadmissible vacation of a suspended article 15).

Accord United States v. Jaramillio, 13 M.J. 782 (A.C.M.R. 1982) (DA Form 2-1 entry indicating the accused had been a trainee at the U.S. Army Retraining Brigade was inadmissible *but* entries on the DA Form 2-1 indicating time lost due to unauthorized absence are admissible because they are computed independent of any judicial or nonjudicial action.).

[96] *Compare* United States v. Warren, 15 M.J. 776 (A.C.M.R. 1983) *with* United States v. Jaramillio, 13 M.J. 782 (A.C.M.R. 1982). *Warren* represents the clear case. In *Warren* the trial counsel attempted to introduce evidence of the accuseds summary court-martial conviction but was precluded from doing so because the documents failed to show *Booker* compliance. The trial counsel was then permitted to introduce DA Form 2-1 indicating the accused had been a trainee at the U.S. Army Retraining Brigade. The court held that once evidence of the summary court-martial conviction had been ruled inadmissible the Government could not introduce backdoor evidence of the same conviction through other personnel documents.

In *Jaramillio* the court also held that DA Form 2-1 entries listing the accuseds prior assignment as trainee in the U.S. Army Retraining Brigade were inadmissible but the court seems to create a more rigorous standard. Unlike the situation in *Warren*, there was no prior adjudication of the admissibility of a summary court-martial conviction. In fact there was no firm evidence that the accuseds assignment was the result of a summary court-martial as opposed to some other level of court-martial. The court held the entries inadmissible because it could not "be ascertained … whether the confinement, which was of 24 days duration, was adjudged by a summary court-martial and, if so, whether the *Booker* requirements were met." *Jarmillio*, 13 M.J. at 783.

[97] *See supra* notes 50, 5.

The military judge may not question the accused to establish compliance with *Booker*.[98] Although this was acceptable at one time,[99] since 1983 the practice of questioning the accused during sentencing has been prohibited even if the accused already waived the right against self-incrimination by pleading guilty.[100] Even if a record of nonjudicial punishment is otherwise inadmissible, the accused can agree to stipulate to the admissibility of the record as a condition of a pretrial agreement.[101]

When presenting personnel documents containing unfavorable information about the accused, trial counsel should be prepared to also offer any favorable personnel information which is contained on the same document or which is contained on other documents in the same personnel file. If the document being introduced in aggravation is incomplete, the defense counsel, through a timely objection, can compel the trial counsel to present a complete document.[102] If the trial counsel introduces a portion of the accused's personnel record as aggravation evidence, the same rule of completeness applies and the defense counsel, through a timely objection, can compel the trial counsel to present any other specifically designated documents contained in the same personnel file.[103] The Air Force Court of Military Review has indicated that the military trial judge may sua sponte order the presentation of relevant personnel documents even if counsel do not intend to introduce any.[104] Additionally, once admitted, these"court exhibits" may not be rebutted by the Government.[105]

Although rule of completeness cases have involved objections to aggravation evidence, the rule probably applies to the introduction of defense evidence as well. There are two practical consequences of invoking the rule of completeness at trial. First, the party forced to introduce documents favorable to their opponent is deprived of the opportunity to rebut those documents.[106] Second, if the offering party does not have the entire file available at trial they may be faced with the tactical dilemma of taking a delay in the trial or foregoing introduction of their own documents.

d. Previous convictions. During the case in aggravation the trial counsel may present evidence of the accused's prior military or civilian convictions.[107] Convictions already received into evidence as impeachment during the trial on the

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[98] United States v. Sauer, 15 M.J. 113 (C.M.A. 1983).*Accord* United States v. Nichols, 13 M.J. 154 (C.M.A. 1982) (the military judge cannot assume facts adverse to the accused and thereby put the burden on the accused to testify; trial counsel introduced an article 15 for "possession of a controlled substance"; the military judge improperly inferred that the drugs possessed were the most serious type unless the defense enlightened him to the contrary); United States v. Laws, SPCM 18750 (A.C.M.R. 20 June 1983) (the military judge cannot force the accused to authenticate documents).

[99] United States v. Spivey, 10 M.J. 7 (C.M.A. 1980); United States v. Mathews, 6 M.J. 357 (C.M.A. 1979). The Court of Military Appeals relied on Estelle v. Smith, 451 U.S. 454 (1981) to specifically overrule these decisions in United States v. Sauer, 15 M.J. 113 (C.M.A. 1983).

[100] United States v. Cowles, 16 M.J. 467 (C.M.A. 1983) (the prohibition against a military judge inquiry applies to guilty plea cases as well as contested cases).

[101] *See*United States v. Glazier, 26 M.. 268 (C.M.A. 1988).

[102] Mil. R. Evid. 106; R.C.M. 1001(b)(2) ("If the accused objects to a particular document as inaccurate or incomplete in a specified respect … the matter shall be determined by the military judge").

[103] United States v. Salgado-Agosto, 20 M.J. 238 (C.M.A. 1985); United States v. Morgan, 15 M.J. 128 (C.M.A. 1983); United States v. Goodwin, 21 M.J. 949 (A.F.C.M.R. 1986).

In *Salgado-Agosto* the Court of Military Appeals reaffirmed its rule of completeness announced in*Morgan*. The court noted that the presentencing procedures interpreted in *Morgan* (MCM, 1969, para. 75) were changed in R.C.M. 1001(b)(2), MCM, 1984, but then went on to hold that Mil. R. Evid. 106 provides an independent basis for the rule of completeness. Mil. R. Evid. 106 provides: "When a *writing* or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it (emphasis supplied)." *Salgado-Agosto* and Morgan make the entire personnel file a "writing" under Mil. R. Evid. 106.*Salgado-Agosto*, 20 M.J. at 239.

The Air Force Court of Military Review applied the rule of completeness in *Goodwin*. In *Goodwin*the trial counsel introduced a letter of reprimand as part of the case in aggravation. The defense counsel objected, demanding that the Government also introduce the accused's efficiency reports. The trial judge denied the defense motion based on the drafters' analysis to R.C.M. 1001(b)(2). The appellate court reversed based on *Salgado-Agosto*. So long as the accused specifies what favorable documents they want introduced the trial counsel must either offer the "complete" personnel file or forego admission of the pro-Government personnel documents. *Goodwin*, 21 M.J. at 951.

To get relief the objecting party must specify, by an offer of proof or otherwise, which documents favorable to their side they want included in the personnel file received into evidence. *Salgado-Agosto*, 20 M.J. at 239; United States v. Davis, SPCM 21064 (A.C.M.R. 16 Dec. 1985).

[104] United States v. Robbins, 16 M.J. 736 (A.F.C.M.R. 1983); United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983); United States v. Hergert, ACM 23974 (A.F.C.M.R. 23 Sept. 1983).

The *Smith* case involved an accused in the grade of lieutenant colonel. The military trial judge asked counsel for both sides whether the accused's efficiency reports would be introduced into evidence. Trial counsel declined to introduce the reports so the defense counsel introduced them during the case in extenuation and mitigation. Trial counsel was then permitted to offer other acts of uncharged misconduct during the Government case in rebuttal. On appeal the defense argued that the trial judge should have compelled the trial counsel to introduce the efficiency reports and thereafter should have precluded the trial counsel from rebutting matters contained in the reports. The Court of Review held that *Morgan* does not give the trial judge authority to compel the trial counsel to present the accused's personnel file. Introduction of such matters by the trial counsel is discretionary and *Morgan* only applies once the trial counsel decides to introduce an incomplete portion of the personnel file. The court also went on to note that*Morgan* encourages gamesmanship which may result in the sentencing authority receiving an incomplete and inaccurate picture of the accused's service record. According to the Air Force Court of Military Review the solution is for the trial judge to direct trial counsel to provide the court with the accused's efficiency reports and allow the trial counsel to present any relevant rebuttal evidence. *Smith*, 16 M.J. at 706.

In *Robbins* the defense counsel asked the trial judge to compel the trial counsel to introduce the accused's performance reports or in the alternative to make them court exhibits. The Air Force Court of Military Review reiterated its view in *Smith* that as a matter of policy the sentencing authority should have all relevant information available. The court seemingly backed off its position in *Smith* which intimated that the trial judge has authority to compel the introduction of official personnel documents relevant to sentencing. Instead the court recommended that applicable regulations mandate the introduction of efficiency reports. *Robbins*, 16 M.J. at 740.

Finally, in *Hergert* the court cited both*Smith* and*Robbins* for the proposition that "the military judge may require either counsel to … [introduce the accused's efficiency or performance reports] … even in the absence of other evidence from the personnel records." *Hergert*, slip op. at n.3.

[105] United States v. Wingart, 27 M.J. 128 (C.M.A. 1988).

[106] United States v. Salgado-Agosto, 20 M.J. 238 (C.M.A. 1985); United States v. Morgan, 15 M.J. 128 (C.M.A. 1983); United States v. Goodwin, 21 M.J. 949 (A.F.C.M.R. 1986).

[107] R.C.M. 1001(b)(3)(A); United States v. Cook, 10 M.J. 138 (C.M.A. 1981). A vacation of a suspension of a court sentence is not a "conviction" under the rule. United States v. Holloway, CM 443289 (A.C.M.R. 7 June 1983). Evidence that the accused "pled guilty to theft in a state court" does not constitute a conviction. United States v. Calin, 11 M.J. 722 (A.F.C.M.R. 1981).

merits can be considered during sentencing without being re-introduced after findings.[108] Convictions may be proven by any evidence admissible under the Military Rules of Evidence[109] to include direct testimony by a witness with firsthand knowledge about the conviction;[110] DA Form 2-2 (Record of Court-Martial Conviction);[111] DD Form 493 (Extract of Military Records of Previous Convictions);[112] the court-martial promulgating order;[113] the actual record of trial;[114] or any other method admissible under the Military Rules of Evidence. Documentary evidence used to prove a conviction must be properly authenticated.[115]

Courts-martial result in a "conviction" once sentence is adjudged in the case.[116] To determine whether a civilian adjudication has resulted in a criminal "conviction" counsel should refer to the law of the civilian jurisdiction where the proceeding took place.[117] A juvenile adjudication is not a conviction within the meaning of R.C.M. 1001(b)(3)(A) and is not admissible during sentencing as a prior conviction.[118]

To be admissible, the conviction must occur before commencement of the presentencing proceeding in which it is offered.[119] Except for summary court-martial convictions,[120] there is no requirement that a conviction be "final" to be admissible.[121] If a conviction is pending appellate review, that fact may be brought out by the defense as a factor affecting the weight to be attributed to the conviction.[122] In addition, a trial judge may, in his or her discretion, allow both parties to present evidence that explains a prior conviction.[123]

When offered as aggravation evidence[124] summary court-martial convictions must be "final"[125] and must meet "*Booker* requirements."[126] The record of a summary court-martial conviction must be finally reviewed to be "final."[127]

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[108] R.C.M. 1001(f)(2). For foundational elements necessary to admit prior convictions of the accused as impeachment *see* Mil. R. Evid. 609.

[109] R.C.M. 1001(b)(3)(C).

[110] *Id.*

[111] *See, e.g.*, United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982).

[112] R.C.M. 1001(b)(3)(C) disussion; United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982).

[113] United States v. Hines, 1 M.J. 623 (A.C.M.R. 1975).

[114] United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985) (record of trial can be used to prove a conviction so long as only relevant portions are considered and the pobative value outweighs any prejudicial effect). *See also* United States v. Charley, 28 M.J. 903 (A.C.M.R. 1989) (Improper to"bootstap" summary court-matial "record of trial" (request for clemency, sworn admissions, CID report, and letter of reprimand) into evidence during sentencing. While DD Form 2329 was admissible per R.C.M. 1001(b)(3), the Military Rules of Evidence remain in effect during the adversarial presentencing proceedings).

[115] *See generally* Mil. R. Evid. sec. IX. Although the document used to prove the conviction must be properly authenticated, collateral documents used to establish an evidentiary foundation do not have to be authenticated. *See* Mil. R. Evid. 104(a); United States v. Yanez, 16 M.J. 782 (A.C.M.R. 1983) (unauthenticated record of trial can be used to establish *Booker* compliance as an evidentiary foundation to admissibility of a summary court-martial conviction).

[116] R.C.M. 1001(b)(3)(A).

[117] R.C.M. 1001(b)(3) analysis. *See, e.g.*, United States v. Browning, 29 M.J. 426 (C.M.A. 1989) (trial counsel must be prepared to establish that State law supports admissibility of the "conviction"). *See also* United States v. Cook, 10 M.J. 138 (C.M.A. 1981). In*Cook* the trial counsel introduced aggravation evidence that the accused pleaded guilty (to loitering and marijuana possession) in a Florida court. The court withheld adjudication of guilt and imposition of sentence, giving the accused 1 year of probation. This evidence was admissible at court-martial as a prior conviction because Florida law considered the defendant"convicted" upon entry of a guilty plea.

United States v. May, 18 M.J. 839 (N.M.C.M.R. 1984) (documentary evidence that shows that the accused pleaded guilty to civilian felony charges is not admissible as a *conviction* absent some indication that the court rendered findings and sentence on the charges).

[118] United States v. Slovacek, 24 M.J. 140 (C.M.A. 1987).

[119] *See* United States v. Caniete, 28 M.J. 426 (C.M.A. 1989). Convictions are admissible under R.C.M. 1001(b)(3)(A) even though the offenses contained therein were committed at dates later than the offenses charged at trial. The courts liberally construe the term "prior convictions" because of the President's general intent to expand military sentencing evidence to include matters contained in the Federal presentence report. United States v. Hanes, 21 M.J. 647 (A.C.M.R. 1985); United States v. Allen, 21 M.J. 507 (A.F.C.M.R. 1985). This represents a change from the 1969 Manual which only admitted convictions "for offenses committed during the 6 years next preceding the commission of any offense of which the accused has been found guilty." MCM, 1969, para. 75*b*(3)(b).

[120] R.C.M. 1001(b)(3)(B).

[121] *Id.* This represents a change from the 1969 Manual which required all convictions to be final before they could be admitted during sentencing. MCM, 1969, para. 75*b*(3)(b).

[122] *Id.*

[123] United States v. Nellum, 24 M.J. 693 (A.C.M.R. 1987). During the case in aggravation the trial judge in *Nellum* admitted, without defense objection, a promulgating order showing that the accused had previously been convicted by special court-martial. The trial judge then admitted, over defense objection, a stipulation of fact from the prior special court-martial record of trial. The stipulation of fact furnished detailed information regarding the commission of the earlier offenses. In upholding the trial judge's action, the appellate court noted that the purpose of admitting the evidence was not to permit a collateral attack on the prior conviction but rather to provide broader understanding of the circumstances surrounding the conviction. The appellate court cautioned trial judges that while they may allow the admission of such evidence, prior convictions may not be relitigated.

[124] Distinguish the admissibility of a summary court-martial conviction as aggravation from the admissibility of summary court-martial convictions to invoke the escalator clause in the habitual offender provisions of R.C.M. 1003(d); or to impeach the accused under Mil. R. Evid. 609. *See generally* United States v. Cofield, 11 M.J. 422 (C.M.A. 1981); United States v. Mack, 9 M.J. 300 (C.M.A. 1980); United States v. Booker, 5 M.J. 238 (C.M.A. 1978).

A summary court-martial is generally an informal, nonadversarial proceeding concerning relatively minor offenses. As such, adjudications of guilty by a summary court-martial are not sufficiently reliable to rise to the level of a "criminal conviction" for purposes of impeachment (Mil. R. Evid. 609) or sentence escalation (R.C.M. 1003) *unless* the accused was represented by defense counsel or affirmatively waived the right to be represented by counsel. Accepting trial by summary court-martial after being told counsel for representation would not be provided does not constitute waiver of the right to counsel. United States v. Rogers, 17 M.J. 990 (A.C.M.R. 1984).

[125] R.C.M. 1001(b)(3)(B).

[126] United States v. Booker, 5 M.J. 238 (.M.A. 1978). If a summary court-martial conviction fails to meet *Booker* requirements it is not admissible as a prior conviction and is not otherwise admissible as"mere evidence of prior duty performance." United States v. Herbin, SPCM 19484 (A.C.M.R. 26 Jan. 1984).

[127] R.C.M. 1001(b)(3)(B).

A summary court-martial is finally reviewed when reviewed by a judge advocate pursuant to R.C.M. 1112.[128] If a promulgating order is used to prove a summary court-martial conviction, the document itself may or may not contain any entry indicating a final review by a judge advocate.[129] Even when finality is not apparent on the face of the document, the court will presume finality if sufficient time has elapsed since the conviction such that review would ordinarily have been completed.[130] This presumption may be overcome if there is conflicting evidence indicating that final review may not have been completed.[131] Where such a conflict occurs, the court must resolve the factual issue based on all the evidence available.[132]

"*Booker* requirements" are satisfied if the accused voluntarily consented to trial by summary court-martial*and* the accused was afforded the opportunity to consult with counsel regarding the right to demand trial by special court-martial.[133] If the documentary evidence used to prove the conviction is annotated with an entry indicating that the accused was afforded the opportunity to consult with counsel and was afforded the opportunity to demand trial by special court-martial, the document establishes a prima facie showing of compliance with *Booker*.[134]

If the record of conviction does not establish these foundational requirements, the trial counsel must cure the defect with live testimony or supplementary documents which demonstrate that the accused was afforded these rights.[135] The military judge may not conduct an inquiry of the accused to establish admissibility.[136] Defense counsel's failure to object at trial to summary court-martial convictions will normally waive any *Booker* issues.[137]

e. Matters in aggravation. Regardless of the accused's plea,[138] after findings of guilty the trial counsel may present evidence that is directly related to the circumstances surrounding the offense*and* evidence concerning the repercussions of the offense.[139] It is useful to think of these as two separate and distinct theories of admissible aggravation evidence.

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[128] R.C.M. 1001(b)(3)(B) indicates that review must be completed under "article 65(c)." Because article 65(c) was deleted from the UCMJ when the Military Justice Act of 1983 went into effect the drafters probably intended for summary court-martial convictions to become final after review by a udge advocate pursuant to UCMJ art. 64(a) and R.C.M. 1112.

[129] The copy of the promulgating order contained in the accused's personnel file may not contain the judge advocate's "legally sufficient, mighty fine trial (LSMFT)" stamp.

[130] United States v. Graham, 1 M.J. 308 (C.M.A. 1976) (promulgating order was 5 years old.). *See also* United States v. Hines, 1 M.J. 623 (A.C.M.R. 1975) 8 months was enough time lapse to constitute prima facie showing of final review for a special court-martial).

[131] *See, e.g.*, United States v. Reed, 1 M.J. 166 (C.M.A. 1975) (absence o supervisory review entry on DA Form 20B overcame the promulgating order's prima facie showing of finality); United States v. Hancock, 12 M.J. 685 (A.C.M.R. 1981) (absence of supervisory review entry on DA Form 2-2 overcame promulgating order's presumption of finality).

[132] *See, e.g.*, United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982) (although the DD Form 493 had an entry showing that the conviction was final, the DA Form 2-2, from which the DD Form 493 was supposed to be prepared, did not have any entry showing review had been completed; DA Form 2-2 was thus held to be controlling).

[133] United States v. Booker, 5 M.J. 238 (C.M.A. 1978) (*Booker* only applies to summary court-martial convictions after 11 October 1977); United States v. Syro, 7 M.J. 431 (C.M.A. 1979) (*Booker* applies to records of summary court-martial introduced as personnel records reflecting past conduct and performance for purpose of aggravation).

The case of *United States v. Booker* followed a series of Supreme Court cases dealing with imposition of prison sentences in proceedings where the accused was not represented by counsel. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25 (1976); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). In *Middendorf* the Supreme Court held that failure to provide counsel for an accused at a summary court-martial abridges neither the fifth nor the sixth amendments. Nevertheless, the Court of Military Appeals imposed the *Booker* requirements as a military due process guarantee. The right to consult with counsel probably is not constitutionally required and is judicially imposed as a matter of policy to effectuate the accused's statutory rights to turn down trial by summary court-martial.

[134] Prior to 1 August 1984, DD Form 485, Charge Sheet, was used to record summary courts-martial proceedings. Since 1 August 1984, a new document, DD Form 2329, Record of Trial By Summary Court-Martial, has been used to document summary courts-martial (MCM, 1984, app. 15). Neither form contains any entry indicating whether the accused had an opportunity to consult with counsel. Some jurisdictions modified the charge sheet by adding a statement asserting that the accused was afforded an opportunity to consult with counsel before electing trial by summary court-martial. Other jurisdictions solved the problem by locally drafting a rights advice form to attach to records of summary court-martial conviction. Since 1 November 1982 Army regulations require DA Form 5111-R, Summary Court-Martial Rights Notification/Waiver Statement, to be attached to records of summary courts-martial. AR 27-10, para. 5-21. When properly completed DA Form 5111-R fully satisfies all *Booker* requirements.

[135] United States v. Alsup, 17 M.J. 166 (C.M.A. 1984); United States v. Kuehl, 11 M.J. 126 (C.M.A. 1981); United States v. Yanez, 16 M.J. 782 (A.C.M.R. 1983). In *Kuehl* the trial counsel introduced a record of trial by summary court-martial. Although the record of trial itself did not establish the *Booker* requirements, attached to the record of trial was a rights advisement form signed by the accused. The form stated that "before deciding whether to consent or object to trial by Summary Court-Martial, I have the right to consult with independent legal counsel, and that the United States will provide a military lawyer for such consultation at no expense to me." This supplemental rights form was sufficient to establish*Booker* compliance.

In *Alsup* the accused was given the opportunity to be represented by counsel at the summary court-martial but was not separately advised of the right to consult with counsel. The accused waived representation, but if the accused would have exercised the right he necessarily would have consulted with counsel before being forced to elect trial by summary court-martial. Under these circumstances Booker requirements were satisfied.

In *Yanez* the trial counsel introduced a summary court-martial promulgating order and an unauthenticated record of trial by summary court-martial, page 4 of DD Form 498. The record of trial contained evidence of*Booker* compliance. The court held *Booker* requirements are a foundation issue. Under Mil. R. Evid. 104 the trial judge is not bound by the rules of evidence when determining preliminary questions such as the foundation for the admissibility of evidence. The trial judge could properly consider an unauthenticated document to decide whether *Booker* requirements had been satisfied.

[136] United States v. Sauer, 15 M.J. 113 (C.M.A. 1983). Prior to 1983 there were a number of military cases which held that during the sentencing phase of the trial the military judge could ask the accused questions to supply information establishing the admissibility of documentary evidence. United States v. Spivey, 10 M.J. 7 (C.M.A. 180); United States v. Mathews, 6 M.J. 357 (C.M.A. 178). In *Sauer* the Court of Military Appeals expressly reversed this line of cases based on the Supreme Court decision in *Estelle v. Smith*, 451 U.S. 454 (181).

[137] United States v. Smith, CM 447229 (A.C.M.R. 18 Oct. 1985); United States v. Williams, CM 446831 (A.C.M.R. 7 June 1985); United States v. Hunt, SPCM 18639 (A.C.M.R. 22 June 1983); United States v. Taylor, 12 M.J. 561 (A.C.M.R. 1981) (defense counsel did not object to the record of summary court-martial conviction when it was offered at trial and trial counsel may have been able to establish *Booker* compliance, failure to raise the issue at trial constituted waiver.). *Cf.* United States v. Munn, ACM S26022 (A.F.C.M.R. 30 Nov. 1983) (plain error to admit a civilian conviction for an offense which occurred after the date of the offense charged at the court-martial—in violation of MCM, 1969, para. 75*b*(3)).

[138] United States v. Vickers, 13 M.J. 403 (C.M.A. 1982).

[139] R.C.M. 1001(b)(4) ("The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty").

The proper methodology for analyzing the admissibility of matters in aggravation involves a three-step inquiry.[140] First, does the offered evidence involve a circumstance directly relating to the charged offense or a repercussion of the charged offense?[141] Second, is the evidence offered in a form admissible under the Military Rules of Evidence (for example, nonhearsay, proper authentication, qualified expert opinions, etc.)?[142] Finally, does the offered evidence satisfy the balancing test of Military Rule of Evidence 403?[143] In applying the balancing test, the court should weigh the probative value of the evidence in proving a valid sentencing consideration against the prejudicial effect of the evidence.[144] During the presentencing proceeding, the only issue remaining in the trial is the determination of an appropriate sentence for the accused. The relevance of evidence offered at that stage of the court-martial must be measured in terms of its probative value in proving or disproving a proper sentencing consideration. Valid sentencing considerations include the relative seriousness of the charged offense,[145] the rehabilitative potential of the accused,[146] and the need to deter the accused from future misconduct.[147]

Many recent cases are confusing because they use language that blurs this three-step methodology.[148] Evidence that shows the accused has no rehabilitative potential is not independently admissible as aggravation evidence unless it involves a circumstance surrounding the offense or a repercussion of the offense.[149] At the presentencing stage of the trial a broader spectrum of evidence becomes relevant because of the broad range of valid sentencing considerations, but the Military Rules of Evidence governing the form of the evidence are not relaxed during the case in aggravation.[150]

The key to success for counsel is an understanding of this three-step methodology combined with an ability to articulate a theory of admissibility or inadmissibility.

The courts have been innovative in defining the"circumstances directly relating to the offense." The phrase encompasses much more than a factual rendition of how the charged offense was committed or factual details about the offense which were not pleaded or proven during findings (such as the street value of the illegal drugs possessed[151] or the black market value of merchandise possessed in violation of regulations).[152]

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[140] United States v. Martin, 20 M.J. 227, 230 n.5 (C.M.A. 1985); United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

[141] United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). *Cf.* United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985) (The first step is to determine if the evidence is relevant, "*i.e.*, is the evidence important to a determination of a proper sentence").

[142] Mil. R. Evid. 1101. The Military Rules of Evidence apply to all aspects of the courts-martial except those specifically excluded in Mil. R. Evid. 1101. The presentencing case in aggravation is not exempt from coverage.

[143] United States v. Martin, 20 M.J. 227 (C.M.A. 1985); United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). Mil. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The military trial judge can sua sponte apply the Mil. R. Evid. 403 balancing test but is only required to apply the test when the defense objects to the offered evidence. United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985); United States v. Green, 21 M.J. 633 (A.C.M.R. 1985).

[144] United States v. Martin, 20 M.J. 227 (C.M.A. 1985).

[145] United States v. Wingart, 27 M.J. 128 (C.M.A. 1988) (must be aggravating evidence of *convicted crime*).

[146] *See, e.g.*, Martin, 20 M.J. at 230 n.4 ("the purpose of the presentencing portion of a court-martial is to present evidence of the relative 'badness' and 'goodness' of the accused as the primary steps toward assessing an *appropriate* sentence"); United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985) (sentencing evidence is relevant if "it provides insight into the accused's rehabilitative potential, the danger he poses to society, and the need for future deterrence"; note however, only two judges were involved in this decision and they concurred only in result); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

[147] United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984); United States v. Garcia, 18 M.J. 716 (A.F.C.M.R. 1984).

[148] Court of Military Review decisions typically take a shotgun approach citing multiple grounds to support admissibility without applying a clear methodology.*See, e.g.*, United States v. Green, 21 M.J. 633 (A.C.M.R. 1985); United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985); United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985).

[149] R.C.M. 1001(b)(5) permits the introduction of*opinion* testimony concerning the accused's rehabilitative potential. Rehabilitative potential is not an independent ground for admitting specific acts of misconduct unless the defense first opens the door by exploring specific acts of conduct during cross-examination. *Cf.* United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985); United States v. Chapman, 20 M.J. 717 (N.M.C.M.R. 1985), *pet. for review granted*, 21 M.J. 306 (1986).

[150] Mil. R. Evid. 1101.*But cf.* United States v. Martin, 20 M.J. 227, 230 n.5 (C.M.A. 1985) ("An appropriate analysis of proffered government evidence on sentencing is first to determine … when is the proffered evidence admissible under either the Military Rules of Evidence or the more relaxed rules for sentencing").

[151] *See, e.g.*, United States v. Witt, 21 M.J. 637, 640 (A.C.M.R. 1985) ("In interpreting what type of evidence is "directly related to" a given offense, this court will liberally construe R.C.M. 1001(b)(4)").

[152] United States v. Hood, 12 M.J. 890 (A.C.M.R. 1982).

When the trial counsel attempts to introduce an expansive factual account of the events leading up to the charged offense, the court must draw a line between circumstances directly relating to the offense and misconduct which only indirectly or tangentially relates to the offense. This issue most commonly arises in the context of drug offenses. In a typical drug case the accused sells illegal drugs to a confidential informant or covert agent. The sale is generally accompanied by negotiations and perhaps a series of otherwise "innocent" informal contacts designed to cultivate a relationship of trust. During these discussions, the accused often admits past uncharged drug transactions and expresses a willingness to engage in future illegal transactions. In addition, the trial counsel will frequently have other evidence of uncharged drug offenses. The trial counsel obviously would like to have this uncharged misconduct admitted in aggravation as a circumstance directly relating to the charged offenses.

The court decisions which address this issue tend to be fact specific and fail to set out precise guidance on when drug negotiations and other evidence of uncharged drug offenses are admissible aggravation evidence.[153] There are at least four different rationales which can be used to admit such evidence: (1) the statements themself are *res gestae*; (2) the uncharged misconduct is *res gestae*; (3) the statement or uncharged misconduct is admissible to prove motive; and, (4) the statement or uncharged misconduct is admissible to show the accused's attitude toward the charged offenses. The common thread of each theory necessarily must be that the offered evidence is a circumstance directly relating to the charged offense.

The accused's statements are admissible as *res gestae* if they are inextricably related in time and place to the commission of the charged offense or to the negotiated arrangements leading to the charged offense.[154] General negotiations, statements made during the course of social contacts designed to cultivate trust between the accused and the agent, or statements made by the accused after apprehension are not admissible using this *res gestae* theory.[155]

If the accused's statements were not *res gestae*, they may nevertheless be admissible if the misconduct itself occurred contemporaneously with the charged offense and was part of the overall criminal scheme which included the charged offense.[156] The key to admissibility under this theory is the relation in time and place between the uncharged misconduct and the charged offense as well as the similarity of the criminal activity.

The admissibility of all uncharged misconduct evidence must be reevaluated in light of the guidance provided in *United States v. Wingart*.[157]

In *United States v. Wingart*, the Court of Military Appeals revisited the issue of the admissibility of Military Rule of Evidence 404(b) uncharged misconduct evidence during guilty plea presentencing proceedings.[158] Their earlier holding in *United States v. Martin*[159] had established that in guilty plea cases, the Government could introduce, during

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[153] *See* United States v. Robinson, 30 M.J. 548 (A.C.M.R. 1990); United States v. Lynott, 28 M.J. 918 (C.G.C.M.R. 1989). *Compare* United States v. Reynolds, CM 444270 (A.C.M.R. 29 Feb. 1984) *with* United States v. Acevedo, CM 444146 (A.C.M.R. 14 May 1984); United States v. Harris, CM 444086 (A.C.M.R. 27 Dec. 1983); United States v. Van Boxel, SPCM 18605 (A.C.M.R. 9 Sept. 1983); and United States v. Farwell, SPCM 18791 (A.C.M.R. 15 July 1983).

In *Reynolds*, the accused pleaded guilty to possession and distribution of marijuana. As aggravation, the Government introduced the testimony of the undercover agent who negotiated the charged distribution. The agent testified that during negotiations the accused said he could not reduce his price because he had already sold some marijuana earlier that day at the offered price. When the agent inquired about possible future sales, the accused stated he shortly would be picking up a large quantity of marijuana and could sell the agent a quarter pound for $175. The court held that because these statements were made during the negotiations concerning the charged offenses, they were *res gestae* inextricably related in time and place to the charged offense.

In Acevedo, the accused also pleaded guilty to possession and distribution of marijuana. During presentencing, the trial counsel introduced two statements the accused made outlining his role as a drug dealer over a 5-month period of time. The court held that because the statements were general and provided no direct nexus with the charged offense they were not admissible as *res gestae*. It is not clear whether these statements would have been admissible if the trial counsel had made it clear that the charged offenses occurred during the 5-month period of drug dealing mentioned in the statements or if the accused's statements had been made contemporaneous with the negotiations concerning the charged offenses.

In *Van Boxel*, the accused pleaded guilty to possession and sale of LSD. The Government aggravation evidence consisted of testimony that at the time the charged offenses occurred the accused expressed a willingness to sell LSD at some undisclosed future time. The court held that this was inadmissible aggravation concerning uncharged misconduct unrelated to the charged offense.

[154] *See, e.g.*, United States v. Doss, SPCM 19552 (A.C.M.R. 5 Mar. 1984) where, after the accused sold the drugs he told the agent "he would have more to sell on Friday." This uncharged misconduct was admissible because the statement was very specific in nature, and was contemporaneous with the charged offense; United States v. Carfang, 19 M.J. 739 (A.F.C.M.R. 1984) where during negotiations with an undercover agent and a confidential informant, the accused stated he was able to get "coke," "grass,""speed," and "acid." These statements were so closely intertwined with the charged offense as to be part and parcel of the entire chain of events; United States v. Keith, 17 M.J. 1078 (A.F.C.M.R. 1983) where during preliminary negotiations which eventually lead to the charged cocaine sale the accused told the agent that he knew of terrorist groups who would be willing to purchase stolen military night vision goggles.

[155] *See* note 183.

[156] United States v. Vezo, CM 447428 (A.C.M.R. 25 Mar. 1986) Sergeant Vezo was convicted of wrongful distribution of marijuana on 20 November 1984, 11 December 1984, and 4 January 1985. In a pretrial confession the accused admitted he had distributed marijuana to members of his unit on other occasions between early November 1984 and the time he was apprehended on 12 January 1985. The court held that this uncharged misconduct "occurred contemporaneously with the charged sales and were part of his overall criminal scheme which included those sales of which he was found guilty. Thus, the uncharged sales were directly related to the charged sales."

United States v. Gober, CM 447009 (A.C.M.R. 7 Oct. 1985) Private Gober was convicted of larceny, forgery, black marketing, possession of a controlled substance, and absence without leave. In aggravation the trial counsel introduced a stipulation of fact describing uncharged misconduct-sale of controlled substances to other soldiers and black marketing liquor. The uncharged misconduct was directly related to the charged offenses because the accused used the same ration control plate to purchase the liquor and the charged black market items; he possessed the controlled substance so he could sell it; and he used the proceeds from these uncharged, illegal activities to finance the charged absence without leave.

[157] 27 M.J. 128 (C.M.A. 1988).

[158] *Id.*

[159] 20 M.J. 227 (C.M.A. 1985).

presentencing proceedings, evidence that would have been *relevant* uncharged misconduct evidence (per Military Rule of Evidence 404(b)) on findings. In*Martin* the court noted that the accused should not be able to determine the admissibility of evidence at the court-martial based upon the plea. Additionally, the court held in *Martin* that the intent of the 1984 Manual for Courts-Martial was to relax the rules of evidence in presentencing proceedings.[160]

In *Wingart*, the Court of Military Appeals established that when determining if aggravation evidence is admissible at the presentencing proceedings, admissibility must be addressed solely from the standpoint of R.C.M. 1001(b)(4). "[U] ncharged misconduct is not admissible, unless it constitutes 'aggravating circumstances' within the purview of R.C.M. 1001(b)(4)."[161] The Martin analysis of whether or not the uncharged misconduct evidence would have been admissible at a trial on the merits per Military Rule of Evidence 404(b) is no longer appropriate.

The court also provided guidance as to whether this uncharged misconduct evidence is admissible as R.C.M. 1001 (b)(5) rehabilitative potential evidence. The court noted that "specific instances of conduct" could be inquired into on cross-examination. But, the uncharged misconduct evidence would not be admissible as extrinsic evidence to establish any lack of rehabilitative potential.[162]

The Court of Military Appeals has strictly interpreted R.C.M. 1001(b)(4) and has severely limited the admissibility of Military Rule of Evidence 404(b) uncharged misconduct during presentencing proceedings.

In the typical drug case the admissions the accused makes during the negotiations leading up to the drug sale may be admissible to show that the accused's attitude toward illegal drugs demonstrates a lack of rehabilitative potential and a substantial likelihood of future drug involvement necessitating lengthy incarceration. This R.C.M. 1001(b)(4) evidence must be evaluated in the context of *Wingart*.[163]

In *United States v. Mullens*,[164] the Court of Military Appeals held that uncharged misconduct was proper R.C.M. 1001(b)(4) aggravation evidence as "a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community…"[165] This analysis should be used when determining if uncharged misconduct is directly related to the offenses.

During the case in aggravation the trial counsel also can present evidence concerning the repercussions of the charged offense.[166] The drafters of the 1984 Manual encouraged an expansive interpretation for victim impact evidence providing that:

> Evidence in aggravation may include 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.[167]

The appellate courts have been liberal in sanctioning a wide variety of evidence in each of the areas cited in the Manual.[168] "Financial impact" can include anything from the hospital costs paid by the victim of an assault,[169] to evidence establishing the black market value of items illegally possessed overseas,[170] to evidence establishing a financial loss to the Government caused by the accused's negligent destruction of an Army ambulance.[171] "Social impact" can include either specific past impacts—such as testimony concerning the loss felt by a family or community for a homicide victim,[172] or potential impacts—such as expert testimony concerning the general effects of rape trauma on a rape victim's social life.[173] "Psychological impact" can include mental anguish felt by a victim,[174] by a victim's

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[160] *Id.* at 229 and 230.
[161] *Wingart*, 27 M.J. at 136.
[162] *Id.* at 136.
[163] Wingart, 27 M.J. 128.
[164] 29 M.J. 398 (C.M.A. 1990).
[165] *Id.* at 400.
[166] United States v. Vickers, 13 M.J. 403 (C.M.A. 1982).
[167] R.C.M. 1001(b)(4) discussion.
[168] *See, e.g.*, United States v. Harrod, 20 M.J. 777 (A.C.M.. 1985).
[169] R.C.M. 1001(b)(4) discussion.
[170] United States v. Hood, 12 M.J. 890 (A.C.M.R. 1982) (permissible aggravation included "expert" CID testimony that the accused could double or triple his money by selling the illegally possessed goods on the black market).
[171] United States v. Schwartz, 24 M.J. 823 (A.C.M.R. 1987). Military judge properly took judicial notice of AR 735–11, which limits the pecuniary liability of a soldier, based on a report of survey, to 1 month's basic pay. The trial counsel had made the request in order to argue the limit of the accused's liability to the government as a matter in aggravation.
[172] United States v. Pearson, 17 M.J. 149 (C.M.A. 1984). While aggravation evidence properly includes the impact of the crime on the victim or the victim's family the sentencing authority cannot impose a punishment to satisfy the desires of others.
[173] United States v. Hammond, 17 M.J. 218 (C.M.A. 1984).
[174] United States v. Snodgrass, 22 M.J. 866 (A.C.M.R. 1966) (evidence of likelihood of psychological damage of incest on the victim); United States v. Marshall, 14 M.J. 157 (C.M.A. 1982) (psychological evidence concerning the long-term residual effects the rape is likely to have on the victim); United States v. Body, CM 446257 (A.C.M.R. 8 Apr. 1985) (mental anguish and suffering of child victim who had been raped and sodomized).

family,[175] by a victim's community,[176] or by a victim's military unit.[177] It is important to note that victim impact evidence may also be admissible in capital murder courts-martial.[178] "Medical impact" includes actual injuries others suffer as a result of the accused's charged offenses[179] and evidence concerning the potential for such injuries.[180] Finally, the courts recognize that many crimes directly[181] and indirectly[182] impact on the military unit's discipline and mission.[183]

There must be a reasonable connection between the accused's offense and the alleged impact but it is not necessary to show that the impact was foreseeable."Repercussions of an offense" are admissible in aggravation if the accused's misconduct "reasonably can be shown to have contributed to those effects."[184]

f. Opinion evidence of rehabilitative potential and past duty performance. Rule for Courts-Martial 1001(b)(5) provides that as part of the case in aggravation, the trial counsel can present opinion testimony concerning the character of the accused's past duty performance and the accused's rehabilitative potential.[185] The Court of Military Appeals, however, has placed severe restrictions on the use of rehabilitative potential opinions. In *United States v. Aurich*,[186] the court held that rehabilitative potential opinions should "rarely" be used by the Government in the case in aggravation. Rather, the Government should wait until the accused places his potential in issue.[187] Additionally, there are strict foundational requirements for these opinions. The leading case in this area is *United States v. Ohrt*.[188] In *Ohrt*, the Court of Military Appeals made clear that R.C.M. 1001(b)(5) does not provide the trial counsel with an opportunity to "influence court members to punish the accused by imposing a punitive discharge."[189] The Court of Military Appeals held that punitive discharges serve as punishment of the accused and general deterrents to those who learn of the crimes and sentences. R.C.M. 1001(b)(5) on the other hand is concerned with rehabilitative potential of the accused. Because these purposes are different, R.C.M. 1001(b)(5) opinion evidence and recomendations for punitive discharges must be kept separate.[190] The court noted that while the Government may call witnesses to testify as to the accused's rehabilitative potential, these witnesses must base their opinions upon the accused's character, performance of duty as a soldier, moral fiber, and determination to be rehabilitated.[191] Post-*Ohrt*, the prosecution may not use R.C.M. 1001(b)(5) to elicit testimony concerning the propriety of a punitive discharge. Additionally, the scope of the question must be limited to "What is the accused's potential for rehabilitation?" The answer must be limited to "In my opinion, the accused has _____ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation."[192] Any opinion testimony should be based on personal observation, but may also be based on reports and other information provided by subordinates.[193] The trial counsel cannot explore specific incidents of misconduct during direct examination but if the defense inquires into specific instances of conduct during cross-examination the "door would be open" for the trial counsel to explore specific incidents of misconduct during redirect.[194] Witnesses cannot express an opinion that the accused has no rehabilitative potential based solely on the seriousness of the charged offense.[195]

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[175] *See* United States v. Whitehead, 30 M.J. 1066 (A.C.M.R. 1990) (2 of 3 family members allowed to testify on sentencing at premeditated murder case); United States v. Fontenot, 29 M.J. 244 (C.M.A. 1989) (parents of rape victim); United States v. Pearson, 17 M.J. 149 (C.M.A. 1984) (impact that death of child due to accused's negligent homicide had on the victim's family members).

[176] *Id.*

[177] *Id. But see* United States v. Sanford, 29 M.J. 413 (C.M.A. 1990) (battalion commander's unit impact evidence was "overkill").

[178] Payne v. Tennessee, 11 S.Ct. 2597 (1991).

[179] United States v. Sargent, 18 M.J. 331 (C.M.A. 1984) (drug purchaser's drug overdose death resulting from the accused's sale or transfer of illegal drugs).

[180] United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985) (expert testimony concerning the potential psychiatric consequences of taking LSD); United States v. Logan, 13 M.J. 821 (A.C.M.R. 1982) (evidence that the "Talwin" illegally possessed by the accused in violation of regulations was a dangerous drug commonly used as a heroin substitute); United States v. Needham, 23 M.J. 383 (C.M.A. 1987) (Department of Justice periodical tracing the history, use, and physical/psychological effects of illegal drugs); United States v. Corl, 6 M.J. 914 (N.C.M.R. 1979) (evidence of psychological and physiological effects of drug illegally sold).

[181] United States v. Vickers, 13 M.J. 403 (C.M.A. 1982) (the effects that the accused's charged disobedience of orders had in exacerbating a larger disruption).

[182] United States v. Fitzhugh, 14 M.J. 595 (A.F.C.M.R. 1982) (effect that the accused's removal from the Personnel Reliability Program had on the unit's military mission). *Cf.* United States v. Caro, 20 M.J. 770 (A.F.C.M.R. 1985) (fact that the accused lied about his involvement in criminal activity was not admissible to show that the investigative agency had to expend additional resources to solve the crime).

[183] *But see* United States v. Sanford, 29 M.J. 413 (C.M.A. 1990).

[184] *But see* United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). In *Witt*, the accused was convicted of unlawfully distributing LSD. During presentencing, the trial counsel introduced evidence that one of the soldiers who ingested the accused's LSD went wild and stabbed other soldiers with a knife. The court held that, although the accused should not be "held responsible" for a never-ending chain of repercussions from the sale of LSD, it is proper for the Government to introduce evidence of repercussions which are reasonably linked to the accused's offense. The foreseeability of the repercussions is irrelevant.

[185] R.C.M. 1001(b)(5).

[186] 31 M.J. 95 (C.M.A. 1990).

[187] *Id.* at 96 n.*.

[188] United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989).

[189] *Id.* at 306.

[190] *Id.* at 306.

[191] *Id.* at 304.

[192] United States v. Aurich, 31 M.J. 95, 96 (C.M.A. 1990).

[193] United States v. Boughton, 16 M.J. 649 (A.F.C.M.R. 1983).

[194] *Id.* Obviously the military judge has broad discretion in limiting collateral inquiries into specific instances of conduct.

[195] Ohrt, 28 M.J. at 304. *See also*United States v. Hefner, 29 M.J. 1022 (A.C.M.R. 1990) (the military judge must determine if the seriousness of the offense is *the* motivator of the R.C.M. 1001(b)(5) opinion (improper), or if it is *a* motivator (proper)).

31–6. The defense case in extenuation and mitigation

Trial counsel must not only prepare the sentencing portion of the case, they must also ensure they do not abdicate their adversarial role during the defense case in extenuation and mitigation. While it is true that a clever defense counsel can limit the trial counsel's participation during this phase of the proceeding, it is not a time to relax. The trial counsel must ensure that the defense does not exceed the bounds of permissible extenuation and mitigation and should be prepared to enter doors opened by the defense.

a. Admissible evidence. After a finding of guilty the defense may present matters in "extenuation and mitigation" to be considered by the sentencing authority.[196] Matters in extenuation are those matters which serve to explain the circumstances surrounding the commission of an offense.[197] Mitigation evidence relates to the accused's character and those aspects of the individual which indicate that sentence leniency is warranted.[198]

The rules of evidence are generally relaxed for the defense presentation of the case in extenuation and mitigation.[199] The military trial judge has discretion in relaxing the rules of evidence and should not admit evidence which is irrelevant or has no indicia of reliability.[200] The trial judge's discretion to exclude extenuation and mitigation evidence should be very carefully exercised in capital cases.[201] If the rules are relaxed for the defense, for example, to allow the consideration of affidavits or letters to the court, the military judge has the discretion to similarly relax the rules of evidence for trial counsel's rebuttal.[202]

The military judge must personally advise the accused of the right to present matters in extenuation and mitigation including the rights of allocution.[203] The accused may make a sworn statement, an unsworn statement,[204] both, or may remain silent.[205]

If the accused makes a statement under oath, he or she is subject to cross-examination within the scope of the direct

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[196] R.C.M. 1001(c)(1). The trial judge should advise the accused of the right to present witnesses and documents in extenuation and mitigation. R.C.M. 1001(a)(3).

[197] R.C.M. 1001(c)(1)(A). *See, e.g.*, United States v. King, SPCM 20994 (A.C.M.R. 29 Aug. 1985) (error for the trial judge to prevent the defense from presenting evidence concerning the accused's blood-alcohol level as extenuation evidence).

[198] R.C.M. 1001(c)(1)(B).*See, e.g.*, United States v. Taylor, 21 M.J. 840 (A.C.M.R. 1986) (defense is entitled to present competent evidence regarding the effect a particular sentence or punishment will have on the accused and can elicit testimony bearing on the accused's propensity or lack of propensity for similar misconduct).

[199] R.C.M. 1001(c)(3) provides that this may include admitting "letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability."

[200] United States v. Elvine, 16 M.J. 14 (C.M.A. 1983) (evidence that a rape victim resumed normal sex life was not admissible to create an inference that she suffered no rape trauma); United States v. Meade, 19 M.J. 894 (A.C.M.R. 1985) (military judge properly excluded letters of transmittal which showed subordinate commanders recommended a lower level court-martial).

[201] United States v. Matthews, 16 M.J. 354, 378 (C.M.A. 1983) ("The accused has unlimited opportunity to present mitigating and extenuating evidence").

[202] R.C.M. 1001(d). Note that this provision does not authorize the relaxation of the rules of evidence for the prosecution's case in aggravation. For examples of relaxed rules on rebuttal *see* United States v. Stark, 17 M.J. 778 (A.F.C.M.R. 1983); United States v. Wyronzynski, 7 M.J. 900 (A.F.C.M.R. 1979).

[203] R.C.M. 1001(a)(3); United States v. Hawkins, 2 M.J. 23 (C.M.A. 1976) (prejudicial error was committed when the trial judge failed to advise the accused of any of his allocution rights and the accused made no statements during sentencing); United States v. Davis, 6 M.J. 969 (N.M.C.M.R. 1979) (prejudicial error was committed when the trial judge failed to advise the accused of any of his allocution rights and the accused's case was damaged by the cross-examination of his sworn sentencing testimony).

The appellate courts will find error when any portion of the allocution rights advice is omitted but the error will usually not be prejudicial and will not result in sentence reassessment. *See* United States v. Kendrick, 29 M.J. 792 (A.C.M.R. 1989) (tested for prejudice); United States v. Grady, 30 M.J. 911 (A.C.M.R. 1990) (no error as record established that accused understood his allocution rights); United States v. Barnes, 6 M.J. 356 (C.M.A. 1979) (the military judge failed to advise the accused about the right to remain silent but the accused made an unsworn statement which in no way prejudiced the sentence); United States v. Shelly, CM 446323 (A.C.M.R. 13 Feb. 1985) (the trial judge failed to advise the accused about the right to remain silent but the accused made an unsworn statement with the assistance of counsel which was obviously beneficial); United States v. Dumas, SPCM 18471 (A.C.M.R. 17 June 1985) (the trial judge failed to advise the accused about the right to remain silent but the accused was not prejudiced because his unsworn statement helped to mitigate his sentence); United States v. Annis, 2 M.J. 1100 (A.C.M.R. 1977) (the military judge failed to advise the accused about the right to remain silent but the accused made a salutary unsworn statement and received a relatively lenient sentence); United States v. Robertson, 17 M.J. 846 (N.M.C.M.R. 1984) (the trial judge failed to advise the accused of any allocution rights but there was no prejudice where the defense strategy clearly required the accused to make a sworn statement and that strategy was employed at trial); United States v. Koek, 6 M.J. 540 (N.C.M.R. 1978) (trial judge erred in omitting advice concerning the rights of allocution but there was no prejudice where defense counsel asserted that he advised the accused of the rights and the rights were effectively exercised at trial); United States v. Walker, 4 M.J. 936 (N.C.M.R. 1978) (the trial judge erred in forgetting to advise the accused of the right to make an unsworn statement but there was no prejudice because the accused made an effective sworn statement).

The military judge must also personally advise the accused of the right to present witnesses and documents in extenuation and mitigation. R.C.M. 1001(a)(3); United States v. Davis, CM 447406 (A.C.M.R. 29 Jan. 1986) (the trial judge erred by omitting the instruction but there was no prejudice where the accused was advised of allocution rights, the accused made an unsworn statement, and the adjudged sentence was more lenient than the limitation contained in the pretrial agreement); United States v. Nelson, 21 M.J. 573 (A.C.M.R. 1985) (it was error to omit the advice but there was no prejudice where the accused was advised of his allocution rights and made an unsworn statement).

[204] R.C.M. 1001(c)(2).

[205] UCMJ art. 31(b). *See also*United States v. Sauer, 15 M.J. 113 (C.M.A. 1983).

examination.[206] The accused's sworn statement constitutes evidence and may be argued during sentencing arguments.[207] As a witness, the accused is subject to the same forms of impeachment applicable to other witnesses under the Military Rules of Evidence.[208] The accused may also make an unsworn statement during presentencing.[209] This statement may be either written or oral[210] and may be made by the accused, the defense counsel, or both.[211] An unsworn statement does not subject the accused to impeachment as a witness.[212] The accused may not be cross-examined by the military judge, the court members, or the trial counsel,[213] but the Government may rebut facts or inferences contained in the unsworn statement.[214] The Government may not, however, rebut *opinions* expressed by the accused in the unsworn statement.[215] Normally the accused makes an unsworn statement from the witness stand, although the military judge may require such a statement to the made from counsel table. The military judge, absent defense waiver,[216] should instruct the court members that an unsworn statement is a legitimate form of testimony and that the accused's election to not make a sworn statement should not be considered adversely.[217]

Finally, the accused has the absolute right to remain silent during the sentencing phase of the trial.[218] Unless the defense waives the protective instruction,[219] the court members should be instructed not to draw any adverse inferences from the accused's silence.[220]

b. Limitations on defense evidence. Although the rules of evidence may be relaxed during the presentation of extenuation and mitigation evidence[221] they are not totally abandoned. The defense does not have an absolute right to present unlimited evidence during sentencing. The military judge has *the discretion* to relax the rules of evidence.[222] Trial counsel should be alert to defense attempts to present evidence which is irrelevant or unreliable.[223]

In guilty plea cases, counsel should listen carefully to matters raised in extenuation and mitigation to ensure that the plea does not become improvident by the presentation of matters inconsistent with the plea.[224] Matters disclosed by the accused during the providence inquiry are evidence and can be presented to the sentencing authority.[225]

During the case in extenuation and mitigation the defense may not relitigate the court's prior findings of guilt,[226] nor

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[206] R.C.M. 611(b) provides the general rule regarding cross-examination: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct."

The right to cross-examine the accused is generally limited in scope to preserve the accused's rights against self-incrimination. *See* Mil. R. Evid. 301(e); Mil. R. Evid. 608(b). For specific examples of the permissible scope of cross-examination *see generally* United States v. Thomas, 16 M.J. 899 (A.C.M.R. 1983); United States v. Robideau, 16 M.J. 819 (N.M.C.M.R. 1983).

[207] R.C.M. 1001(g).

[208] For a discussion of evidence admissible to attack the credibility of a witness *see generally* S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence (2d ed. 1986 & Supp. 1989).

[209] R.C.M. 1001(c)(2)(C).

[210] *Id.* But the accused may *not* submit a written sworn affidavit.

[211] *Id.*

[212] United States v. Konarski, 8 M.J. 146 (C.M.A. 1971); United States v. Harris, 13 M.J. 653 (N.M.C.M.R. 1982); United States v. Shewmake, 6 M.J. 710 (N.C.M.R. 1978); United States v. McCurry, 5 M.J. 502 (A.F.C.M.R. 1978).

[213] R.C.M. 1001(c)(2)(C); United States v. King, 12 C.M.A. 71, 30 C.M.R. 71 (1960).

[214] R.C.M. 1001(c)(2)(C) states that the Government may rebut statements of fact made by the accused during the unsworn statement.

[215] *See* United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990) (Government may not explain accused's opinion that "although he had not been perfect, he believed he had served well"); and United States v. Partyka, 30 M.J. 242 (C.M.A. 1990) (Government may not rebut accused's unsworn statement/ opinion that he was not to blame for victim's trauma).

[216] For a discussion of defense waiver of protective instructions *see* DA Pam 27-173, para. 22-15.

[217] United States v. King, 12 C.M.A. 71, 30 C.M.R. 71 (1960); Benchbook, para. 2-37. *Accord* United States v. Brown, 17 M.J. 987 (A.C.M.R. 1984) (it was improper for trial counsel to comment adversely on the accused's election to make an unsworn statement by saying"if … [the accused's testimony was true] … why not make a sworn statement?" The trial judge had a sua sponte duty to give a curative instruction).

[218] UCMJ art. 31(b).

[219] *See supra* note 191.

[220] Benchbook, para. 7-12.

[221] R.C.M. 1001(c)(3).

[222] R.C.M. 1001(c)(3) provides "The military judge*may*, with respect to matters in extenuation or mitigation or both, relax the rules of evidence" (emphasis supplied).

[223] *See* United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Meade, 19 M.J. 894 (A.C.M.R. 1985). *But cf.* United States v. Gonzalez, 16 M.J. 58 (C.M.A. 1983) (military judge abused his discretion in refusing to accept affidavits offered by the defense where his sole basis for exclusion was the trial counsel's oral assertion that the affiants had changed their opinions after they had been interviewed by him).

[224] *See* DA Pam 27-173, chap 21.

[225] United States v. Holt, 27 M.J. 57 (C.M.A. 1988).

[226] United States v. Teeter, 16 M.J. 68 (C.M.A. 1983); United States v. Koonce, 16 M.J. 660 (A.C.M.R. 1983); United States v. Brown, 13 M.J. 890 (A.C.M.R. 1982). *Cf.* United States v. Woods, NMCM 85 2939 (N.M.C.M.R. 31 Jan. 1986).

In *Teeter* the accused was convicted of premeditated murder. Sergeant Teeter did not testify during the merits but the defense counsel presented an alibi defense through the testimony of other witnesses. During extenuation and mitigation the accused wanted to resurrect the alibi defense through his own sworn testimony. The court held that it was proper for the trial judge to prevent Sergeant Teeter from relitigating the findings of the court.

In *Brown* the defense counsel attempted to persuade the court members to reconsider their findings. The trial judge properly prohibited the defense counsel from using the sentence argument to challenge or relitigate the court's findings.

Finally, *Woods* presents a novel twist to the issue. In *Woods* the trial judge allowed the accused to present his defense for the first time during extenuation and mitigation and allowed the defense counsel to urge reconsideration. When the defense tactic backfired the accused argued on appeal that the trial judge erred in permitting the defense evidence. The court held that the trial judge has the discretion to prohibit relitigation of the findings but is not required to do so.

can defense invade the province of the sentencing authority by presenting opinion testimony about what would be an appropriate sentence.[227] Additionally, the defense may not introduce evidence concerning court-martial sentences other accused received in separate trials.[228]

Even when the defense has a right to present certain matters to the sentencing authority, the trial judge has discretion to decide in what form that testimony must be produced.[229] Under some circumstances the trial judge may properly compel the defense to use an adequate substitute for the live testimony of a material witness.[230]

c. Cross-examination of defense witnesses. Trial counsel may interview defense witnesses (except the accused) prior to trial to prepare cross-examination exposing any weaknesses in the foundation[231] or logic of defense witness' opinions about the accused's character. Cross-examination may also be used to lay the predicate for rebuttal testimony.

The trial judge has considerable discretion in defining the appropriate scope of cross-examination.[232] The scope of cross-examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness.[233]

Specific incidents of uncharged misconduct can be inquired into if they impeach the credibility of the witness or are probative of untruthfulness.[234] When accused testify under oath, they waive the privilege against self-incrimination

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[227] United States v. Taylor, 21 M.J. 840 (A.C.M.R. 1986) (the defense is entitled to present competent evidence regarding the effect a particular sentence or punishment will have but may not have witnesses express an opinion on what type of sentence is appropriate. Recommendations about an appropriate punishment are not helpful to the fact finder, as required by Mil. R. Evid. 701, and pose the danger of unfair prejudice and confusion of issues); United States v. Carter, SPCM 17172 (A.C.M.R. 17 Nov. 1982). *Accord* United States v. Randolph, 20 M.J. 850 (A.C.M.R. 1985) (improper for Government aggravation witness to recommend a bad conduct discharge); United States v. Jenkins, 7 M.J. 504 (A.F.C.M.R. 1979) (improper for Government witness to recommend the maximum punishment).

[228] The accused's sentence must be an individualized determination by the sentencing authority. *See, e.g.*, United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176 (1959); United States v. McNeece, 30 C.M.R. 453 (A.B.R. 1960).

See also United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1983) (even in a capital case the accused cannot introduce evidence that a co-accused had a pretrial agreement guaranteeing a specific sentence limitation; sentence disparity between a co-accused and the accused cannot be argued at trial even though under some circumstances sentence comparison is appropriate on review.).

For a discussion of how appellate courts determine sentence appropriateness when there are highly disparate sentences in closely related cases see *United States v. Ballard*, 20 M.J. 282 (C.M.A. 1985); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Olinger*, 12 M.J. 458 (C.M.A. 1982); *United States v. Scantland*, 14 M.J. 531 (A.C.M.R. 1982);*United States v. Smith*, 15 M.J. 948 (A.F.C.M.R. 1983);*United States v. Theberge*, 15 M.J. 667 (A.F.C.M.R. 1983); *United States v. Harden*, 14 M.J. 598 (A.F.C.M.R. 1982).

[229] United States v. Combs, 20 M.J. 441 (C.M.A. 1985); United States v. Courts, 9 M.J. 285 (C.M.A. 1980). *Cf.* United States v. Gonzalez, 16 M.J. 58 (C.M.A. 1983).

In *Combs* the accused asked the Government to transport his mother from West Virginia to the general court-martial in Panama so she could testify on sentencing about her son's troubled family background and her plans to help him rehabilitate himself. The trial judge properly ruled that this testimony could adequately be presented in the form of a stipulation of fact as opposed to live testimony.

In *Courts* the trial judge properly ruled that the Government was not required to bring the accused's sister from Indiana to trial in California even though she was a material sentencing witness. The trial judge determined within his sound discretion that some alternative to live testimony would adequately vindicate the accused's right to present this evidence to the sentencing authority.

In *Gonzalez* the court held that a Government offer to stipulate to the expected testimony of material sentencing witnesses is not an adequate substitute for the live in-court testimony, although an offer to stipulate to the facts to which the witnesses were expected to testify may be. *Accord* United States v. Combs, 20 M.J. 441, 443 n.3 ("The Government's offer to stipulate to expected testimony is not an adequate substitute for a stipulation of fact").

[230] *Combs*, 20 M.J. at 442 (factors for the trial judge to consider are "whether the testimony relates to disputed matter; whether the Government is willing to stipulate to the testimony as fact; whether there is other live testimony available to appellant on the same subject; whether the testimony is cumulative of other evidence; whether there are practical difficulties in producing the witness; whether the credibility of the witness is significant; whether the request is timely; and whether another form of presenting the evidence (*i.e.*, former testimony or deposition) is available and sufficient").

[231] *See, e.g.*, United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982) (the accused's immediate supervisor testified that he had known the accused since 1979 and in his opinion the accused was an outstanding airman, a good candidate for rehabilitation, and should be retained in the Air Force; on cross-examination the trial counsel asked the supervisor whether he was aware that the accused made a statement admitting that he had been selling hashish since April 1977; trial counsel may not ask groundless questions about uncharged misconduct just to create unwarranted innuendo in the mind of the sentencing authority. But when the trial counsel has a reasonable basis to believe the misconduct occurred it is permissible to ask about it to test the foundation of the character witness' opinion); United States v. Walker, SPCM 19907 (A.C.M.R. 30 Nov. 1984) (the accused's supervising NCO testified that the accused was a role model for others and so he gave the accused the highest ratings possible on his efficiency report; the trial counsel asked the supervisor whether he was aware that when he wrote the efficiency report the accused had already tested positive in a urinalysis; the trial counsel could properly test the weight to be given the character witnesses' testimony so long as there was a good faith factual basis for asking the question and the incident asked about was relevant to the character traits addressed on direct examination).

[232] Mil. R. Evid. 608(b). *See, e.g.*, United States v. Thomas, 6 M.J. 899 (A.C.M.R. 983). The accused made a sworn statement that she recognized the seriousness of her offenses, regretted committing the crimes, and desired to be all that she could be in the Army. On cross-examination the trial counsel asked who had initiated the charged sale of drugs and where the transaction took place. The scope of cross-examination exceeded the subject matter of direct examination and thus violated the accused's privilege against self-incrimination.

[233] R.C.M. 611(b); United States v. Gambini, 13 M.J. 423 (C.M.A. 1982). *Compare* United States v. Sharp, 29 M.J. 856 (A.F.C.M.R. 1989) (can cross-examine on relevant specific instances of misconduct) *with* United States v. Cole, 29 M.J. 873 (A.F.C.M.R. 1989) (cross-examination impro per when prejudice outweighs probative value). *See also* United States v. Lang, CM 443662 (A.C.M.R. 29 July 1983) (the accused made a sworn statement that his involvement with drugs destroyed his marriage, he had not used drugs since his apprehension, he liked his job, and he desired to stay in the Army; on cross-examination, the trial counsel asked whether it was true that since preferral of charges his duty performance had been bad and had included incidents of failure to repair as well as drunk on duty; cross-examination exceeded the scope of direct); United States v. Robideau, 16 M.J. 819 (N.M.C.M.R. 1983) (the accused made a sworn statement that he did well during a prior enlistment in the Marine Corps; on cross-examination the trial counsel asked the accused what his intentions were regarding future service and why he committed the charged offenses; cross-examination exceeded the scope of direct).

[234] Mil. R. Evid. 608(b). *See, e.g.*, United States v. Tubman, SPCM 17962 (A.C.M.R. 13 Jan. 1984) In*Tubman* the accused was convicted of drug offenses arising out of two separate transactions. uring extenuation and mitigation the accused testified under oath that he distributed the drugs as a favor to a friend. On cross-examination the trial counsel asked the accused whether 4 years earlier he had sold drugs and made a false official statement about his drug involvement. The cross-examination was proper because the accused intimated through his testimony that he had never been involved with drugs before. The trial counsel was entitled to clarify that testimony. Once the accused unequivocally denied any prior drug involvement he could be impeached with specific incidents of prior drug related misconduct.

with respect to the matters concerning which they testify[235] but do not necessarily waive the privilege against self-incrimination with respect to collateral or unrelated incidents of uncharged misconduct.[236] Because the trial counsel is unable to interview the accused, the trial counsel should ask the military judge for latitude during cross-examination.

31–7. The prosecution case in rebuttal

If the defense counsel puts on any evidence in extenuation and mitigation, the trial counsel has the opportunity to present evidence in rebuttal.[237] This includes the opportunity to rebut any factual assertions the accused may have made in an unsworn statement.[238] If the trial judge relaxed the rules of evidence for the defense during the case in extenuation and mitigation, the trial judge *may* relax the rules of evidence to the same degree during rebuttal.[239] Rebuttal may properly include evidence to impeach the credibility of defense witnesses,[240] including the accused if a sworn statement was made during extenuation and mitigation.[241]

Pretrial preparation and "game planning" is essential to take full advantage of any "open doors" created during extenuation and mitigation. Trial counsel can help open doors by doing a good cross-examination of defense witnesses. If cross-examination questions are legitimately directed at exploring the direct examination, the trial counsel can rebut matters elicited during the cross-examination.[242]

The appellate courts have been liberal in interpreting the permissible scope of rebuttal holding that the trial counsel can rebut impressions and inferences created by the accused or defense witnesses.[243] There are three specific limitations on the liberal right to present evidence: (1) defense opinion evidence about general good duty performance and recommendations for retention in the service do not open the door to rebuttal with evidence of specific acts of misconduct;[244] (2) defense evidence of remorsefulness cannot be rebutted by evidence of the accused's pretrial silence;[245] and (3) defense witness' recommendations for leniency cannot be rebutted by recommendations as to any specific punishment.[246]

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[235] Mil. R. Evid. 301(e).

[236] Mil. R. Evid. 608(b). *See, supra* note 223.

[237] R.C.M. 1001(d).

[238] R.C.M. 1001(c)(2)(C). *See, e.g.*, United States v. Wallace, ACM S26482 (A.F.C.M.R. 2 Nov. 1984) (after accused made an unsworn statement saying he had never used drugs at Edwards A.F.B. the Government rebutted with an otherwise inadmissible letter of reprimand for use of marijuana while stationed there); United States v. Wright, ACM 23922 (A.F.C.M.R. 30 Aug. 1983) (the accused during an unsworn statement said "I would like to get my life straightened out as soon as I can get all this bad stuff behind me"; trial counsel could not rebut with evidence that the accused tried to sell drugs again before trial because it didn't rebut any factual assertion.

[239] R.C.M. 1001(d). *Accord* Mil. R. Evid. 1101(c) ("The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001").

[240] *See, e.g.*, Mil. R. Evid. 608(a) (opinion and reputation evidence of character for untruthfulness); Mil. R. Evid. 608(c) (evidence of bias, prejudice, or any motive to misrepresent); Mil. R. Evid. 613 (extrinsic evidence of prior inconsistent statements).

[241] If the accused makes an unsworn statement he or she does not become a "witness" and the trial counsel cannot rebut the statement with evidence of untruthfulness (unless the defense has presented specific evidence of truthfulness). United States v. Konarski, 8 M.J. 146 (C.M.A. 1979); United States v. Harris, 13 M.J. 653 (N.M.C.M.R. 1982); United States v. Shewmake, 6 M.J. 710 (N.C.M.R. 1978); United States v. McCurry, 5 M.J. 502 (A.F.C.M.R. 1978).

[242] *See, e.g.*, United States v. Rodgers, 18 M.J. 565 (A.C.M.R. 1984); United States v. Jeffries, 47 C.M.R. 699 (A.F.C.M.R. 1973).

In Rodgers the accused was convicted of possession and distribution of hashish. The defense presented three sergeants who testified that the accused could be rehabilitated for continued service in the Army. The trial counsel's cross-examination established that two of the sergeants based their opinion in part on the premise that the accused's offense was a one-time incident. On rebuttal the trial counsel was permitted to introduce the accused's pretrial admission that he had sold hashish on 8 other occasions and had smoked hashish 9 or 10 times in the last year.

The *Jeffries* case provides a good example of how trial counsel can use cross-examination to expand rebuttal opportunities. In *Jeffries* the accused made a sworn statement that he was sorry for his offense, wished to complete his enlistment, and would do better if retained in the service. On cross-examination the trial counsel properly tested the sincerity of the testimony by asking the accused when he made the decision to do better. The accused replied "I've been trying ever since the offense." Trial counsel could then rebut this testimony with evidence that since the date of the offense the accused had been late to work and failed to comply with military appearance standards.

[243] United States v. Strong, 17 M.J. 263 (C.M.A. 1984); United States v. Konarski, 8 M.J. 146 (C.M.A. 1979); United States v. Murphy, SPCM 19476 (A.C.M.R. 30 Mar. 1984); United States v. Mansel, 12 M.J. 641 (A.F.C.M.R. 1981); United States v. Oenning, 20 M.J. 935 (N.M.C.M.R. 1985).

In *Strong* the defense presented evidence that during a prior enlistment the accused received a good conduct medal and an honorable discharge. The trial counsel rebutted with otherwise inadmissible evidence of nonjudicial punishment administered during the prior enlistment. The defense had tried to create the impression that the accused's prior enlistment was unblemished. The trial counsel is entitled to rebut impressions and inferences created by the defense evidence.

In a rehearing on sentence held at the U.S. Disciplinary Barracks, Sergeant Konarski presented members of the prison cadre who testified that he should be retained in the service as an NCO and no further confinement was necessary. The trial counsel rebutted with expert psychiatric and psychological evidence that good behavior during confinement does not ensure good behavior outside confinement; the accused could profit more from treatment in the disciplinary barracks than from outpatient treatment as a parolee; and that the accused is likely to repeat his crimes if released from confinement. The court held that this was proper rebuttal because the defense witness' recommendation for retention in the service necessarily implied a belief that the accused would have continued good duty performance and would not commit future crimes.

In *Murphy* the defense presented documentary evidence that the accused received a good conduct medal for the period 15 January 1980 through 24 January 1983. The trial counsel was permitted to rebut with testimony of the accused's first line supervisor who testified that during that period the accused required constant supervision or else he would go to his room or another section and go to sleep.

In *Oenning* the defense introduced an enlisted performance evaluation for the period 14 June to 27 October 1981 which said the accused willingly followed commands and regulations. The trial counsel rebutted this evidence by presenting an otherwise inadmissible record of nonjudicial punishment for possession of marijuana on 18 July 1981. The court held that this was proper rebuttal because the defense had created the reasonable inference that the accused's record for that period of time covered by the performance evaluation was unblemished.

[244] United States v. Gambini, 13 M.J. 423 (C.M.A. 1982) (Relying in part on para. 138(f), MCM, 1969).

[245] United States v. Friedman, 14 M.J. 865 (C.G.C.M.R. 1982); United States v. Morris, 9 M.J. 551 (N.M.C.M.R. 1980).

[246] United States v. Jenkins, 7 M.J. 504 (A.F.C.M.R. 1979) (improper for Government witness to recommend"the maximum punishment").

31–8. Other factors which may be considered on sentencing

a. Plea of guilty. Upon a timely defense request, the accused is entitled to an instruction that a plea of guilty usually saves the Government time, effort, and expense.[247]

b. Time spent in pretrial confinement. The military judge must instruct, upon defense request, that time spent in pretrial confinement should be considered in deciding an appropriate sentence.[248] Since the accused receives administrative day-for-day credit for time spent in pretrial confinement[249] a complete instruction should also inform the court members about the administrative credit.[250]

c. The accused's false testimony on the merits. If the court's findings indicate that they must have disbelieved the sworn testimony of the accused on the merits, they may consider the accused's mendacity during sentencing if certain prerequisites are met.[251] First, the court[252] must conclude that the accused lied.[253] Second, the court must conclude that the false testimony was willful and concerned a material matter.[254] Finally, the court may not punish the accused for lying but may properly consider the accused's false testimony only as a factor relating to the accused's rehabilitative potential.[255] The military judge must give a limiting instruction outlining these prerequisites if the trial counsel argues the accused's mendacity.[256] The military judge may give the limiting instruction sua sponte even if the trial counsel does not argue the matter.[257]

d. The accused's absence from trial. If the accused is tried in absentia, the sentencing authority may not punish the accused for the unauthorized absence but may consider the accused's voluntary absence as an indication of the accused's rehabilitation potential.[258]

e. Administrative consequences of a sentence. As a general rule, the court members cannot be instructed on, and cannot consider, the administrative consequences of their sentence.[259] Their duty is to adjudge a sentence based on the evidence presented in court without regard to outside considerations such as the possibility of clemency action[260] or the possibility of parole.[261] Command policies and directives regarding the disposition of offenders or directives impacting on the military corrections system are not appropriate sentencing factors and the military judge has a sua sponte duty to exclude them from consideration.[262] The court members may, however, consider that a punitive discharge deprives an individual of substantially all benefits administered by the Department of Veterans Affairs.[263]

Although the guidelines in the area are unclear, there is some authority which suggests that a military judge may consider administrative consequences of a sentence, such as rules governing parole eligibility, when sitting as the sentencing authority.[264]

f. Purposes of sentencing. If requested by either side, the military judge may, in his or her discretion, instruct that the five principal reasons for adjudging a sentence are:

(1) Protection of society from the wrongdoer;

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[247] United States v. McLeskey, 15 M.J. 565 (A.F.C.M.R. 1982); United States v. Simpson, 16 M.J. 506 (A.F.C.M.R. 1983).
[248] United States v. Davidson, 14 M.J. 81 (C.M.A. 1982).
[249] United States v. Allen, 17 M.J. 126 (C.M.A. 1984); R.C.M. 305(k).
[250] United States v. Stark, 19 M.J. 519 (A.C.M.R. 1984).
[251] United States v. Warren, 13 M.J. 278 (C.M.A. 1982).
[252] These prerequisites also apply to the military judge when acting as sentencing authority. United States v. Beaty, 14 M.J. 155 (C.M.A. 1982).
[253] United States v. Warren, 13 M.J. 278 (C.M.A. 1982).
[254] *Id.*
[255] *Id.*
[256] United States v. Baxter, 14 M.J. 762 (A.C.M.R. 1982); United States v. Rench, 14 M.J. 764 (A.C.M.R. 1982); United States v. Gore, 14 M.J. 945 (A.C.M.R. 1982).
[257] United States v. Cabebe, 13 M.J. 303 (C.M.A. 1982).
[258] United States v. Chapman, 20 M.J. 717, 718 (N.M.C.M.R. 1985), *aff'd* 23 M.J. 226 (C.M.A. 1986).*See also* United States v. Denney, 28 M.J. 521 (A.C.M.R. 1989).
[259] United States v. Ellis, 34 C.M.R. 454 (C.M.A. 1964); United States v. Wheeler, 18 M.J. 823 (A.C.M.R. 1984).
[260] Benchbook, para. 2-37.
[261] *See, e.g.*, United States v. Bates, CM 443075 (A.C.M.R. 11 Apr. 1984).
[262] United States v. Grady, 15 M.J. 275 (C.M.A. 1983).
[263] United States v. Simpson, 16 M.J. 506 (A.F.C.M.R. 1983); United States v. Chasteen, 17 M.J. 580 (A.F.C.M.R. 1983).

(2) Punishment of the wrongdoer;

(3) Rehabilitation of the wrongdoer;

(4) Preservation of good order and discipline in the military; and

(5) The deterrence of the wrongdoer and those who know of his or her crime and sentence from committing the same or similar offenses.[265]

General deterrence may be considered (and argued) as an appropriate factor so long as it is not considered to the exclusion of other appropriate factors.[266] Specific deterrence is also a proper sentencing consideration.[267]

The military judge must tailor his or her sentencing instructions to the evidence presented in the case,[268] and must stress the need for an individualized sentence.[269]

g. Sentence worksheet. In a court-martial with sentencing by members, the trial counsel will ordinarily prepare a sentence worksheet tailored to reflect all sentencing alternatives.[270] The military judge and the defense counsel examine the worksheet at an article 39(a) session.[271] During deliberations, the court members use the sentence worksheet as a guide to assist them in putting their sentence in proper form.[272] The worksheet is marked as an appellate exhibit and attached to the record of trial.[273]

31–9. Sentencing procedures

a. Discussion. After all the evidence has been presented, counsel have made their closing arguments, and the military judge has instructed on the law, the court members retire to deliberate on the sentence.[274] Deliberations must take place with all members present and without any outside intrusions.[275]

Before voting, the members should enter into full and free discussion of all available evidence.[276] The members may ask for additional evidence if it appears that they have insufficient evidence for a proper determination or if it appears they have not received all available admissible evidence.[277]

b. Balloting. When the court members have completed their discussions, each member may propose a complete sentence in writing.[278] The junior court member collects the proposals[279] and delivers them to the president of the court who arranges them in order of severity.[280] The court members then vote on the proposals by secret, written ballot[281] beginning with a vote on the least severe proposal.[282] The members continue to vote on the proposals in the increasing order of their severity until the required number of concurring votes are obtained to select a sentence.[283]

For sentences including the death penalty, the vote must be unanimous.[284] For noncapital sentences, a two-thirds concurrence is required for sentences including confinement for 10 years or less,[285] and a three-fourths concurrence is required for sentences including more than 10 years' confinement.[286]

If none of the proposed sentences receives the required amount of concurrence, the members repeat the entire

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[264] *See* United States v. Hannan, 17 M.J. 115, 123 (C.M.A. 1984):

> Thus, in seeking to arrive at an appropriate sentence, Judge W. properly took into account the rules governing parole eligibility. Indeed, military judges can best perform their sentencing duties if they are aware of the directives and polices concerning good-conduct time, parole, eligibility for parole, retraining programs, and the like.

But see United States v. Grady, 30 M.J. 911 (A.C.M.R. 1990) (error for the military judge to construct a sentence specifically relying on the collateral matter of what drug treatment programs are available at the confinement facility).

[265] Benchbook, para. 2-59.

[266] United States v. Lania, 9 M.J. 100 (C.M.A. 1980).

[267] United States v. Garcia, 18 M.J. 716 (A.F.C.M.R. 1984) (the trial counsel was permitted to introduce evidence that men who commit sexual offenses with children have over 80 percent recidivism rate when not incarcerated.).

[268] R.C.M. 1005(a) discussion.

[269] R.C.M. 1005(e)(4).

[270] R.C.M. 1005(e)(1) discussion.

[271] R.C.M. 1006(e) discussion.

[272] *Id.*

[273] Benchbook, para. 2-38.

[274] R.C.M. 1006(a).

[275] *Id.*

[276] R.C.M. 1006(b).

[277] R.C.M. 1006(b). The military judge decides whether the additional evidence will be produced as an interlocutory, discretionary ruling. United States v. Lampani, 14 M.J. 22 (C.M.A. 1982).

[278] R.C.M. 1006(c).

[279] *Id.*

[280] *Id.* The president's determination of the relative severity of the proposed sentences is subject to the objection of a majority of the other members.

[281] UCMJ art. 51; R.C.M. 1006(d)(2).

[282] R.C.M. 1006(d)(3)(A); United States v. Lumm, 1 M.J. 35 (C.M.A. 1975).

[283] R.C.M. 1006(d)(3)(A). Once the required number of votes is obtained on a proposed sentence that sentence becomes the sentence of the court.

[284] UCMJ art. 2(b)(1); R.C.M. 1006(d)(4)(A).

[285] UCMJ art. 52(b)(2): R.C.M. 100(d)(4)(B).

[286] UCMJ art. 2(b)(3); R.C.M. 1006(d)(4)(C).

process of discussion, proposal, and balloting.[287] The court members have no duty to agree on a sentence, therefore it is possible to have a"hung jury" on sentence.[288] The military judge may not coerce the members into reaching a compromise sentence.[289] If the members cannot agree on a sentence, the military judge should declare a mistrial and return the case to the convening authority who may direct a rehearing on sentence or order a sentence of"no punishment."[290]

c. Announcement of the sentence. The court must announce its sentence as soon as it is determined.[291] "Announcement" occurs when the president of the court reads, in open court, the sentence which was actually reached by the court during its deliberations.[292]

Prior to announcement of the sentence, the military judge should review the sentence worksheet to ensure that the sentence is in a proper form.[293] Examination of the sentence worksheet[294] or oral clarification of the worksheet[295] does not constitute "announcement" of the sentence.

If the president of the court incorrectly states the sentence which was agreed upon during deliberations, this "slip of the tongue" does not constitute an announcement of the sentence.[296] A "slip of the tongue" concerning the court's sentence can be corrected anytime before the authenticated record of trial is forwarded to the convening authority[297] without resort to formal reconsideration procedures.[298]

In announcing the sentence, the president should not disclose the specific number of votes for or against the sentence.[299] If the court's oral announcement of a sentence is legal and unambiguous, a conflicting worksheet does not affect the validity of the sentence.[300]

31–10. Reconsideration of sentence

a. General. After a sentence proposal receives the required number of concurring votes during the balloting, that sentence becomes the final verdict[301] and there can be no further balloting unless done pursuant to proper reconsideration procedures.[302]

b. Timing limitations. The court[303] may reconsider a sentence with a view towards decreasing it anytime before the record of trial is authenticated.[304] A sentence can be reconsidered with a view toward increasing it only before that sentence is announced in open court.[305]

c. Procedure for reconsideration. As a general rule the military judge does not instruct on reconsideration procedures unless one of the court members requests the instruction or proposes reconsideration.[306] Once a timely proposal for reconsideration is made by one of the court members, the entire panel must vote on whether they wish to reballot.[307] Voting must be by secret written ballot.[308] A sentence may be reconsidered with a view toward increasing the sentence only if a majority of the members vote for reconsideration.[309] A sentence which includes confinement for more than 10 years may be reconsidered with a view toward decreasing the sentence if more than one-fourth of the members vote for reconsideration.[310] A sentence which includes 10 years of confinement or less may be reconsidered with a view toward

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[287] R.C.M. 1006(d)(3)(A).
[288] R.C.M. 1006(d)(6).
[289] United States v. Straukas, 41 C.M.R. 975 (A.F.C.M.R. 1970) ("hung jury" instruction that members were under an obligation to reach a sentence created a fair risk of a compromise verdict requiring a rehearing on sentence).
[290] R.C.M. 1006(d)(6).
[291] UCMJ art. 53; R.C.M. 1007(a); United States v. Lee, 13 M.J. 181 (C.M.A. 1982) (it was error for the military judge to seal the court's sentence pending resolution of a defense petition to dismiss charges based on a violation of the USAREUR 45-day rule).
[292] R.C.M. 1007(b).
[293] R.C.M. 1006(e) discussion.
[294] R.C.M. 1006(e).
[295] *Id.*
[296] R.C.M. 1007(b).
[297] *Id. See* United States v. Baker, 30 M.J. 594 (A.C.M.R. 1990) (military judge properly held a post-trial article 39(a) session to correct the omission in the sentence announcement (the president of the panel failed to announce the adjudged dishonorable discharge)).
[298] For a discussion of formal reconsideration procedures *see* para. 31–10.
[299] R.C.M. 1006(e) discussion. Under the 1984 Manual the court is no longer required to announce that the required "two-thirds" or "three-fourths"concurrence was obtained. There is a presumption that the court members properly complied with the military judge's voting instructions. R.C.M. 1006(e) analysis.
[300] United States v. Donnelly, 12 M.J. 503 (A.F.C.M.R. 1981).
[301] R.C.M. 1009(d) discussion.
[302] *See generally* R.C.M. 1009.
[303] The military judge presiding over a trial by military judge alone may reconsider a sentence in accordance with the same timing limitations applicable to reconsideration by the court members.
[304] R.C.M. 1009(a).
[305] R.C.M. 1009(b).
[306] Benchbook, para. 2–30; United States v. Bridges, NMCM 84 1964 (N.M.C.M.R. 7 Feb. 1984) (although the trial judge can clarify ambiguities in a sentence reached by the court members, it is improper for the trial judge to suggest to the court members that they should reconsider their verdict).
[307] R.C.M. 1009(d)(2).
[308] *Id.*
[309] R.C.M. 1009(d)(3)(A).
[310] R.C.M. 1009(d)(3)(B)(ii).

decreasing the sentence if more than one-third of the members vote for reconsideration.[311]

31–11. Defective sentences

a. Ambiguous or illegal sentences. Normally, ambiguities or illegalities in the sentence should be detected and resolved by the military judge when the sentence worksheet is examined prior to announcement.[312] After the sentence is announced, the military judge can seek a clarification of the ambiguity or illegality any time prior to adjournment.[313] After the case is adjourned, the military judge may initiate a reconsideration proceeding but only with a view to clarifying or decreasing the sentence;[314] the convening authority can order a proceeding to seek clarification;[315] or the convening authority can approve the lowest legal, unambiguous sentence adjudged.[316]

b. Suspended sentences. The court may not suspend a sentence;[317] that authority is reserved to the convening authority and service secretary.[318] A recommendation by the court to suspend a sentence does not, standing alone, impeach the sentence.[319]

31–12. Impeachment of sentence

Once a sentence is reached, there are strong policy reasons for preventing collateral attacks on the procedures used by the court to arrive at their sentence. The rules regarding impeachment of a sentence are the same as the rules applicable to impeaching the findings (discussed supra para. 30-6).

31–13. Permissible punishments by courts-martial

a. Death penalty.

(1) General. The last soldier executed under the UCMJ was PFC John Bennett, hanged in 1961 for rape and attempted murder.[320] In the early 1970's, the Supreme Court of the United States decided that virtually all State laws that allowed the death penalty were unconstitutional.[321]

Although the Supreme Court never directly decided the constitutionality of the military death penalty,[322] their decisions addressing the constitutional prerequisites to the imposition of capital punishment in a number of State cases cast doubt as to the constitutionality of the military death penalty.[323]

In 1982-1983, the Courts of Military Review split[324] on the constitutionality of the capital punishment procedures contained in the 1969 Manual.[325] Finally, the Court of Military Appeals decided the issue in the case of *United States v. Matthews*,[326] holding military death penalty provisions unconstitutional.[327] The President responded by enacting new capital punishment procedures effective 25 January 1984.[328] These new provisions were incorporated into the 1984 Manual.[329]

(2) Procedures for imposing capital punishment. The capital punishment procedures contained in R.C.M. 1004 are designed to ensure that a death penalty is adjudged only after an individualized evaluation of the accused's case, and only after specific aggravating factors are found to have been present.

The Manual now contains an exclusive list of aggravating factors which may be relied upon to impose the death penalty[330] for an offense referred to the court as capital.[331]

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311 R.C.M. 1009(d)(3)(B)(iii).
312 R.C.M. 1006(e) discussion.
313 R.C.M. 1009(c)(2)(B).
314 R.C.M. 009(c)(2)(B); R.C.M. 009(b).
315 R.C.M. 1009(c)(3).
316 *Id.*
317 United States v. Occhi, 2 M.J. 60 (C.M.A. 1976).
318 UCMJ arts. 71(d) and 74(a).
319 *See, e.g.*, United States v. Cimoli, 10 M.J. 516 (A.F.C.M.R. 1980); United States v. McLaurin, 9 M.J. 855 (A.F.C.M.R. 1980).
320 English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F. L. Rev. 552 (1979).
321 *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).
322 The Sureme Court declined the oportunity to decide the issue. Schick v. Reed, 419 U.S. 256 (1974).
323 *See generally* Pfau & Milhizer,*The Military Death Penalty and the Constitution: There Is Life After Furman*, 97 Mil. L. Rev. 35 (1982); Pavlick, *The Constitutionality of the U.C.M.J. Death Penalty Provisions*, 97 Mil. L. Rev. 81 (1982).
324 The military death penalty provisions were upheld in United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982); United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983); United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1983). The military death penalty was held to be unconstitutional in United States v. Gay, 16 M.J. 586 (A.F.C.M.R. 1983).
325 MCM, 1969, para. 75.
326 United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (mandate issued 27 October 1983).
327 *Id.*
328 Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984).
329 R.C.M. 1004. Note, however, that the Court of Military Appeals is currently reviewing the constitutionality of the resident promulgating R.C.M. 1004. *See* United States v. Curtis, 29 M.J. 96 (C.M.A. 1989) (mandatory review case filed). This capital case was argued to the Court of Military Appeals, August 29, 1990.
330 R.C.M. 1004.

Before arraignment, the trial counsel must give the defense written notice of those aggravating factors the prosecution intends to prove.[332] After all the evidence supporting the case has been introduced, the military judge must instruct the court members on such aggravating factors as may be in issue, and must instruct the members to consider all of the defense evidence in extenuation and mitigation.[333]

Before a death penalty may be adjudged, the court members must unanimously find beyond a reasonable doubt that one or more of the aggravating factors existed.[334] They must also unanimously find that any mitigating circumstances are substantially outweighed by the aggravating circumstances.[335] When the members announce their sentences, they also announce which aggravating factor(s) were found by unanimous vote.[336]

b. Separation from the service. There are only three types of punitive separations authorized as punishment at courts-martial:[337] dismissal,[338] dishonorable discharge,[339] and bad-conduct discharge.[340]

(1) Dismissal. A dismissal is the only type of punitive separation which can be imposed on a commissioned officer, a commissioned warrant officer, or a cadet.[341] Only a general court-martial may adjudge a dismissal,[342] but it may award a dismissal for *any* UCMJ violation.[343]

(2) Dishonorable discharge. Noncommissioned warrant officers and enlisted soldiers may receive separation by dishonorable discharge[344] if convicted of an offense carrying a dishonorable discharge as part of the maximum punishment[345] and if tried by general court-martial.[346]

(3) Bad-conduct discharge. Only enlisted soldiers may receive a bad-conduct discharge.[347] A bad-conduct discharge may be imposed for offenses authorized a punitive discharge if the accused is convicted at a general court-martial or at a special court-martial empowered to adjudge a bad-conduct discharge.[348]

c. Deprivations of liberty. There are only four types of deprivation of liberty which may be imposed by a court-martial:[349] confinement;[350] hard labor without confinement;[351] confinement on bread and water or diminished rations;[352] and restriction to specified limits.[353]

(1) Confinement. A court-martial may sentence an accused to confinement but may not specify the place of confinement.[354] A commissioned officer may be confined only by a general court-martial.[355] Although the 1984 Manual eliminated the phrase "at hard labor" from this form of punishment, "confinement" may properly include hard labor.[356]

(2) Hard labor without confinement. Hard labor without confinement, for up to 3 months, may be imposed on enlisted soldiers.[357] The accused's commanding officer designates the "hard labor" which is performed in addition to

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[331] The rules pertaining to capital referrals are contained in R.C.M. 201(f)(2)(C).

[332] R.C.M. 1004(b)(1) and (c). Some of the aggravating factors which may be relied on to adjudge the death penalty for premeditated murder are:
a. The accused has been found guilty in the same case of another murder.
b. The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim.
c. The accused knew the victim was a commissioned, warrant, noncommissioned or petty officer in the execution of office.
d. The accused knew the victim was a member of a law enforcement or security agency or activity and was in the execution of office.
e. The accused was engaged in the commission, attempted commission, or flight after commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy.
f. 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.
g. The murder was committed for the purpose of receiving money or a thing of value.

[333] R.C.M. 1004(b)(6).

[334] R.C.M. 1004(b)(7).

[335] R.C.M. 1004(b)(4)(B).

[336] R.C.M. 1004(b)(8).

[337] The types of punishment listed in R.C.M. 1003 are the *only* punishments which may legally be imposed at a court-martial. Courts-martial may not impose administrative discharges such as a "general discharge"or a discharge under "other than honorable conditions." R.C.M. 1003(b).

[338] R.C.M. 1003(b)(10)(A).

[339] R.C.M. 1003(b)(10)(B).

[340] R.C.M. 1003(b)(10)(C).

[341] R.C.M. 1003(b)(10)(A).

[342] UCMJ art. 19; UCMJ art. 20.

[343] R.C.M. 1003(b)(10)(A).

[344] R.C.M. 1003(b)(10)(B).

[345] The maximum punishment authorized for each offense is found in MCM, 1984, Part IV.

[346] UCMJ art. 19; UCMJ art. 20.

[347] R.C.M. 1003(b)(10)(C).

[348] Procedural prerequisites which must be met before a special court-martial may adjudge a bad-conduct discharge are outlined in UCMJ art. 19.

[349] R.C.M. 1003(b). A court-martial may not impose correctional custody, extra duty, or extra training as a punishment.

[350] R.C.M. 1003(b)(8).

[351] R.C.M. 1003(b)(7).

[352] R.C.M. 1003(b)(9).

[353] R.C.M. 1003(b)(6).

[354] R.C.M. 1003(b)(8).

[355] R.C.M. 1003(c)(2)(A)(ii).

[356] R.C.M. 1003(b)(8) discussion.

[357] R.C.M. 1003(b)(7).

the soldier's regular duties.[358]

(3) Confinement on bread and water (or diminished rations). Enlisted soldiers attached to or embarked in a vessel may be sentenced to confinement on bread and water or confinement on diminished rations for up to 3 days.[359] A medical officer's approval must be obtained before the punishment may be executed.[360]

(4) Restriction to specified limits. An accused may be sentenced to restriction for up to 2 months.[361] When a court-martial adjudges restriction, the court should specify the limits of the restriction.[362]

d. Deprivations of pay. Only two forms of deprivation of pay may be imposed as a court-martial punishment:[363] forfeiture of pay and allowances,[364] and fines.[365]

(1) Forfeitures of pay and allowances. A forfeiture of pay and allowances deprives an accused of pay and allowances as they accrue.[366] It cannot be applied retroactively.

(a) Partial forfeitures. If the court imposes partial forfeitures, the forfeitures apply only to basic pay.[367] Additionally, partial forfeiture must be adjudged as an exact amount of dollars to be forfeited each month for a specified number of months.[368]

(b) Total forfeitures. Total forfeitures may apply to basic pay and to all allowances.[369]

(2) Fines. A fine imposed by a court-martial mandates that a specific amount of money be paid when the fine is ordered executed.[370] At special and summary courts-martial, the amount of fine plus forfeitures cannot exceed the amount of forfeitures which could have been imposed.[371]

Normally a fine should be reserved for cases in which the accused has been unjustly enriched, but this is not a mandatory limitation.[372]

The accused's failure to pay a fine can result in a conversion of the fine to *additional* confinement if: (1) the court specifically provides for such a stipulation in the sentence;[373] (2) the resultant total confinement does not exceed the maximum authorized period of confinement;[374] and (3) the accused's failure to pay was not a result of his or her indigency.[375]

e. Reduction in grade. Reduction to the lowest enlisted grade (or any intermediate grade) is an authorized punishment for enlisted soldiers convicted by either a general or special court-martial.[376] An officer cannot be reduced in grade by a court-martial except in time of war.[377]

Army enlisted soldiers convicted by court-martial are administratively reduced in grade to Private, E-1, if their court-martial sentence includes a punitive discharge, confinement, or hard labor without confinement.[378]

f. Reprimand. Any court-martial may include a reprimand as part of the adjudged sentence.[379] The convening authority determines the content of the reprimand and actually issues it in writing.[380]

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[358] R.C.M. 1003(b)(7) discussion.
[359] R.C.M. 1003(b)(9).
[360] R.C.M. 1003(b)(9) discussion.
[361] R.C.M. 1003(b)(6).
[362] R.C.M. 1003(b)(6) discussion.
[363] R.C.M. 1003(b). Detention of pay is not an authorized court-martial punishment.
[364] R.C.M. 1003(b)(2).
[365] R.C.M. 1003(b)(3).
[366] R.C.M. 1003(b)(2) discussion.
[367] R.C.M. 1003(b)(2); United States v. Humphrey, 14 M.J. 661 (A.C.M.R. 1982); United States v. Mahone, 14 M.J. 521 (A.F.C.M.R. 1982).
[368] R.C.M. 1003(b)(2); United tates v. Pierce, 25 M.J. 607 (A.C.M.R. 1987) (sentence which included a forfeiture of "one half of one month's pay per month for ten months" was erroneous since sentence of forfeitures must be stated in exact amount of dollars to be forfeited each month); United tates v. Perry, 24 M.J. 557 (A.C.M.R. 1987) (a forfeiture of $625.00 pay per month for 75 days was contrary to R.C.M. 1003(b)(2) since forfeitures must be stated in terms of the number of months the forfeitures will last, not the number of days); United tates v. White, 23 M.J. 859 (A.C.M.R. 1987) (sentence which included forfeitures "for so long as the accused is entitled to pay" was contrary to the Manual mandate that forfeitures be stated in terms of the amount to be forfeited each month and the number of months the forfeitures will last).
[369] *Id.* Total forfeitures may not be approved when confinement has not been adjudged. R.C.M. 1107(d)(2) discussion: "[W]hen an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial … unless requested by accused"); United States v. Warner, 25 M.J. 64 (C.M.A. 1987).
[370] R.C.M. 1003(b)(3) discussion.
[371] R.C.M. 1003(b)(3).
[372] R.C.M. 1003(b)(3) discussion.
[373] R.C.M. 1003(b)(3).
[374] *See*maximum sentence limitations in MCM, 1984, Part IV.
[375] R.C.M. 1113.
[376] R.C.M. 1003(b)(5).
[377] R.C.M. 1003(c)(2)(A)(i). During time of war an officer's sentence of dismissal may be commuted to reduction to any enlisted grade.
[378] UCMJ art. 58(a).
[379] R.C.M. 1003(b)(1).
[380] *Id.*

31–14. Prior punishments

If the accused is being court-martialed and the accused has already received article 15 punishment for that offense, the accused is entitled to receive credit for that prior punishment.[381] The convening authority is not required to set aside the article 15 prior to the court-martial; the convening authority must, however, ensure that the accusd receives "day-for-day, dollar-for-dollar, stripe-for-stripe" credit.[382] This rule prohibiting prior punishment has been extended to administrative reductions based upon the same conduct for which an accused is later court-martialed.[383]

[381] United States v. Pierce, 28 M.J. 1040 (A.C.M.R. 1989).
[382] United States v. Pierce, 27 M.J. 367, 369 (C.M.A. 1989).
[383] United States v. Blocker, 30 M.J. 1152 (A.C.M.R. 1990).

Chapter 32
Corrections

32–1. Introduction

There are three separate tiers in the Army's corrections system.[1] At the lowest level is the Installation Detention Facility (IDF). There are 18 of these facilities located throughout the United States, Germany, and Korea. Pretrial confinees and prisoners with sentences to confinement of six months or less serve their sentences at these facilities. The next level in the system is the United States Army Correctional Brigade (Correctional Brigade) located at Camp Funston on Fort Riley, Kansas. The Correctional Brigade, formerly called the Retraining Brigade, is the Army's medium-term confinement facility. Prisoners with sentences of confinement greater than six months and up to and including three years serve their sentences at the Correctional Brigade. The third tier is the United States Disciplinary Barracks (USDB), at Fort Leavenworth, Kansas. The USDB is the Armed Forces' long-term confinement facility. Soldiers with a sentence to confinement of more than three years are confined at the USDB. The eligibility requirements for the other services vary.

32–2. United States Army Correctional Brigade[2]

The mission of the Correctional Brigade is to prepare prisoners for transition to civilian life as useful citizens or, in a few select cases, for return to duty. The Correctional Brigade environment is unique in that prisoner control is maintained by military discipline, instead of walls and bars for most of the typical prisoners' stay at the Correctional Brigade. The Correctional Brigade doctrine is that the minimum custody/military discipline environment when coupled with correctional treatment, educational programs, military and vocational training best prepares the typical first-time prisoner for a crime-free life after prison as either a productive soldier or a useful citizen in civilian life. Moreover, this correctional system is less expensive to establish and operate than the traditional fortress-type prison. It must be noted, however, that under the consolidation of corrections program, as of 1 October 1992 the Correctional Brigade will be closed.[3]

32–3. USDB[4]

The USDB is the only long-term maximum security confinement facility for Army, Air Force, and Marine prisoners.[5] Officer prisoners from all branches of the Armed Forces are confined at the USDB. The USDB, originally designated as the United States Military Prison, was established by congressional action in 1874. It was established as the United States Disciplinary Barracks in November 1940 and was placed under the operational control of the Department of Army. The mission of the USDB is to provide correctional treatment and training, care, and supervision necessary to return inmates to civilian life as useful, productive citizens with improved attitudes and motivation.

On 29 November 1990, the Deputy Secretary of Defense approved Option 2A of the Report to the Secretary of Defense on the Consolidation of Corrections under DoD (dated 1 June 1990). The effective date of consolidation of all DoD confinement assets is 1 October 1992.

The following characteristics describe Option 2A:

a. DA is the executive agency for all DoD "long-term" confinement at no cost to other services.

b. Option 2A defines "long-term" as more than one year remaining on a sentence after convening authority action and initial clemency consideration. All other prisoners will be "short-term."

c. Services will have the option of retaining long-term prisoners at the USDB or transferring them to the Federal Bureau of Prisons.

d. Short-term prisoners will be retained at regional confinement facilities.

e. DA may retain the following facilities: The USDB and eight regional confinement facilities at Forts Riley, Knox, Campbell, Carson, Hood, Lewis, Benning, and Sill. The U.S. Army Correctional Brigade will close on 1 September 1992.

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[1] On 29 Nov. 1990, the Secretary of Defense approved Option 2A of the Report to the Secretary of Defense on the Consolidation of Corrections under DoD (1 June 1990). The effective date for consolidation is 1 Oct. 1992. Between 29 Nov. 1990 and 1 Oct. 1992, DOD is in a transitional phase. As a result, general guidelines may or may not be followed on a case-by-case basis.

[2] The information in this section was obtained from an Information Paper, subject: The U.S. Army Correctional Activity, 8 Feb. 88 (prepared for the USJA, U.S. Army Correctional Brigade, formerly the U.S. Army Correctional Activity).

[3] *See* Option 2A, Report of the Secretary of Defense on the Consolidation of Corrections under DoD, 1 June 1990.

[4] The information in this section was obtained from Annual Historical Study, FY 85, United States Disciplinary Barracks.

[5] Note, however, that under Option 2A, services may confine long-term confinees in Federal Bureau of Prisons facilities.

32–4. Clemency and parole[6]

Most soldiers convicted at court-martial receive a sentence making them eligible for regulatory clemency consideration and, in many instances, parole as well. Defense counsel overlook a valuable service if they fail to investigate the potential for favorable clemency and parole consideration that can occur during the period of incarceration at either the USDB or the Correctional Brigade. When a guilty plea is being tendered and the terms of the pretrial agreement satisfy the prisoner transfer criteria to either the Correctional Brigade or the USDB, defense counsel should discuss opportunities for clemency and parole with their clients in advance of the trial date. The availability of these proceedings offers hope to clients beyond the trial. As Chief Judge Everett said in Hannan: "For defendants in criminal cases, the bottom-line question often is how much time must be spent in confinement. If this can be reduced by any means--including probation at the time of trial or subsequent release on parole--the defendant usually is anxious for this to be done."[7] This assertion by Chief Judge Everett is born out by experience. Prosecutors and trial defense counsel generally focus most, if not all their efforts, on the disposition of an accused's case in the courtroom setting.

32–5. Clemency and parole program authority

The authority for the clemency and parole programs that function within the Army correctional system is derived from a variety of statutes, Army regulations, and local policies. The Secretary of the Army is authorized by Federal statute to provide a system of parole for offenders who are confined in military correctional facilities and who were at the time of commission of their offenses subject to the Secretary's authority.[8] Pursuant to this statutory authority, the Secretary of the Army has established policies and procedures for the conditional release on parole of Army prisoners. Although originally only applicable to the USDB at Fort Leavenworth, Kansas, the parole procedures set forth in AR 190-47, chapter 12,[9] are also applied at the Correctional Brigade by local policy.[10] AR 15–130[11] reflects the delegation of authority from the Secretary of the Army to the Army Clemency Board (ACB) to make parole determinations. The ACB has a "standing" civilian president and two rotating Army officer members.

Apart from parole, Section 953 of Title 10, United States Code, requires the Secretary of the Army to establish a functional clemency system within military correctional facilities. This has been accomplished and clemency procedures are prescribed in AR 15-130 and AR 190-47, chapter 6. Although the ACB is not empowered to make clemency determinations, the Secretary of the Army has delegated authority to the ACB to make clemency and restoration to duty recommendations to be acted upon by the Deputy Assistant Secretary of the Army (Review Boards and Personnel Security).[12] Currently AR 190-47 is being redrafted to comport with DOD Instruction 1325.4.[13] This instruction promotes uniformity among the military services concerning the treatment of prisoners. Specifically, it has changed the eligibility requirements and considerations for parole and clemency.[14]

In addition to the aforementioned legislative and regulatory clemency and parole provisions, correctional facility commanders[15] have been entrusted with broad discretionary authority to grant clemency. Both the commandant of the USDB and the Correctional Brigade commander have been designated general court-martial convening authorities by the Secretary of the Army. The Army's two correctional facility commanders may mitigate, remit, or suspend, in whole or in part, any unexecuted portion of a court-martial sentence, to include uncollected forfeitures, other than sentences extending to death or dismissal or affecting a general officer.[16] Timely clemency disposition of military prisoners through the exercise of the correctional facility commander's authority to mitigate, remit, or suspend court-martial sentences is deemed essential to the Army Correctional program[17] prisoners do receive clemency pertaining to confinement, forfeitures, and punitive discharges, the correctional facility commander can not direct a prisoner's restoration to duty, reappointment to an enlisted grade above private (E1), or authorize direct substitution of an administrative discharge for a punitive discharge. Recommendations regarding these forms of clemency are forwarded to the ACB.

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[6] *See* Phillips, *The Army's Clemency and Parole Programs in the Corrections Environment: A Procedural Guide and Analysis,* The Army Lawyer, Aug. 1986.

[7] United States v. Hannan, 17 M.J. 115, 122 (C.M.A. 1984).

[8] 10 U.S.C. § 952 (1982).

[9] AR 190–47, chap. 12 (1 Oct. 1978) (C1, 1 Nov. 1980).

[10] Policy Number ZX–25–84, United States Army Correctional Activity, U.S. Army, subject: Parole of Prisoners from the United States Army Correctional Activity (USACA) (3 Apr. 1984) (hereinafter USACA Policy ZX–25–84).

[11] AR 15-130, para. 5*b.*

[12] AR 15–130, para. 5a, at 1–2.

[13] DOD Instruction 1325.4 (19 May 1988) [hereinafter DOD Instr. 1325.4].

[14] *Id.* at C.1.

[15] In accordance with AR 190–47, para. 2–1 (1980) there are only two Army correctional facilities, the USDB and USACA. Army correctional facilities should not be confused with Installation Detention Facilities which incarcerate pretrial and post-trial prisoners serving a short sentence to confinement of less than 4 months.

[16] Uniform Code of Military Justice art. 74, 10 U.S.C. § 874 (1982), MCM, 1984, R.C.M. 1108(b). AR 190–47, para. 6–19*f* (3).

[17] AR 190–47, para. 6–14*a.*

32–6. Clemency eligibility and consideration

All prisoners incarcerated at either the USDB or the Correctional Brigade are eligible for automatic clemency consideration at a three-tiered process. They are initially considered for clemency at a three-member disposition board convened at the correctional facility, then by the correctional facility commander, and lastly at the Army Clemency Board sitting in Washington, D.C. Prisoners are initially considered for clemency in accordance with guidelines imposed by the Department of Defense.[18] Clemency powers by either the correctional facility commander or the ACB may not be exercised prior to initial action by the convening authority.[19] Convening authorities are required by Army regulation to immediately forward a copy of the initial promulgating order to the commander of the proper confinement facility.[20] Notification of convening authority action is to be accomplished, by electrical means, if necessary, within 24 hours of the time the action is taken.[21] Effective January 1, 1986, the Commander, United States Army Finance and Accounting Center authorizes finance and accounting officers (FAO) worldwide to accept requests from staff judge advocate and command judge advocates for transmission of notice of convening authority action via electronic mail through the JUMPS Teleprocessing System (JTELS) to the FAO's serving the USDB or the Correctional Brigade.[22] Use of JTELS provides an additional, expedited means to meet the 24-hour notice requirement. In United States v. Powis,[23] the petitioner claimed that he was prejudiced by being denied the opportunity to obtain clemency in the regular course of clemency and parole procedures provided for sentenced prisoners. The petitioner was found to have been prejudiced by the deprivation of an inchoate right to appear before a clemency disposition board caused by the convening authority's failure to take initial action in a timely fashion. Although finding prejudice to the petitioner, the court found that "the extent to which a substantive right may be affected cannot be determined presently because it is a derivative both of disposition board recommendation and Naval Clemency and Parole Board action. The course of normal review is still available for purging prejudicial effects."[24] The court ruled that the petitioner was entitled to relief in the nature of mandamus and directed that the convening authority take action and notify the USDB of the action within six days of the court's decision.[25] Timely receipt of initial promulgating orders and electrical messages by correctional facilities remains a continuing problem.

One area of particular confusion pertains to clemency in the form of "return to duty" or"restoration to duty." These are terms of art and should be viewed as mutually exclusive. Individuals unfamiliar with the corrections process often misunderstand these two terms. "Restoration to duty" is a term used to describe procedures taken in connection with an individual who was sentenced to confinement and a punitive discharge or dismissal by court-martial and where a discharge or dismissal has been executed.[26] "Return to duty" is a term used to describe procedures taken in connection with a prisoner whose sentence includes confinement without a punitive discharge or whose punitive discharge has been remitted or suspended by the convening authority or appellate review agencies, or who is still pending the appellate process and whose discharge has not yet been executed.[27]

Prisoners with a sentence including a punitive discharge will automatically be considered for clemency in the form of return to duty. Prisoners must, however, submit a voluntary written application to be considered for restoration to duty. In the absence of exceptional circumstances, conviction of a felony- equivalent offense ordinarily disqualifies prisoners from restoration or return to duty.[28] When a prisoner is "returned to duty," the unexecuted portion of the sentence is suspended or remitted. Prisoners returned to duty will complete their previous unfulfilled service obligation or be required to extend, at the discretion of the approving authority, to serve for a period of at least one year.[29]

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[18] DOD Instr. 1325.4 J.3.*a.* A prisoner will not be considered for clemency if their approved sentence includes no confinement or their sentence to confinement is less than 12 months. The time at which they will be considered for clemency depends upon their approved sentence to confinement:

(a) 12 months or more but less than 10 years shall not be more than 9 months from the date confinement begins.
(b) 10 years or more but less than 20 years shall not be more than 24 months from the date confinement began.
(c) 20 years or more but less than 30 years shall not be more than 3 years from the date confinement began.
(d) 30 years or more, including a sentence to confinement for life, shall not be more than 5 years from the date confinement began.

In all cases consideration will occur annually after the first consideration. Prisoners who are sentenced to death are ineligible for consideration.

[19] AR 190–47, para. 6–14*f*, at 6–14.

[20] AR 27–10, para. 12–3.

[21] *Id.*

[22] Message, DAJA–CL, DA, Washington, D.C. for Staff Judge Advocates, Judge Advocates, Trial Defense Service, Military Judges, Legal Counsel, subject: Notification of Convening Authority. Action to the U.S. Disciplinary Barracks (USDB) and the USA Correctional Activity (USACA), dated 24 Dec. 1985.

[23] United States v. Powis, 10 M.J. 649 (N.C.M.R. 1980).

[24] *Id.* at 650.

[25] *Id.* at 650.

[26] MCM, 1984, app. A, at A–2.

[27] *Id.*, app. A, at A–2.

[28] *See id.*, para. 6–15*b*, at 6–15.

[29] *Id.*, para. 6–17*c*(1), at 6–16.1 –6–17.

Whereas the Commander, the Correctional Brigade, has the independent power to direct a return to duty, only the Secretary of the Army can direct restoration. Restoration creates a new term of service, generally in the lowest enlisted grade. It leaves unaffected the earlier service terminated by the punitive discharge and has no bearing on appellate review of the court-martial occurring in the preceding term. Restoration is a form of clemency which enables a prisoner to earn an honorable discharge subsequent to a previously executed punitive discharge.

A prisoner being considered for clemency appears before a clemency disposition board convened at the correctional facility. The board is comprised of three voting members with military police or corrections experience. Board procedures generally comply with AR 15-6.[30] The disposition board's recommendation is forwarded for action to the activity commander. If the facility commander does not exercise his or her authority to grant clemency, the action is forwarded to the ACB for final disposition.

The final rung in the clemency ladder is the ACB sitting in Washington, D.C. Upon completing its review, the ACB does not have the independent power to approve clemency. The ACB makes recommendations to the Deputy Assistant Secretary of the Army (Review Boards and Personnel Security), who has been delegated the power to grant clemency by the Secretary of the Army.[31] The Deputy Assistant Secretary's action completes the clemency process. The clemency process is repeated in its entirety 12 months subsequent to the initial review date should the individual remain a prisoner.

The clemency process is performed on every prisoner incarcerated at the USDB and the Correctional Brigade each year. There are some minor variations in the disposition process occurring within the Correctional Brigade and the USDB. The key common denominators, which ensure uniformity of treatment throughout the Army's correctional system, are the correctional facility disposition boards and the ACB.

32–7. Parole eligibility and considerations

Although intertwined in the disposition process, parole is a matter separate and distinct from clemency. Parole has no connection with the pardon or forgiveness of a prisoner's conviction and is not provided solely as a reward for good conduct in a correctional facility. Parole can best be defined as a form of conditional release from physical confinement. Parole does not constitute the completion of the correctional treatment process, but is, instead, a continuation of a prisoner's sentence in an alternate form. Additionally, parole consideration, unlike clemency, is not automatic. Parole must be requested by the prisoner.

The purpose of parole is to restore a measure of freedom to the prisoner, to provide guidance and supervision after a prisoner's return to a civilian community environment and to help a prisoner to again become a useful member of society. Parole is granted to carefully selected prisoners when it is considered to be in the best interest of the prisoner, United States Army, and the American society. The criteria which shall be considered are:

a. the nature and the circumstances of the offenses;

b. the individual's military and civilian history;

c. the individual's confinement record;

d. the personal characteristics of the individual to include age, education, marital and family status, and psychological profile;

e. the impact of the offense upon a victim;

f. the protection and welfare of society;

g. the need for good order and discipline within the service; and

h. other matters as appropriate.[32]

Note that these are the same criteria to be considered for clemency.[33]

All military prisoners with an approved unsuspended punitive discharge, a dismissal, an administrative discharge, or in a retired status, confined pursuant to a sentence or aggregate sentence of more than 12 months are eligible for parole consideration after having served one-third of their term of confinement, but in no case less than six months. They are also eligible after having served 10 years of a sentence to confinement for 30 years or more as a sentence to life. Prisoners confined pursuant to a death sentence are not eligible for parole consideration.

In United States v. Surry,[34] the accused was sentenced by the presiding military judge to a bad- conduct discharge, confinement at hard labor for a term of 18 months, a partial forfeiture of pay, and a reduction to the lowest grade. Pursuant to the terms of a plea bargain the convening authority reduced the confinement from a term of 18 months to 1 year and approved the remainder of the sentence. At the Army Court of Military Review the appellant contended that he had been deprived of equal protection of the laws espousing the view that a prisoner whose sentence to confinement does not exceed one year is, per se, ineligible for parole. The appellant further asserted that the military judge failed to

[30] AR 15–6 (11 May 1988).
[31] 14 The Advocate 260 (1982).
[32] DOD Instr. 1325.4 J.4.
[33] *Id.* J.3.b.
[34] United States v. Surry, 6 M.J. 800 (A.C.M.R. 1978), *pet. denied,* 7 M.J. 62 (1979).

assure that the appellant understood that his plea bargain would deprive him of parole eligibility. Both contentions were rejected as the court found that the appellant was not ineligible for parole and that he may apply for parole consideration at any time. The court noted that paragraph 12-5c, AR 190-47 "did not limit in any way the eligibility requirement that the ACB may waive." The court went on to say that, in instances where prescribed eligibility requirements were not otherwise met, parole will be granted only if the board deems that exceptional circumstances exist. Given the purposes, conditions and duration of parole, this does not unreasonably discriminate against the short-term prisoners.[35] In a footnote the court alluded to "some misunderstanding as to the proper interpretation of the regulations" on this issue.[36] The court concluded in that since there was "no long-standing executive interpretation in conflict with"[37] its holding, the fact that there were no parole applications from prisoners with sentences to confinement of one year or less, was not determinative.

There is no definition for the term "exceptional circumstances" in AR 190-47. Although the term has never been explicitly defined in the parole context, the circumstances of the appellant in United States v. Hannan, in the words of Chief Judge Everett, "could be viewed as 'exceptional'."[38] Hannan demonstrates the potential adverse consequences awaiting defense counsel who are not adequately informed on the subject of an accused's parole eligibility. In Hannan, the appellant contended that his approved sentence was too short. The military judge sentenced Hannan to dismissal, forfeiture of $1,100.00 pay per month for 2 years, and confinement at hard labor for 1 year and 1 day.[39] Hannan and his well-intentioned defense counsel had negotiated a pretrial agreement which provided a punishment ceiling of confinement at hard labor for a period of 1 year, dismissal, and total forfeiture of pay and allowances for a period of 1 year.[40] After adjudging the appellant's sentence, the judge became aware of the sentence limitations within the pretrial agreement and perceived its possible impact on the parole eligibility which the judge had intended for Hannan. The trial judge submitted a clemency recommendation to the convening authority in which he asserted the appellant merited an opportunity to be considered for parole based on his conduct while serving his sentence.

The convening authority when taking action, reduced the sentence to that specified in the pretrial agreement.[41] Hannan or his counsel never took any formal action to release the convening authority from his obligation under the pretrial agreement and never requested that the convening authority refrain from reducing the confinement to 1 year. Hannan urged before the Court of Military Appeals "that if his sentence had remained at a year and a day rather than being reduced to only a year, he probably would have been paroled and released from confinement earlier than the date on which he was released." Hannan further alleged that, while incarcerated at the USDB, he submitted a parole plan and attempted to obtain a determination regarding his eligibility for parole. The response he received from the Parole Officer "was that 'with an approved sentence of confinement for one year you are not eligible for parole.' "[42]

The appellant raised four parole-related issues before the appellate courts. Hannan claimed he was denied effective assistance of counsel when his military defense counsel erroneously assured him that he would be eligible for parole and that the military judge failed to discuss the effect that the sentence limitation provision found in his pretrial agreement would have on his eligibility for parole. The two remaining issues were that the convening authority approved a sentence which, as a matter of law, was in excess of the sentence adjudged and that the appellant was denied due process of law when his request for a determination of parole eligibility was summarily denied. The Court of Military Appeals found "that any expectation of Hannan and his lawyers that he would be eligible for parole was not an inducing cause of his guilty pleas." Second the court held that the trial judge has little occasion "to raise the question of parole eligibility during the providence hearing, since at that time he quite properly had not apprised himself of the ceiling on punishment… . "[43]

On the third issue, the court found "that the failure of the defense counsel to seek clarification of the Staff Judge Advocate's review should be construed as a waiver of any complaint about the convening authority's action."[44] On the final issue the court referenced the exceptional circumstances waiver provision of paragraph 12-Sc, AR 190-47 and asserted that "presumably appellant could have been considered for parole under this proviso."[45] The court then cited the decision in United States v. Surry and continued by stating, "Certainly, the circumstances of his case -including the effort by Judge Wold, the original sentencing authority to make him eligible for parole--could be viewed as 'exceptional'."[46] Unfortunately for Hannan, neither he nor his legal advisors brought these unusual circumstances to the attention of correctional officials or sought explicitly to invoke the exception in the parole regulations. As a result, the

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[35] *Id.* at 802.
[36] *Id.* at 802.
[37] *Id.* at 802 n.4.
[38] 17 N.J. at 125.
[39] *Id.* at 118.
[40] *Id.* at 118.
[41] *Id.* at 119.
[42] *Id.* at 120.
[43] *Id.* at 123.
[44] *Id.* at 124.
[45] *Id.* at 125.
[46] *Id.* at 125.

court found that the failure to consider Hannan's application for parole on its merits could not be attributed solely to the Government. The Court of Military Appeals refused to grant any relief beyond that which the Court of Military Review had given earlier and affirmed its decision. The Court of Military Review had, in view of appellant's being "misled" as to his parole eligibility and "in an abundance of caution," reduced Hannan's forfeitures by 1 month in order to grant him some sentence relief.[47]

[47] *Id.* at 125.

Part 5
Post-Trial Procedure

Chapter 33
Post-Trial Hearings

33–1. Proceedings in revision

Article 60(e), UCMJ,[1] authorizes the convening authority, or whoever takes the initial action on the case, to order a proceeding in revision. This form of action is appropriate to correct "an apparent error or omission in the record"[2] or to resolve an"improper or inconsistent action by the court-martial."[3] The matter may affect the findings, the sentence, or both. The correction must be made, however, without "material prejudice to the substantial rights of the accused."[4]

The UCMJ imposes some specific limitations on the scope of proceedings in revision. The court cannot reconsider a finding of not guilty or a ruling tantamount to a not guilty finding as to any specification.[5] The court may not reconsider a not guilty finding as to any charge.[6] As an exception to this rule, a finding of guilty to the charge or some other appropriate charge may be made if the findings contain a finding of guilty to some specification tried as an offense under the charge, and that specification adequately alleges an offense under any punitive article of the Uniform Code of Military Justice.[7] Finally, the court may not increase the severity of the sentence in any part or as a whole except where a mandatory sentence is specified.[8] R.C.M. 1102 reflects these same limitations on proceedings in revision.[9]

Notwithstanding these limits, the scope of proceedings in revision is fairly broad. Such proceedings have been held to rectify erroneous oral announcement of a sentence (prior to adjournment);[10] to record the accused's awareness of his various rights to counsel;[11] to reconsider and revise the sentence after striking the consideration of inadmissible evidence;[12] and to correct the erroneous oral announcement of a finding.[13] Proceedings in revision have also been used to correct a defective sentencing instruction where the error was not prejudicial to the accused[14] and to correct deficiencies in a pretrial agreement inquiry.[15]

By the same token, certain actions are outside the scope of proceedings in revision. Such proceedings cannot be used to remedy an error created by failing to instruct on some element of the charged offense[16] or of a lesser included offense.[17] Likewise, a proceeding in revision may not be used to supply an omitted sentencing instruction to the court members.[18]

Subject to the topical limitations discussed above, a proceeding in revision may be directed by the military judge or the convening authority.[19] The military judge's authority to so direct ends when the military judge authenticates the record of trial.[20] The convening authority may order a proceeding in revision until the convening authority takes initial action on the case. After that time, the convening authority may act only when authorized by a higher reviewing authority.[21] Furthermore, if any part of the sentence has been ordered executed a proceeding in revision may not be held in the case.[22]

The procedural rules for courts-martial generally apply to proceedings in revision. In particular, the provision of R.C.M. 505 permitting changes in the court-martial's members, judge, or counsel and the rules concerning the presence of the members, judge, and counsel are applicable.[23] R.C.M. 1102, however, authorizes a proceeding in revision with

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[1] UCMJ art. 60(e).
[2] *Id.* at art. 60(e)(2).
[3] *Id.*
[4] *Id.*
[5] *Id.* at art. 60(e)(2)(A).
[6] *Id.* at art. 60(e)(2)(B).
[7] *Id.*
[8] *Id.* at art. 60(e)(2)(C).
[9] R.C.M. 1102(c) (1)–(3).
[10] *See* United States v. Baker, 32 M.J. 290 (C.M.A. 1991); United States v. Liberator, 34 C.M.R. 279 (C.M.A. 1964); and United States v. Robinson, 15 C.M.R. 12 (C.M.A. 1954). *See also* United States v. Massey, 17 M.J. 683 (A.C.M.R. 1983); United States v. Baker, 30 M.J. 594 (A.C.M.R. 1990).
[11] United States v. Barnes, 44 C.M.R. 223 (C.M.A. 1972).
[12] United States v. Carpenter, 36 C.M.R. 24 (C.M.A. 1965).
[13] United States v. Downs, 15 C.M.R. 8 (C.M.A. 1954).
[14] United States v. Starusak, 4 M.J. 639 (A.F.C.M.R. 1977).
[15] United States v. Steck, 10 M.J. 412 (C.M.A. 1981).
[16] United States v. Warsham, 10 C.M.R. 653 (A.F.B.R. 1953); United States v. Stubblefield, 2 C.M.R. 637 (A.F.B.R. 1951). *But cf.* United States v. Mead, 16 M.J. 270 (C.M.A. 1983).
[17] United States v. Evans, 5 C.M.R. 585 (A.F.B.R. 1952).
[18] United States v. Roman, 46 C.M.R. 78 (C.M.A. 1972).
[19] R.C.M. 1102(a).
[20] R.C.M. 1102 (d).
[21] *Id.*
[22] R.C.M. 1102(d). The convening authority will commonly order portions of the sentence executed when he takes action. *See* R.C.M. 1113(b).
[23] R.C.M. 1102(e)(1).

less than all the originally detailed court members so long as the jurisdictional requirements as to number of court members are satisfied.[24] In a case requiring action by court members, a different, properly qualified military judge may be detailed to preside at the revision proceedings if the original judge is not reasonably available.[25]

The military judge is authorized to take any appropriate action including instructions to the members at a proceeding in revision. The members may, of course, deliberate on corrective action in closed session.[26] The record of a proceeding in revision becomes part of the original record of trial and must be maintained, prepared, authenticated, and served in accordance with R.C.M. 1103 and 1104.[27]

33–2. Dubay hearings[28]

A proceeding in revision is not a proper forum for presenting or considering additional evidence in a case.[29] Yet there are many possible circumstances when the presentation and consideration of additional evidence may serve a beneficial purpose without the need for a rehearing[30] or retrial of the facts relevant to the accused's guilt or innocence. To fill this hiatus, the Court of Military Appeals created what is now known as a Dubay hearing.[31] The original Dubay hearing was ordered so that a law officer, the precursor of the military judge, could hear evidence and legal argument and render findings on the existence of unlawful command control over court-martial proceedings. Subsequently, the scope of inquiry has broadened considerably although the purpose remains the same. As the court has said, "[a] Dubay proceeding, in effect, is utilized to gather additional evidence or to resolve conflicting evidence before determining an issue presented to the appellate tribunal."[32]

In addition to being a fact-finding device for appellate courts, the Dubay hearing has also been used by convening and supervisory authorities in the legal review of cases.[33] This practice has been accepted by the Court of Military Appeals as consistent with the policy that "corrective action should take place as promptly as possible, since otherwise evidence may become unavailable or irreversible damage inflicted."[34] The Court of Military Appeals has also concluded that "a military judge may convene a Dubay hearing on his own motion prior to authentication of the record of trial."[35] The powers of both the convening authority and military judge may be limited where the case was tried by members and there is a failure of proof as to an element of an offense.[36]

33–3. R.C.M. 1102 and post-trial article 39(a) sessions

With the case law in this posture, the drafters of the Manual for Courts-Martial, 1984, adopted the holding of Brickey and several related cases[37] in creating R.C.M. 1102. In part, that rule provides that "[a]n Article 39(a) session under this rule may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence."[38] The topical scope of such post-trial sessions is not further defined or limited. The drafters offer only one example of the intended working of the rule: examining allegations of misconduct by a court member or counsel.[39] The scope of the provision is at least as broad as that of any Dubay hearing and may be broader given the unrestricted language of R.C.M. 1102(b)(2).[40]

Under R.C.M. 1102, limitations similar to those that restrict proceedings in revision apply to post-trial article 39(a) sessions.[41] Here again, the military judge's authority to convene a post-trial article 39(a) session terminates when he authenticates the record of trial.[42] Likewise, the convening authority may order a post-trial article 39(a) session until

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[24] R.C.M. 1102(e)(1)(A)(i).
[25] R.C.M. 1102(e)(1)(A)(ii).
[26] R.C.M. 1102(e)(2).
[27] R.C.M. 1102(e)(3).
[28] United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).
[29] R.C.M. 1102(b)(1) discussion; *but see* United States v. Brickley, 16 M.J. 258, 264 (C.M.A. 1983).
[30] *See* UCMJ art. 60(e)(1).
[31] 37 C.M.R. 411 (C.M.A. 1967).
[32] United States v. Flint, 1 M.J. 428, 429 (C.M.A. 1976).
[33] *See, e.g.*, United States v. Dyer, 5 M.J. 643 (A.F.C.M.R. 1978); United States v. Hashow, 3 M.J. 529 (A.F.C.M.R. 1977); United States v. Howard, 2 M.J. 1078 (A.C.M.R. 1976).
[34] United States v. Brickey, 16 M.J. at 264–65.
[35] United States v. Brickey, *supra*, at 265.
[36] United States v. Irvin, 21 M.J. 184, 186–7 (C.M.A. 1986). In *Irvin* the court stated that the Government's failure to establish jurisdiction could not be"rectified" by a *Dubay* hearing. *Id.* at 187. The court also asserted:

> Our decision in *United States v. Mead*, 16 M.J. 270 (C.M.A. 1983), would seem to imply that even after the conclusion of the original trial, the Government may be allowed to demonstrate the existence of facts which are subject to judicial notice.

Id. at 187, n.8.
[37] *See, e.g.*, United States v. Mead, 16 M.J. 270 (C.M.A. 1983); United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983).
[38] R.C.M. 1102(b)(2).
[39] R.C.M. 1102(b)(2) discussion.
[40] A post-trial article 39(a) session cannot be used to invade the jurors' deliberations except as permitted by Mil. R. Evid. 606(b). United States v. Boland, 22 M.J. 886 (A.C.M.R. 1986), *petition denied* 23 M.J. 400 (C.M.A. 1987).
[41] R.C.M. 1102(c).
[42] R.C.M. 1102(d).

initial action is taken or at any later time if authorized by a reviewing authority.[43] Again, like a proceeding in revision, the personnel requirements of R.C.M. 505 and 805 apply to post-trial article 39(a) sessions.[44] Of course, the court members are not present at an article 39(a) session, unless they are called as witnesses.[45] A military judge may take any appropriate action at a post-trial article 39(a) session. One significant difference remains, however, defense counsel should note that while a proceeding in revision is barred by the execution of any part of the sentence, a post-trial article 39(a) session is not and such a session may be authorized or directed by a reviewing authority superior to the convening authority.[46]

While the post-trial article 39(a) session is available to the Government to correct some trial deficiencies,[47] it is of greater significance to the defense in that it offers an additional opportunity to attack a conviction or sentence. For example in United States v. Scaff[48] the Court of Military Appeals held that until the military judge authenticates the record of trial, he or she may conduct post-trial sessions to consider newly discovered evidence and in proper cases may set aside findings of guilty and the sentence.[49] One potential problem under this rule involves shipment of an accused to a distant place of confinement before a post-trial session is called by the military judge. Unless waived, the accused's presence is required at an article 39(a), UCMJ, session.[50] A second area of concern is that the rule does not spell out the procedures for requesting or assembling a post-trial session. Because not every request for an R.C.M. 1102 session by the Government or the defense will be granted, counsel must support the request both as to fact and law to facilitate effective appellate review of the request and its disposition. A complete recital of the material facts and relevant law will help the trial judge determine whether to convene a post-trial session as well as assisting the appellate court.[51] Obviously, counsel who oppose the other party's request for a post-trial session should make an equally complete submission in support of their position.

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[43] *Id.*
[44] R.C.M. 1102(e)(1)(B). *See* United States v. Baker, 32 M.J. 290 (C.M.A. 1991).
[45] UCMJ art. 39(a)(4).
[46] R.C.M. 1102(d) analysis.
[47] *See* United States v. Mead, 16 M.J. 270 (C.M.A. 1983).
[48] 29 M.J. 60 (C.M.A. 1989).
[49] *See* R.C.M. 1210(f).
[50] UCMJ art. 39(a); United States v. Caruth, 6 M.J. 184 (C.M.A. 1979).
[51] *See* United States v. Toy, 32 M.J. 753 (A.C.M.R. 1991)

Chapter 34
Post-Trial Actions and Review

34–1. Preparation and authentication of the record of trial

The military judge adjourns the court after the announcement of a not guilty verdict or the sentence. The trial is complete, but the record of trial must be prepared and authenticated before the convening authority takes action on the case.

A general court-martial record of trial ordinarily will be typed verbatim.[1] The record of trial should set forth all essential jurisdictional facts and all proceedings in open session or out-of-court hearings.[2] The transcript of a general court-martial, however, need not be verbatim in the following cases: when the proceedings result in an acquittal of all charges and specifications; when the proceedings terminate prior to findings; when the proceedings result in findings of not guilty only by reason of lack of mental responsibility; or when the court's sentence does not include a punitive discharge and is not in excess of 6 months confinement or other punishments that exceed a special court-martial's jurisdiction.[3] If the court's sentence exceeds 6 months confinement or other punishments that could have been imposed by a special court-martial, the requirement for a verbatim transcript is not obviated by reducing the sentence to one which could have been imposed by a special court-martial unless the summarized record is sufficient for purposes of review.[4]

The court reporter prepares the record by transcribing the notes or recordings made during the trial, and then submits the record to the trial counsel for examination.[5] Trial counsel can correct any minor errors discovered and initial the changes.[6] If major errors are present, the record should be returned to the reporter for rewriting.[7] Unless unreasonable delay will result, defense counsel must examine the record before submitting it to the military judge for authentication.[8] The defense counsel should call any errors discovered to trial counsel's attention, report such errors to the judge, or note objections to the record in a brief under article 38(c), UCMJ.

The military judge or judges who presided over the trial or any portion of the trial proceedings shall authenticate the record or the applicable portions of the record. If corrections are made, an errata or correction sheet should be prepared and included in the original, corrected record of trial. If the military judge cannot authenticate the record because of death, disability, or absence, the trial counsel authenticates the record.[9] If the trial counsel is unavailable by reason of death, disability, or absence, a court member may authenticate the record.[10]

Timely appeal is the heart of the appellate process, but the need for prompt review should not be invoked as a rationale for circumventing proper authentication. In United States v. Cruz-Rijos[11] the Court of Military Appeals held that the military judge should be used to authenticate the record whenever possible. In Cruz-Rijos, the court held that the trial counsel impermissibly invoked the "absence" provision of paragraph 82f of the MCM, 1969, and improperly authenticated the record, making 800 ex parte changes in the process, when the military judge was present and presiding over other courts-martial just 12 days after trial counsel authenticated the record. The court ordered a new review and action after proper authentication and cited a then recent trial judge's memorandum that "[j]udges should authenticate records of trial unless the delay in obtaining authentication would create a palpable risk of dismissal of cases under the Dunlap rule."[12] The demise of the Dunlap rule should not affect this policy.[13] Once the record is authenticated, the trial counsel must arrange to have a copy of the record delivered to the accused.[14] If it is impracticable to serve a copy of the record of trial on the accused, substitute service is authorized. In that case, the

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[1] R.C.M. 1103(b)(2)(B). The MCM, 1984, authorizes use of video tape to record the trial proceedings (R.C.M. 1103(j)(1)), but the authorization must be implemented by service regulations. The Army has not authorized use of videotape for this purpose. Moreover, the video tape would not be a substitute for a written transcript except in case of military exigencies (R.C.M. 1103(j)(2)). *See* United States v. Huff, 1 M.J. 614 (A.C.M.R. 1975); United States v. Killscrow, 1 M.J. 615 (A.C.M.R. 1975).

[2] R.C.M. 1103(b)(2), (c), (e); R.C.M. 1305.

[3] R.C.M. 1103(b)(2).

[4] United States v. Thompson, 47 C.M.R. 489 (C.M.A. 1973); United States v. Stevenson, 49 C.M.R. 409 (A.C.M.R. 1974); United States v. Crutchfield, 48 C.M.R. 602 (A.C.M.R. 1974).

[5] R.C.M. 1103(i)(1)(A).

[6] *Id.*

[7] *Id.*

[8] R.C.M. 1103(i)(1)(B).

[9] R.C.M. 1104(a)(2)(B).

[10] *Id.*

[11] 1 M.J. 429 (C.M.A. 1976).

[12] *Trial Judge Memorandum Number 98 (1 June 1976)*, 76–7 Judge Advocate Legal Service 28 (1976). *See also* UCMJ art. 54(c). The *Dunlap* rule (convening authority must take action within 90 days if accused is in confinement) was created in Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974) to guarantee timely post-trial action in cases where the accused was in confinement. The case was overruled in United States v. Banks, 7 M.J. 92 (C.M.A. 1979).

[13] *See also* United States v. Balletta, 30 M.J. 1073 (A.C.M.R. 1990) (Trial counsel may not invoke substitute authentication rules simply because the trial judge "did not wish to take the time to authenticate the record while he was involved in other courts-martial."); United States v. Lott, 9 M.J. 70 (C.M.A. 1980) (PCS to distant place qualifies as absence for substitute authentication); United States v. Walker, 20 M.J. 971 (N.M.C.M.R. 1985) (Navy Court finds 30-day leave to be sufficient for substitute authentication).

[14] R.C.M. 1104(b)(1)(A). For summary courts-martial,*see* R.C.M. 1305(e)(1)(A).

record will be served on the accused's trial defense counsel.[15] A copy of the record must be provided to the accused as well as soon as possible.[16] The authenticated record will be forwarded to the convening authority for initial review and action.[17]

The procedure for preparation of a special court-martial record depends on whether the court sentenced the accused to a punitive discharge. If the court adjudged a punitive discharge, the record must be verbatim, and the procedures are the same as the procedures for preparing a general court-martial record.[18] If the court did not adjudge a punitive discharge, the record may be summarized.[19] In fact, if the court acquitted the accused of all charges and specifications, or found the accused not guilty only by reason of lack of mental responsibility, or if the proceedings were terminated prior to findings by withdrawal, mistrial, or dismissal, the record of trial need contain only"sufficient information to establish jurisdiction over the accused and the offense," in addition to the original charge sheet and a copy of the convening orders and any amending orders.[20] In a special court without a military judge, the president serves as the authenticating officer.[21]

In a summary court-martial, the record is prepared using DD Form 2329, Record of Trial by Summary court-martial. The appropriate blanks are filled in and the summary court officer authenticates the record by signing each copy.[22]

The record of trial must be authenticated before the convening authority takes action on it.[23] If the convening authority acts on an unauthenticated record, the record will be remanded for a new post-trial recommendation by a staff judge advocate and action by a convening authority.[24]

34–2. Post-trial duties of counsel

a. Trial counsel duties. Article 60, UCMJ, and R.C.M. 1101(a) require that trial counsel notify the convening authority or a designated delegate of the convening authority, such as the staff judge advocate or chief of staff, of the results of each trial promptly after the court-martial adjourns.[25] This same provision directs the trial counsel to supervise the preparation, authentication, and distribution of the record of trial in accordance with the applicable regulations.

b. Trial defense counsel duties. Rule for Court-Martial 502(d)(6) addresses the duties of the accused's trial defense counsel. Section (E) of the discussion which follows that rule addresses post-trial duties. Five separate categories of duties are listed: deferment of confinement; examination of the record of trial and appellate issues; submission of matters to the convening authority; advice as to appellate rights; and, examination and response to the staff judge advocate's post-trial recommendation. Each of these responsibilities will be discussed below.

(1) *Deferment of confinement.* If the accused has been sentenced to a term of confinement, the accused may petition the convening authority to defer the service of the confinement. R.C.M. 1101(c) governs the deferment process. The accused has the burden of showing that the interests of the accused and the community in release outweigh the community's interests in immediate and continued confinement.[26] Among the factors which the convening authority can consider in determining whether to defer a portion of the sentence are the nature of the offenses, the effect of the crime on the victim, the command's need for the accused, and the effect of deferment on good order and discipline in the command.[27] The commander's decision must be in writing and must state why the deferment request is denied.[28] It is subject to judicial review only for abuse of discretion.[29] If deferment is granted, the commander can include appropriate restriction or conditions on the accused during the period of deferment.[30] For example, the accused may be ordered not to enter a certain service club, housing area, or geographical limits. These conditions must not be a substitute form of punishment.[31] After deferment is granted, the convening authority may rescind the deferment, but the accused is entitled to some due process considerations including notice and an opportunity to be heard on the issue.[32] When the rescission decision is made before initial action, the prisoner may be reconfined immediately.[33]

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[15] United States v. Derksen, 24 M.J. 818 (A.C.M.R. 1987).
[16] R.C.M. 1104(b)(1)(B), (C).
[17] R.C.M. 1104(e).
[18] R.C.M. 1103(c)(1).
[19] R.C.M. 1103(c)(2).
[20] R.C.M. 1103(e).
[21] R.C.M. 502(b)(2)(C); AR 27–10, para. 8–1*c*(1).
[22] R.C.M. 1305.
[23] United States v. Hill, 47 C.M.R. 397 (C.M.A. 1973); United States v. Smith, 41 C.M.R. 471 (A.C.M.R. 1969).
[24] United States v. Shurley, 44 C.M.R. 683 (A.C.M.R. 1971); United States v. King, 44 C.M.R. 680 (A.C.M.R. 1971).
[25] R.C.M. 502(d)(5) discussion.
[26] R.C.M. 1101(c)(3).
[27] *Id.* Additionally, the commander may consider the probability of flight by the accused, the likelihood that the accused will commit additional crimes, potential intimidation of witnesses, interference with the administration of justice, and the accused's character, mental status, family, and service record.
[28] Longhofer v. Hilbert, 23 M.J. 755 (A.C.M.R. 1986).
[29] R.C.M. 1101(c)(3); *see* United States v. Browndl, 6 M.J. 338 (C.M.A. 1978).
[30] Pearson v. Cox, 10 M.J. 317 (C.M.A. 1981). *See also* United States v. Porter, 12 M.J. 546 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 34 (C.M.A. 1982) (conditional deferment requiring accused to stay out of Colorado, the site of her crimes, not an unlawful limitation on liberty).
[31] R.C.M. 1101(c)(5).
[32] R.C.M. 1101(c)(6) and (7). *See* Collier v. United States, 42 C.M.R. 113 (C.M.A. 1970).
[33] R.C.M. 1101(c)(7)(B); United States v. Daniels, 42 C.M.R. 120 (C.M.A. 1970).

(2) *Examination of the record of trial.* R.C.M. 1103(i)(1)(B) provides that the trial defense counsel shall be permitted to examine the record of trial before authentication unless unreasonable delay will result. Counsel should use this opportunity to ensure that an accurate record is sent to the military judge or judges for authentication. This examination process will also serve to remind counsel that authentication cuts off the power of the trial judge to hold a post-trial article 39(a) session without action by the convening or higher authority.[34] Thus this examination of the record should be a check for accuracy and for issues which might merit a post-trial hearing. Defects in the accuracy of the record may be corrected by describing them, in writing, for the trial counsel, the military judge, or appellate authorities. In order to properly perform this review, the defense counsel should be given access to the court reporter's notes and tapes.

(3) *Submission of matters by the accused.* R.C.M. 1105 authorizes the accused to submit matters after sentencing for the convening authority's consideration before acting on the case. The submissions can consist of anything which might reasonably tend to affect the convening authority's action including, but not limited to: legal errors, evidence used at trial, portions or summaries of the record of trial, favorable matters not admitted at trial, and clemency recommendations from any source. Counsel should, for example, inform the convening authority that the military judge recommended suspension of a punitive discharge. Counsel must confer with the accused to determine what, if anything, will be submitted.[35]

These submissions under R.C.M. 1105 must be considered by the convening authority.[36] When the accused's R.C.M. 1105 submissions contain allegations of legal error, the staff judge advocate must respond to those allegations.[37] The response may be a simple statement of disagreement, so it may be of little immediate benefit to file extensive legal memoranda under R.C.M. 1105 alleging novel theories of legal error. Rather, trial defense counsel should emphasize the equitable, human aspects of the case and of the client to generate command consideration in favor of clemency. Family circumstances, prior good service, and other soldiers' recommendations are the types of material contemplated under R.C.M. 1105.[38] The submissions are not limited by the record of trial or the rules of evidence. R.C.M. 1105 offers, in effect, an opportunity to make a second sentencing argument and to include things counsel could not or did not use at trial. Never before have defense counsel's persuasive writing skills been so important to the accused.

The accused's submissions under this rule are subject to time limits depending on the type and results of trial.[39] For all general courts-martial and special courts-martial, the submissions must be made within 10 days after service with the post-trial recommendation or the authenticated record of trial, whichever is later. For summary courts- martial, the time period runs for 7 days after sentencing. In every case, the convening authority may extend the deadline for up to 20 additional days for good cause shown by the accused. These time periods are not affected by post-trial sessions under R.C.M. 1102 unless a new sentence is announced.[40] Any delay for "good cause" does not include time for obtaining material that could have been obtained and presented at trial with exercise of reasonable diligence.[41]

The right to make submissions under R.C.M. 1105 is subject to waiver in several ways.[42] Failing to make such submissions within the applicable time period waives the right. Making a partial submission without expressly reserving the right to make additional submissions in writing forecloses additional filings under R.C.M. 1105. The right to submit matters may be deliberately waived by a written expression of such an intent which is irrevocable. Finally, if the accused is absent without leave so that the record of trial cannot be served under R.C.M. 1104(b)(1), and no counsel or substitute counsel is available for such service, the accused will have waived the right to file such matters as to the time period which runs for ten days after such service.

(4) *Appellate rights.* Trial defense counsel must advise accused about their appellate rights upon conviction. Counsel must explain, if applicable, the appeal procedure for cases automatically reviewed by the Army Court of Military Review,[43] the procedure for discretionary or mandatory review by the United States Court of Military Appeals,[44] the potential for discretionary review by the United States Supreme Court,[45] and any additional review procedures available.[46] If, after a general court-martial conviction, the accused's case would be reviewed by The Judge Advocate General of the Army under article 69(a), UCMJ, the trial defense counsel must explain that process to the accused.[47]

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[34] R.C.M. 1102(d).
[35] *See* United States v. Davis, 33 M.J. 13 (C.M.A. 1991) (R.C.M. 1005 improperly limits defense submissions to *only* written matters). *See also* United States v. Harris, 30 M.J. 580 (A.C.M.R. 1990) (defense counsel is responsible for determining and gathering appropriate post-trial defense submissions).
[36] R.C.M. 1107(b)(3)(A)(iii).
[37] R.C.M. 1106(d)(4); *see* United States v. Keck, 22 M.J. 755 (N.M.C.M.R. 1986).
[38] Effron, *Post-Trial Submission to the Convening Authority Under the Military Justice Act of 1983*, The Army Lawyer, July 1984, at 59, 60.
[39] R.C.M. 1105(c).
[40] R.C.M. 1105(c)(3).
[41] R.C.M. 1105(c)(4).
[42] R.C.M. 1105(d).
[43] R.C.M. 1201(a).
[44] R.C.M. 1204.
[45] R.C.M. 1205.
[46] R.C.M. 1206, 1207.
[47] R.C.M. 1201(b).

The right to waive appellate review and the consequences of such a waiver must also be explained to the accused.[48] If the case is not otherwise subject to appellate review or if the accused elects to waive appellate review, the trial defense counsel must also explain the judge advocate's legal review process under R.C.M. 1112. The accused must also be advised of the right to petition The Judge Advocate General for relief under article 69(b), UCMJ, if the case will become final without review by the Army Court of Military Review or The Judge Advocate General.[49] In each instance, the accused should be advised that counsel will render any appropriate assistance in electing, waiving, or exercising any of the appellate review procedures discussed above.

(5) *Article 38(c) Brief.* If the defense counsel feels that the record contains reversible error or desires to submit new matters to mitigate the sentence, such argument or matter may be included in an article 38(c) brief.[50] In the past, the Court of Military Appeals has encouraged counsel to file such briefs.[51] The brief, when submitted to the Government, becomes a part of the record of trial on appeal.[52] There is a strong argument that, if a defense counsel prepares and submits an article 38(c) brief, failure to attach the brief to the record results in reversible error. In that case, the appellate court may remand the case for reconsideration by the reviewing authority below.[53] The role of the article 38(c) brief is entirely separate from the accused's submissions under R.C.M. 1105; however, there is no need to repeat R.C.M. 1105 submissions in such a brief.

(6) *Post-trial recommendation.* The trial defense counsel has a duty to examine the staff judge advocate's post-trial recommendation under R.C.M. 1106.[54] The recommendation must be served on the accused as well as defense counsel. The convening authority must allow 10 days to pass after such service before taking action on the case.[55] This time allows the defense to read the recommendation and prepare a response or rebuttal. The convening authority may extend this time period for good cause shown.[56] If counsel fails to comment on any erroneous, inadequate, or misleading aspect of the recommendation, such an error in the recommendation is waived on subsequent appellate review. Plain errors are not waived.[57]

The defense response to the post-trial recommendation may be limited to addressing matters relevant to the R.C.M. 1106 recommendation. It may also be appropriate in some cases to combine the matters which would ordinarily be filed separately under R.C.M. 1105 with the defense response under R.C.M. 1106(f).[58] In any event, the defense response to the post-trial recommendation, just like the R.C.M. 1105 submissions, must be considered by the convening authority before acting on the case.

34–3. The staff judge advocate's post-trial recommendation

One of the fundamental reforms of the Military Justice Act of 1983 was to reduce, to the greatest extent possible, the burden of legal review on the nonlawyer commander/convening authority. To accomplish this, the post-trial review process was drastically altered. R.C.M. 1106, which implements the amended article 60, UCMJ, provides for a staff judge advocate's post-trial recommendation in most general courts-martial and in special courts-martial which adjudge a bad conduct discharge. This recommendation is not required to be a legal review. It is intended to be a concise written document that will assist the convening authority in the exercise of the command prerogative of taking action on the sentence. Unlike past practice under paragraph 85b of the 1969 Manual, the new rule does not require the short-form review concerning jurisdiction where the proceedings at a general court-martial terminated without a finding of guilty.

Under R.C.M. 1106 the post-trial recommendation must include:

(1) The adjudged findings and sentence;

(2) A summary of the accused's service record;

(3) A description of any pretrial restraint;

(4) A statement concerning the effect of any pretrial agreement; and

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[48] R.C.M. 1110; R.C.M. 1010(a)(2).

[49] R.C.M. 1201(b)(3).

[50] Article 38(c), UCMJ, provides:

> (c) In any court-martial proceeding resulting in a conviction, the defense counsel—
> (1) may forward for attachment to the record of proceedings a brief of such matters as he or she determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);
> (2) may assist the accused in the submission of any matter under section 860 of this title (Article 60); and
> (3) may take other action authorized by this chapter.

[51] *See, e.g.*, United States v. Ballard, 21 M.J. 282, 286 (C.M.A. 1985); United States v. Fagen, 30 C.M.R. 192 (C.M.A. 1961).

[52] *Id.*

[53] *See* United States v. Harrison, 16 C.M.A. 484, 37 C.M.R. 104 (1967). The court observed in *Harrison* that had the article 38(c) brief been included in the record before the Board of Review, the Board "might have treated the accused with ... greater leniency." *Id.* at 487, 37 C.M.R. at 107.

[54] United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

[55] R.C.M. 11106(f)(1); R.C.M. 1107(b)(2).

[56] R.C.M. 1106(f)(5).

[57] R.C.M. 1106(f)(6).

[58] Effron, *Post-Trial Submissions to the Convening Authority Under the Military Justice Act of 1983*, The Army Lawyer, July 1984, at 59, 62.

(5) A specific recommendation concerning the convening authority's action in the case.

The recommendation must also state the staff judge advocate's opinion concerning the need for corrective relief as to legal errors raised in timely defense submissions under R.C.M. 1105 or 1106.[59] This opinion need not be supported by any analysis or rationale.[60] The rule also authorizes the inclusion of any other appropriate matters, even from outside the record.[61]

The post-trial recommendation to the convening authority may not be made by any person who has acted as a court member, military judge, trial counsel or assistant trial counsel, defense counsel, assistant or associate defense counsel, or as an investigating officer in the case.[62] Additionally, if the staff judge advocate testified at the trial as to some contested matter,[63] or if the staff judge advocate must review his or her own pretrial action in formulating a recommendation,[64] then the staff judge advocate may be disqualified from preparing the post-trial recommendation. In the absence of clear legal authority, the potential for disqualification should be tested by asking whether the officer's actions before or during the trial create, or appear to create, a risk that the officer will be unable to evaluate the evidence objectively and impartially.[65]

34–4. Initial action by the convening authority

R.C.M. 1107 governs the convening authority's action on a case. If the convening authority has other than an official interest in the case or has participated in the trial in a manner which creates or appears to create a lack of impartiality or objectivity, he or she may be disqualified from taking action.[66] In those cases, the record must be forwarded to some other officer exercising general court-martial jurisdiction for action.

The nature of the action to be taken on the findings and the sentence is a matter of command prerogative within the sole discretion of the convening authority.[67] The convening authority is not required to review the case for legal or factual sufficiency. Thus, the commander may properly consider such matters as justice, clemency, discipline, mission requirements, or other appropriate considerations. Legal errors may, of course, be corrected by the convening authority, but the commander is not required to analyze the record for legal errors.

There are some limitations on the convening authority's action. The action cannot be taken before the time periods specified for submission of written matters by the accused to the convening authority unless this right is waived by the accused.[68] The convening authority is obligated to consider certain matters. Those matters are: the result of trial in the case; the staff judge advocate's recommendation, if one is required; and the matters submitted by the accused, if any.[69]

In addition to these things which must be considered, the commander may consider the record of trial, the accused's personnel records, and any other appropriate matters.[70] If such matters are outside the record and are adverse to the accused, then the defense must be given notice and an opportunity to respond.[71]

In taking action, the convening authority need not act on the findings. If desired, the findings could be set aside in whole or in part, reduced to lesser included offenses, or a rehearing could be directed as to some or all the findings.[72] In acting on the sentence, the convening authority may approve or disapprove it in whole or in part, mitigate it, or change it, so long as the severity is not increased.[73] The commander may act on the sentence for any reason or for no reason, but the action taken must be explicitly stated.[74]

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[59] United States v. Hill, 27 M.J. 293 (C.M.A. 1988) (the SJA must respond to allegations of legal error submitted by the accused within permissible time allocations even though the accused submitted them after service of the post-trial recommendation).

[60] *See* United States v. Keck, 22 M.J. 755 (N.M.C.M.R. 1986).

[61] *But see* R.C.M. 1107(b)(3)(B)(iii) for the requirement to give the accused notice and an opportunity to rebut any adverse information from outside the record. *See also* United States v. Groves, 30 M.J. 811 (A.C.M.R. 1990).

[62] R.C.M. 1106(b). *See also* United States v. Grinter, 28 M.J. 840 (A.F.C.M.R. 1989) (even though art. 32 investigation was waived, officer initially appointed as investigating officer was disqualified from preparing the post-trial recommendation).

[63] United States v. Choice, 49 C.M.R. 663 (C.M.A. 1975).

[64] United States v. Engle, 1 M.J. 387 (C.M.A. 1976).

[65] United States v. Newman, 14 M.J. 474 (C.M.A. 1983).

[66] R.C.M. 1107(a) discussion. *See* United States v. Rivera-Cintron, 29 M.J. 757 (A.C.M.R. 1989); United States v. Cortes, 29 M.J. 946 (A.C.M.R. 1990); and United States v. Ralbovsky, 32 M.J. 921 (A.F.C.M.R. 1991).

[67] R.C.M. 1107(b). *See* United States v. Tu, 30 M.J. 587 (A.C.M.R. 1990); and United States v. McKnight, 30 M.J. 205 (C.M.A. 1990).

[68] R.C.M. 1107(b)(2).

[69] R.C.M. 1107(b)(3)(A). *But see* United States v. McKnight, 30 M.J. 205 (C.M.A. 1990) (convening authority is not bound by SJA's post-trial recommendation). *See also* United States v. Craig, 28 M.J. 321 (C.M.A. 1989) (to ensure the record provides evidence that the convening authority reviewed all defense submissions, the SJA should list all defense submissions as enclosures to the post-trial recommendation and addendum, or, the convening authority should initial and date all defense submissions).

[70] R.C.M. 1107(b)(3)(B).

[71] *See supra* note 53.

[72] R.C.M. 1107(c).

[73] *See* Waller v. Swift, 30 M.J. 134 (C.M.A. 1990) (the convening authority's power to commute sentences is not absolute. The power cannot be used to increase the severity of the sentence for any specific accused).*See also* United States v. Bono, 26 M.J. 240 (C.M.A. 1988).

[74] R.C.M. 1107(d).

34–5. Judge advocate legal review

Under R.C.M. 1112, summary courts-martial and special courts-martial without an adjudged bad conduct discharge will be reviewed by a judge advocate.[75] The written review must consider the court's jurisdiction over the accused and each offense as to which there is an approved finding of guilty, the sufficiency of the specifications, and the legality of the sentence.[76] If the accused has submitted allegations of legal errors under R.C.M. 1105, R.C.M. 1106, or filed them directly with the reviewing judge advocate, a response to those allegations must be included in the judge advocate's review.[77] If the judge advocate determines that corrective action is necessary or appropriate, the record of trial and review must be sent to the general court-martial convening authority for action. In those cases, the review must also contain a recommendation as to the appropriate action and an opinion as to whether such action is required as a matter of law.[78] The convening authority has plenary powers when action is taken on the case.[79]

Also, under R.C.M. 1112, a judge advocate will review general courts-martial and special courts- martial with sentences that include an approved bad conduct discharge if the accused has waived or withdrawn appellate review. The review must address the same considerations noted above: jurisdiction; sufficiency of the pleadings; legality of the sentence; a response to legal errors; and, as required, a recommendation for action and a legal opinion as to the need for corrective action.

In cases reviewed under R.C.M. 1112, the records must be forwarded to the general court-martial convening authority for action in three instances: (1) if the reviewing judge advocate recommends corrective action; (2) if the approved sentence includes a bad conduct discharge, a dishonorable discharge, dismissal, or confinement in excess of 6 months; or (3) if required by departmental regulations.[80] The Secretary of the Army has not added any other class of cases requiring convening authority action. This review is ordinarily the final legal review of the accused's conviction.

Following legal review under R.C.M. 1112, the convening authority's final action may order the punitive discharge executed. Cases involving a dismissal must be reviewed at the Secretary of the Army level.[81] The convening authority must consider additional matters when ordering a punitive discharge executed if that discharge was approved more than 6 months before the date of the final action and the accused has not been on appellate leave. The staff judge advocate must then advise the convening authority whether retention of the accused would be in the best interest of the Army; what the findings and sentence as approved are; if the soldier has been on active duty since the trial, the nature and character of such active duty; and whether the staff judge advocate recommends execution of the discharge.[82]

If the reviewing judge advocate under R.C.M. 1112 recommends some corrective action which, in the opinion of the reviewer, is required as a matter of law, and the convening authority takes action less favorable to the accused than is recommended by the reviewer, then the case must be forwarded to the Judge Advocate General for review.[83]

The final action taken by the convening or any higher authority must be promulgated in supplementary orders.[84] In addition to the guidance of R.C.M. 1114, the Secretary of the Army has provided further procedural guidance in Army regulations.[85]

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[75] R.C.M. 1112(a)(2), (3).
[76] R.C.M. 1112(d)(1).
[77] R.C.M. 1112(d)(2).
[78] R.C.M. 1112(d)(3).
[79] UCMJ art. 64(c).
[80] R.C.M. 1112(e).
[81] *See supra* note 41.
[82] R.C.M. 1113(c)(1).
[83] R.C.M. 1112(g)(1).
[84] R.C.M. 1114(b)(2).
[85] AR 27–10, chap. 12.

Chapter 35
Appeals

35–1. Introduction

At common law there was no right to a criminal appeal.[1] State and Federal jurisdictions developed appellate processes through statutory or regulatory provisions. In the military, the right to appeal a court-martial finding or sentence is statutorily created by the Uniform Code of Military Justice.[2] The system created by the UCMJ is similar to that found in the Federal sector. Many trial decisions may be appealed to the service Courts of Military Review,[3] intermediate appellate courts which fulfill functions similar to United States Circuit Courts of Appeals. Further appeal may then be had to the United States Court of Military Appeals[4] and, possibly, to the United States Supreme Court.[5]

This chapter will deal with the construction and application of the military appellate process.[6] It will examine those Manual provisions implementing the UCMJ and the UCMJ itself. Some discussion will also concern the Army's regulations in the area.[7] At the outset, however, the responsibilities of counsel at the trial level must be addressed.

35–2. Initial procedures

The appellate process begins with the announcement of a sentence. Thereafter, both trial and defense counsel have important appellate roles to perform. Failure to perform these duties may prejudice the rights of the convicted accused. Such prejudice may be remedied at the appellate level.

a. Trial counsel responsibilities. Immediately following trial, trial counsel must inform the command of the findings and sentence.[8] This is accomplished by completing DA Form 4430-R (Report of Result of Trial). The result of trial form is then distributed to the accused's immediate commander, the convening authority, and the local confinement facility, when appropriate. Completion and distribution of the form begins the appellate processing of the now convicted accused's case, and that process should begin as soon as possible after trial.

The trial counsel is also responsible for ensuring that the record of trial is completed in timely fashion and adequately preserved.[9] In this respect, counsel must pay particular attention to the recording tapes used by the court reporter during the trial. All tapes must be retained in their original condition until the appellate process is complete.[10] They should be stored in a secure area and catalogued to facilitate their retrieval. Occasionally, an appellate court will determine that the record before it is deficient, and will request that the trial jurisdiction make the recording tapes available to determine what actually occurred at trial. If the Government is unable to provide the tapes, the record may lose its verbatim character, resulting in a retrial or other relief.[11]

b. Defense counsel responsibilities. As described above, trial counsel's appellate responsibilities are administrative in nature. The trial counsel ensures that the record is properly processed while it is in the trial jurisdiction. Trial defense counsel, on the other hand, performs substantive appellate functions with respect to the convicted accused's case. While many of these functions are detailed in chapter 34, it is important to recognize that they are in fact part of the appellate handling of the case and part of trial defense counsel's continuing responsibilities to the accused. This particular point was aggressively made by Judge Perry in United States v. Palenius,[12] in which the Court of Military Appeals reversed a conviction because the accused had not received proper advice from the trial defense counsel concerning the appeal of the case. Judge Perry's opinion directed defense counsel to discuss post-trial alternatives with their clients thoroughly. Such advice must inform the appellant of the nature of the appellate process and the powers of the various forums involved. Judge Perry stated:

> These powers include the obligation to review the entire record for sufficiency as to the finding of guilt as to all charges and a determination anew of the appropriateness of the approved sentence Article 66(c), UCMJ, 10 U.S.C. § 866(c). These duties should be explained in terms understandable to the accused. As to the power of the Court of Military Review to determine the sufficiency of the evidence upon which the conviction rests, the accused should be made aware that this means that the judges of that court must review the trial transcript and themselves be satisfied beyond a reasonable doubt of the guilt of the accused based upon the evidence of record. Concerning the authority of the Court of Military Review to affect the sentence, the accused should be advised that if the court

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[1] United States v. Larneard, 3 M.J. 76, 79 (C.M.A. 1977); *see* IV Wharton's Criminal Procedure ... 637 (C. Torcia 12th ed. 1976).
[2] 10 U.S.C. §§ 801–940 (1982) [hereinafter cited as UCMJ].
[3] UCMJ art. 66.
[4] UCMJ art. 67.
[5] 28 U.S.C. § 1259 (1982); UCMJ art. 67(h)(1).
[6] The Government's right to appeal under article 62a, UCMJ is not covered in this discussion, but is detailed in chapter 29.
[7] AR 27–10, chaps. 13, 14.
[8] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1101(a) [hereinafter cited as MCM, 1984, and R.C.M., respectively].
[9] R.C.M. 1103(b)(1).
[10] AR 27–10, para. 5–32; R.C.M. 1103(b)(1)(B).
[11] *See* United States v. Chollet, 30 M.J. 1079 (C.G.C.M.R. 1990).
[12] 2 M.J. 86 (C.M.A. 1977).

is convinced that the sentence as approved by the convening authority is unduly severe, that court has the authority and the duty to reduce the sentence accordingly but that under no circumstance may the court increase the sentence as approved.[13]

To reinforce this general statement of the defense counsel's obligations, the court detailed what would be expected. First, trial defense counsel must advise their clients concerning the procedural nature of the appellate process. In effect, the accused must be told what happens, as well as where and when. Further, during the period leading up to the convening authority's initial action, defense counsel should, in consultation with the accused, determine whether any pleas for modification or reduction in sentence are appropriate or desired.

Second, the court held that "the trial defense attorney should familiarize himself with the grounds or issues, if any, which should be argued during the appeal before the Court of Military Review."[14] In this respect, all such matters should be discussed with the accused and forwarded to appellate defense counsel.[15]

Third, the court said that trial defense counsel"should remain attentive to the needs of his client by rendering him such advice and assistance as the exigencies of the particular case required."[16] Such matters as seeking deferment or suspension of all or part of a sentence should be discussed.

Finally, the court rejected what it considered the"prevailing practice among some trial defense attorneys of ceasing all activity on behalf of their clients and, in effect, terminating the relationship of attorney and client without permission of their clients or of the courts…"[17] In effect, the court held that trial defense counsel must continue their representation until they are either relieved by the appellant, the courts, or other counsel.

It is important to recognize that Judge Perry's opinion was carefully calculated to stimulate trial defense counsel to provide their clients with effective representation not only during the trial process, but also during the period immediately prior to appellate counsel's involvement. Without this effort by trial defense counsel, the accused will be unrepresented, and as a result vulnerable.[18]

35–3. Appellate review

Every court-martial conviction is reviewed. While reviews are accomplished at the local installation and other cases are forwarded to Headquarters, Department of the Army, every case receives a legal examination. The initial level of review is determined by the type of court-martial and the sentence adjudged. Before examining the structure of the appellate system, the accused's option to waive appellate review will be discussed.

a. Waiver or withdrawal of appellate review. After any conviction by a general court-martial, except one in which an adjudged death penalty has been initially approved, or any conviction by a special court-martial in which the initially approved sentence includes a bad conduct discharge, an accused may elect to waive or withdraw from appellate review under article 61, UCMJ, and R.C.M. 1110. The rule makes it clear that the waiver or withdrawal of appellate review must not be compelled or coerced.[19] If an accused waives appellate review under this rule, the case will still be reviewed by a judge advocate pursuant to R.C.M. 1112 (see supra chap. 33).

In making the decision to waive appellate review, an accused has the right to consult with legal counsel.[20] Usually, this consultation will be with the civilian, individual military, or detailed counsel who represented the accused at trial. If that counsel is not immediately available, the Manual provides authority to appoint an associate counsel to advise the accused. If trial defense counsel has been excused under R.C.M. 505(d)(2)(B), substitute counsel may be detailed.[21]

If the appeal is already in appellate channels, an accused will be advised concerning withdrawal from appellate review by the appointed appellate defense counsel.[22] The Manual also provides for an associate counsel and the detailing of counsel for the accused if no appellate defense counsel has been assigned.[23]

An accused must submit a waiver of appellate review within 10 days after the accused or the defense counsel is served with a copy of the convening authority's initial action. The waiver must be in writing and it must be attached to the record of trial.[24] The waiver must include a statement that the accused and the defense counsel have discussed the accused's appellate rights, that they discussed the effect a waiver would have on these rights, that the accused understands these matters, and that the waiver is voluntarily submitted. Counsel and the accused must both sign the

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[13] *Id.* at 91 n.7.
[14] *Id.* at 93.
[15] Should the appellant desire that any issue be considered, the indication of that desire must be honored by appellant defense counsel and the service Court of Military Review. *See* United States v. Knight, 15 M.J. 202 (C.M.A. 1983); United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[16] *Id.*
[17] *Id.*
[18] *See* United States v. Harris, 30 M.J. 580 (A.C.M.R. 1990), in which the court noted that trial defense counsel is responsible for determining and gathering appropriate post-trial defense submissions.
[19] R.C.M. 1110(c). *See*Clay v. Woodmansee, 29 M.J. 663 (A.C.M.R. 1989).
[20] R.C.M. 1110(b).
[21] R.C.M. 1110(b)(2)(C).
[22] UCMJ art. 70.
[23] R.C.M. 1110(b)(3).
[24] R.C.M. 1110.

waiver. A waiver of appellate review is submitted to the convening authority. Forms for executing a waiver or a withdrawal are included at appendices 19 and 20, Manual for Courts-Martial.

A withdrawal from appellate review may be filed with the authority exercising general court-martial jurisdiction over the accused, who will promptly forward it to The Judge Advocate General, or directly with The Judge Advocate General.[25] Such a request may be made at any time before review is complete.

A waiver or withdrawal will bar review by The Judge Advocate General under R.C.M. 1201(b)(1) and by the Court of Military Review. Once a waiver or withdrawal is submitted in substantial compliance with the rules, it may not be revoked.[26]

b. General courts-martial. After the convening authority takes initial action under R.C.M. 1107, if the approved sentence includes death or if the accused has not waived review under R.C.M. 1110, the record of trial and the convening authority's action are forwarded to The Judge Advocate General of the Army pursuant to R.C.M. 1111. If appellate review is waived, the record of trial and the convening authority's action will be reviewed by a judge advocate at the installation level.[27]

At the Office of The Judge Advocate General, the review process of a general court-martial depends upon the sentence adjudged. Some cases are reviewed by the U.S. Army Court of Military Review. They are those cases in which—

(1) The approved sentence includes death.

(2) The approved sentence includes dismissal of a commissioned officer, cadet, or midshipman.

(3) The approved sentence includes a dishonorable or bad conduct discharge or confinement for a year or more.

All other general courts-martial when there has been a finding of guilty and when the accused has not waived or withdrawn from appellate review are examined by The Judge Advocate General pursuant to article 69(a), UCMJ. These cases are sent to the Examination and New Trials Division, United States Army Legal Services Agency, a field operating agency of the Office of The Judge Advocate General, for review by attorneys designated by The Judge Advocate General as Examiners. The Judge Advocate General may also direct that those general courts-martial, the appellate review of which is not provided for in R.C.M. 1201(a), be reviewed by the Army Court of Military Review.[28]

General courts-martial which automatically qualify for review by a Court of Military Review may be appealed to the United States Court of Military Appeals, located in Washington, D.C., unless the Court of Military Review reduces the sentence to a level such that the case no longer qualifies for automatic review under article 66, UCMJ. This court will hear petitions for review from the accused, and, when the petition is founded upon "good cause," issue an order granting review.[29] The Judge Advocate General of each service may also certify questions to the court.[30] In this event, the court must review the record sent to it but need not resolve the legal issue certified.[31] These issues are also discussed in more detail below.

c. Special courts-martial.

(1) Special courts-martial not authorized to adjudge a bad conduct discharge. After the convening authority takes action, the case will be forwarded to a judge advocate for legal review pursuant to R.C.M. 1112. The reviewing judge advocate should be located at the installation level. The case is not automatically forwarded to Headquarters, Department of the Army. Review by a judge advocate under this rule will usually be the final level of legal review for a special courts-martial. There are two ways, however, that the case may be reviewed by The Judge Advocate General.

If the judge advocate who examines the case at the installation level concludes that as a matter of law corrective action should be taken, but the convening authority does not take action that is at least as favorable to the accused as that recommended by the reviewing judge advocate, the case must be forwarded to The Judge Advocate General for review.[32] The accused may also apply to The Judge Advocate General for review of a special court-martial conviction based upon one or more of the following grounds:

(a) newly discovered evidence;

(b) fraud on the court;

(c) lack of jurisdiction;

(d) error prejudicial to the substantial rights of the accused; and

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[25] *See* AR 27–10, para. 13–5*a.*

[26] R.C.M. 1110(g)(1). *But see* Clay v. Woodmansee, 29 M.J. 663 (A.C.M.R. 1989), holding the waiver null because it was the result of the Government's promise of clemency.

[27] *See* R.C.M. 1112.

[28] UCMJ art. 66; R.C.M. 120(a).

[29] UCMJ art. 67(b); R.C.M. 1204(a)(3).

[30] UCMJ art. 67(b)(2).

[31] United States v. Clay, 10 M.J. 269 (C.M.A. 1981).

(e) appropriateness of the sentence.[33]

Such a review, if granted, will be conducted by the Examination and New Trials Division.

(2) Special courts-martial authorized to adjudge a bad conduct discharge. Legal review of these cases depends on the sentence adjudged and initially approved. If the case does not include a punitive discharge, the conviction is reviewed in the same manner as a regular special court-martial discussed above. If the case includes a bad conduct discharge and appellate review is not waived or withdrawn, the conviction is reviewed in the same manner as a general court-martial.

d. Summary courts-martial. A summary court-martial is reviewed in the same matter as a regular special court-martial. After the convening authority's action, the case is forwarded to a judge advocate for legal review in accordance with R.C.M. 1112.[34] There is no further appeal, unless the accused applies for review by The Judge Advocate General pursuant to article 69(b), UCMJ.

35–4. The Army Court of Military Review

a. Generally. The U.S. Army Court of Military Review is composed of the Chief Judge and two or more appellate military judges designated by The Judge Advocate General in accordance with article 66, UCMJ. Although not established in name until 1969, the Courts of Military Review are the successors of the Boards of Review.[35]

For the purpose of reviewing court-martial cases, the court sits in three-judge panels or as a whole as prescribed in the rules of court.[36] Each panel performs the functions prescribed by the UCMJ concerning records of trial by court-martial referred to it.

The Chief Judge, assisted as described below, is responsible for the overall operation and administration of the court in accordance with policies prescribed in the rules of court and by The Judge Advocate General. The Chief Judge presides at hearings before the court sitting as a whole and at hearings before any panel of which the Chief Judge is a member. In the absence of the Chief Judge, the senior appellate military judge present performs those duties.

Each panel is composed of a senior judge and two appellate military judges designated by the Chief Judge. The senior judge is responsible for the operation of the panel and presides at hearings before it. In the absence of the designated senior judge, the senior appellate military judge on that panel performs those duties.

Responsibility for receiving and processing court-martial cases referred to the court, including referrals to panels, and for related administrative matters, is vested in the Clerk of Court. As to such cases and related administrative matters, the Clerk of Court acts under the supervision of the Chief Judge in accordance with policies established by The Judge Advocate General and the Chief Judge.[37]

A commissioner, certified in accordance with article 27(b), UCMJ, is assigned to assist the Chief Judge and each senior judge. The commissioner's duties are as specified by the Chief Judge or senior judge. In addition to such normal duties, the commissioner for the Chief Judge serves as plans officer for the U.S. Army Legal Services Agency (USALSA). In this capacity, he receives assignments from the executive, USALSA, for projects related to the administration of the agency, analyzes proposed legislative and regulatory changes in the administration of military justice, and assists the Chief Judge in preparing publications to provide guidance for military judges in the Army.

Each appellate judge assists the executive, USALSA, in the instruction and training of Reserve personnel assigned to the court as individual mobilization augmentees.

The Chief Judge, in addition to performing the judicial functions indicated above, has overall responsibility for the effective functioning of the U.S. Army Judiciary at both the trial and appellate levels. The Chief Judge is responsible for establishing rules and procedures for trial judges to improve the quality, fairness, and efficiency of military trials. The Chief Judge exercises judicial supervision over trial and appellate counsel in their roles as officers of the court.

b. Jurisdiction. Pursuant to article 66(b), the Army Court of Military Review may hear only those cases referred to it by The Judge Advocate General. The UCMJ provides that the service Judge Advocate General will forward the following cases to the court automatically: those in which the sentence, as approved, extends to death, or in which the sentence, as approved, extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for 1 year or more.

c. Scope of review. The various service courts of review fulfill functions similar to the Federal circuit courts. They act as intermediate appellate tribunals. The service courts of review, however, have broader powers of review than those of civilian appellate systems.

In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority.[38] Further, the court shall approve only those findings and sentences "as it finds

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[32] R.C.M. 1201(b)(2), 1112(g)(1).
[33] UCMJ art. 69(b); R.C.M. 1201(b)(3).
[34] R.C.M. 1306(c).
[35] The history of the Army Court of Military Review is briefly discussed in The Army Lawyer, Dec. 1985, at 36.
[36] *See* AR 27–13.
[37] AR 10–72; AR 27–10, para. 13–8.
[38] *See* United States v. Kelly, 14 M.J. 196 (C.M.A. 1982).

correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witness."[39]

This provision of the UCMJ specifically instructs the service courts of review to be convinced of the accused's guilt and to independently evaluate the evidence of record independently. The court has held that it must be satisfied of the appellant's guilt beyond a reasonable doubt.[40] Its review is not limited to appellate counsel's allegations or error. Rather, the court has investigated issues wholly apart from those presented by counsel. The court must also review each case referred to it even if appellate counsel present no allegations of error.

d. Powers on review. While the court's powers to search for errors may be expansive, its treatment of error is controlled by traditional judicial standards. article 59(a) provides that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[41] This familiar appellate standard is generally adhered to in military appellate practice.[42] Still, the Court of Military Appeals has on occasion gone beyond the statutory requirement.[43] Both the service courts of review and the Court of Military Appeals also measure error by constitutional standards in appropriate cases.[44]

As mentioned above, the service courts of review are specifically authorized to ensure that each sentence adjudged is appropriate and to take most necessary corrective actions. While this power is well beyond that provided to Federal circuit courts, it is not without limitation. Beginning with United States v. Simmons,[45] military authority has consistently held that the power to suspend sentences does not rest in the judicial branch.

> If Congress had intended to alter this prior consistent policy in relation to the sentence powers of a board of review, it seems to us that it would have done so in express language. This failure to confer the power expressly, appears in the light of historical development of military criminal law, to be even more persuasive that Congress did not intend to grant it or at least overlooked making such grant. Indeed, by article 71 of the Code, supra, Congress has continued the previous pattern of limiting the power of suspension to The President, to the Secretary of the Department, and the convening authority, who may order the sentence executed. Concededly, it is anomalous that a board of review can remit a punitive discharge entirely but is powerless to suspend it under a probationary guarantee of continued good behavior.[46]

The military appellate courts have occasionally found themselves unable to resolve adequately the question before them based on the existing record of trial. Under these circumstances the court has pursued two available alternatives. First, the court has sometimes ordered that affidavits be obtained from the appropriate parties addressing the matters in controversy. While this practice is often used by the service courts of review, it is an ineffective means of testing the truthfulness of any allegation or witness. Alternatively, the court may order that the record of trial be returned to the trial jurisdiction for a limited hearing into the issue. See infra chapter 34. Such a procedure was specifically authorized in United States v. Dubay.[47] A Dubay hearing permits a trial level forum to investigate the issues and develop a record for appellate review. In Dubay, the question was whether the accused's trial was tainted by improper command control. The court determined that since post-trial affidavits would not satisfactorily settle the matter, a limited hearing was appropriate to make a record and to permit appropriate action at the command level. Such appropriate action might include setting aside the original charges and ordering a retrial, or returning the record to the reviewing court for a new appeal, this time armed with an adequate record.[48]

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[39] UCMJ art. 66(c).

[40] *See* United States v. Taliau, 7 M.J. 845 (A.C.M.R. 1979).

[41] *See also* Mil. R. Evid. 103(a).

[42] *See generally* United States v. Bolling, 16 M.J. 901, 903 (A.C.M.R. 1983) (Foreman, J., concurring, deploring the demise of the prejudicial error standard in multiplicity issues).

[43] *See* United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Chestnut, 2 M.J. 84, 85 n.4 (C.M.A. 1976); United States v. Green, 1 M.J. 453 (C.M.A. 1976). *Compare* United States v. Hasting, 461 U.S. 499 (1983) (Court of Appeals may not, in exercise of supervisory powers, reverse conviction absent prejudicial error).

[44] *Compare* United States v. Barnes, 8 M.J. 115 (C.M.A. 1979) (dealing with errors that are not of constitutional magnitude) *with* United States v. Alba, 15 M.J. 573 (A.C.M.R. 1983) (discussing the application of the "harmless beyond a reasonable doubt standard" in courts-martial). *See* United States v. Remai, 19 M.J. 229 (C.M.A. 1985) (adopting the harmless error rule for testing a violation of the fifth amendment right to counsel).

[45] 6 C.M.R 105 (C.M.A. 1952). *But see*United States v. Clark, 16 M.J. 239 (C.M.A. 1983) (Everett, C.J., concurring); United States v. Millsap, 17 M.J. 980 (A.C.M.R. 1984).

[46] 6 C.M.R. at 108. *See also* Affronti v. United States, 350 U.S. 79 (1955); United States v. Darville, 5 M.J. 1 (C.M.A. 1978); United States v. Occhi, 2 M.J. 60 (C.M.A. 1976). The courts of review likewise do not have the power to defer the service of a sentence to confinement. The courts' primary responsibility is to reassess those sentences which are inappropriate or incorrect in law. *See* United States v. Rasmussen, 4 M.J. 513 (C.G.C.M.R. 1977).

[47] 37 C.M.R. 411 (C.M.A. 1967).

[48] *See, e.g.*, United States v. Vietor, 10 M.J. 69 (C.M.A. 1980).

35–5. The United States Court of Military Appeals

a. Generally. The Court of Military Appeals was established by Congress in 1951 pursuant to article 67 of the Uniform Code of Military Justice and article I of the United States Constitution. In 1989, Congress restructured the court. It is now defined in articles 67 and 141 through 146 of the UCMJ.[49] It is an independent appellate forum attached for administrative purposes to the Department of Defense. The court is located at 450 E Street N.W., Washington D.C. 20442-0001.

b. Composition. Membership on the court is controlled by article 142. Article 142 requires that the court be composed of five judges appointed from the civilian community. Like all Federal judges, the Court of Military Appeal's judges must be selected by the President of the United States, with the advice and consent of the Senate. While the general rule is that each judge serves a 15-year term, Congress staggered the terms of two new appointees to 7 and 13 years. Article 142(b)(3) also requires that the court be bipartisan; as a result, no more than three of the judges may be from the same political party. The judges are paid at the same rate as judges sitting on Federal circuit courts of appeals and are entitled to the same allowances as their Federal counterparts. The chief judge of the court is designated by the President and presides over sessions of the court while in attendance. Article 143(b) states that the other members of the court are ranked by the date of their commissions. Article 144 authorizes the court to promulgate its own rules of practice and procedure and to alter them from time to time. The current Rules of Court are contained in Volume 15 of the Military Justice Reporter.

While judges of the Court of Military Appeals have fixed terms of service, they cannot be removed from office for political or similar reasons. Article 142(c) provides that the "Judges of the court may be removed from office by the President, upon notice and hearing, for (1) neglect of duty; (2) misconduct; or (3) mental or physical disability. A judge may not be removed by the President for any other cause." This subsection ensures that the members of the court will be sufficiently independent of outside interests to resolve the complex and important questions that come before them consistent with their conscience and legal principles. Articles 142(e) and (f) allow senior judges and article III judges to temporarily fill vacancies on the court.

c. Jurisdiction.

(1) Automatic review. Article 67(a) categorizes the court's jurisdictional prerequisites. There are three separate avenues to review. First, pursuant to subparagraph (a)(1), the court shall review "all cases in which the sentence, as affirmed by the Court of Military Review, extends to death."

(2) Certification. Subparagraph (a)(2) provides that the court shall review "all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review." This process, known as certification, allows a judge advocate general to present certain significant legal questions to the court for its consideration. While this process can be seen as a form of Government appeal, it is equally available to the defense.[50]

Although certification requires the Court of Military Appeals to consider a case, the procedure does not require the court to answer the certified question in all instances. The court may decline to address the certified question when it is moot, advisory, or otherwise defective.[51] Similarly, the court has"declined to resolve certified issues which would not result in 'a material alteration of the situation for the accused or the Government.'"[52] Otherwise, the Court of Military Appeals must address all issues which have properly been certified.[53]

(3) Petition. By far, subparagraph (a)(3) provides the court with the majority of its cases. This provision of article 67 mandates that the court shall review all cases considered by a Court of Military Review when the accused petitions for review and is able to demonstrate "good cause" for further review. In United States v. Caprio[54] , the court extended this provision by allowing the Government to appeal a lower court's adverse extraordinary writ decision by way of petition rather than certification. In reaching this result, the court stated that if a Judge Advocate General considers that a case decided by a Court of Military Review presents a question so important as to require consideration by the Court of Military Appeals, the Judge Advocate General can use the certified question process of article 67(a)(2) of the Code.[55] Otherwise, the Government's partisan interest in an extraordinary relief matter can be presented by petition for review of an adverse decision in the Court of Military Review, or, as our present Rule 25(a) puts it, "an appeal from a denial thereof," with appropriate indication of the reason why review should be granted.[56]

Counsel familiar with Supreme Court practice should not confuse the "good cause" standard with certiorari. Those

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[49] National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101–89, 103 Stat. 1570 (1989). This statute creates subchapter XI of the UCMJ, Court of Military Appeals.
[50] *See, e.g.*, United States v. Evans, 45 C.M.R. 353 (C.M.A. 1972).
[51] United States v. Kelly, 14 M.J. 196 (C.M.A. 1982).
[52] United States v. Clay, 10 M.J. 269 (C.M.A. 1981), and cases cited therein.
[53] United States v. Kelly,*supra.*
[54] 12 M.J. 30 (C.M.A. 1982).
[55] *See supra* United States v. Redding.
[56] 12 M.J. at 33.

courts that may review a case by issuing a writ of certiorari are not required to hear a case merely because a party demonstrates legal issues requiring relief. Such a court may interpose "ripeness" and other legal barriers to review.

Petitions for review must satisfy a timeliness requirement. The relevant statutory provision reads:

> (c) The accused may petition the Court of Military Appeals for review of a decision of a Court of Military Review within 60 days from the earlier of—
>
> (1) the date on which the accused is notified of the decision of the Court of Military Review; or
>
> (2) the date on which a copy of the decision of the Court of Military Review, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record. The Court of Military Appeals shall act upon such a petition promptly in accordance with the rules of the court.[57]

d. Powers and actions of the Court of Military Appeals. Before the Court of Military Appeals may act, the case before it must have been approved by the convening authority and affirmed or reversed by a service court of review. In the event a case is certified to the court by a Judge Advocate General, the court need act only with respect to the certified issue.[58] Similarly, when the court accepts a petition for review, it need only resolve those questions raised in the petition. The court is not limited to the issues raised by appellant or specified by The Judge Advocate General but may specify issues for review. It has not been reluctant to exercise this power. Unlike the service courts of review, however, the Court of Military Appeals may act "only with respect to matters of law."[59] In this manner, the court is prohibited from reviewing sentence appropriateness[60] or strictly factual questions.[61] Such matters are within the purview of the intermediate service Courts of Military Review.

When the Court of Military Appeals determines that relief is necessary, it possesses all the powers traditionally held by appellate courts to carry out their resolutions. Article 67(d) states that the court may set aside both the findings and sentence. In addition, "it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing."[62] If the court sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed. Subparagraph (e) of article 67 authorizes the court to direct the appropriate Judge Advocate General to carry out its orders.[63]

35–6. Review by the United States Supreme Court

Article 67a, UCMJ permits both the accused and the Government to petition the United States Supreme Court for review, by writ of certiorari, of cases decided by the Court of Military Appeals. The denial of a petition for a grant of review by the Court of Military Appeals is not a reviewable decision.[64] The Supreme Court can grant certiorari only in those cases actually decided by the Court of Military Appeals. The percentage of petitions for certiorari granted by the Supreme Court is generally low. Thus, only the rare military case will reach the Supreme Court by this route. In any case, however, a petition for certiorari is now the final appeal for military appellants.

The Government may also petition for certiorari. The Solicitor General's office exercises control over Government petitions, as it does for other Federal agencies. Only exceptional cases with far-reaching impact are likely to be candidates for Government petitions.

35–7. Appellate counsel

a. Introduction. Pursuant to article 70, UCMJ, Congress has provided for both defense and Government counsel on appeal.[65] It should be recognized that the court-martial system is a bifurcated one, that is, counsel who litigated the case at the trial jurisdiction do not handle the appeal. Appellate counsel assigned to the United States Army Legal Services Agency in Washington, D.C., conduct all appellate litigation unless civilian counsel is obtained by the accused.

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[57] UCMJ art. 67(b).

[58] The court may also choose to review issues raised by the appellant or to specify issues itself. *See*United States v. Kelly, 14 M.J. 196 (C.M.A. 1982).

[59] UCMJ art. 67(d).*Compare* UCMJ art. 62 (Courts of Military Review may act only with respect to matters of law in review of Government appeals); United States v. Burris, 21 M.J. 140, 143 n. 6 (C.M.A. 1985).

[60] *But see* United States v. Dukes, 5 M.J. 71 (C.M.A. 1978).

[61] In testing the "legal sufficiency"of the findings below, the Court of Military Appeals determines whether the evidence of record, viewed in the light most favorable to the Government, supports the factual determinations of the finder of fact. United States v. Arias, 3 M.J. 436 (C.M.A. 1977). *See* United States v. Albright, 26 C.M.R. 408 (C.M.A. 1958).

[62] UCMJ art. 67(d).

[63] UCMJ art. 67(e).

[64] UCMJ art. 67a(a).

[65] *See* R.C.M. 1202.

b. Government Appellate Division. The Government Appellate Division is composed of the Chief, Government Appellate Division, and such other appellate counsel as are detailed to the Division. Under the supervision of the Assistant Judge Advocate General for Military Law, the Government Appellate Division performs the following functions:

(1) Provides representation for the United States before the Army Court of Military Review and the Court of Military Appeals when directed to do so by The Judge Advocate General and, when requested by the Solicitor General, represents the United States before the Supreme Court.

(2) Recommends to The Judge Advocate General that cases be forwarded to the Court of Military Appeals for review pursuant to article 67(b)(2), UCMJ.

c. Defense Appellate Division. The Defense Appellate Division is composed of the Chief, Defense Appellate Division, and such other appellate counsel as are detailed to the Division. Under the supervision of the Assistant Judge Advocate General for Civil Law, the Defense Appellate Division performs the following functions:

(1) Provides representation of accused before the Army Court of Military Review, the Court of Military Appeals, or the Supreme Court as provided in article 70(c), UCMJ.

(2) Recommends to The Judge Advocate General that clemency action be taken in appropriate cases under the provisions of article 74, UCMJ.

(3) Recommends to The Judge Advocate General that cases be forwarded to the Court of Military Appeals in accordance with article 67(b)(2), UCMJ.

35–8. Petition for a new trial

Article 73, UCMJ, and R.C.M. 1210 provide that an accused or his or her counsel may, within 2 years after approval by the convening authority of the court-martial sentence, petition The Judge Advocate General for a new trial. If the accused's case is pending review before a Court of Military Review or the Court of Military Appeals, The Judge Advocate General will refer the petition to the appropriate court for action. Otherwise, The Judge Advocate General will act on the petition.

There are two grounds for obtaining a new trial. First, a new trial may be ordered on grounds of newly discovered evidence if an injustice has resulted from the findings. To qualify as newly discovered evidence, the evidence must have been discovered after the trial, must not have been discoverable at the time of trial in the exercise of due diligence, and would probably produce a substantially more favorable result for the accused.[66] As can be seen, the burden on the accused in this area is a difficult one to meet. A petitioner may also obtain relief if it can be demonstrated that the original conviction occurred because fraud was practiced upon the trial court. Petitioner must show that the fraud substantially contributed to the conviction or sentence.[67]

[66] United States v. Bacon, 12 M.J. 489 (C.M.A. 1982).
[67] United States v. Kennedy, 8 M.J. 577 (A.C.M.R. 1979).

Chapter 36
Extraordinary Writs

36–1. Authority for extraordinary writs

a. The All Writs Act.

"The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[1]

The All Writs Act is the basis for the issuance of extraordinary writs by the military appellate courts.[2] The scope of relief available is not restricted except by the language of the statute. There are five writs commonly employed by reviewing courts to accomplish their purposes.

b. The five types of extraordinary writs.

(1) Writ of Certiorari. A writ of certiorari permits courts of last resort to order certification to them of a record of trial by an inferior court in a terminated proceeding for review by the superior court.[3]

(2) Writ of Mandamus. A writ of mandamus is issued by a court of competent jurisdiction to inferior courts, or to an officer, requiring the performance of a specific act which the court or officer has a preexisting duty to do.[4]

(3) Writ of Prohibition. A writ of prohibition is an order from a court of competent jurisdiction prohibiting an inferior tribunal or official from exercising jurisdiction outside its proper cognizance.[5]

(4) Writ of Error Coram Nobis. This writ is issued to bring before a court a judgment previously rendered by the same court for the purpose of reviewing an error of fact.[6]

(5) Writ of Habeas Corpus. The most common of all writs, habeas corpus, generally demands that a detained person be brought before a court so that an inquiry may be made as to the legality of the detention.[7]

c. The scope of the All Writs Act. One key aspect of the All Writs Act is that it applies only to "courts established by act of Congress" and the United States Supreme Court. Are the military courts within the meaning of this part of the Act?

The United States Court of Military Appeals has decided that it has jurisdiction to issue writs under the All Writs Act as it is a court created by Congress.[8] The Supreme Court has also noted the jurisdiction of the Court of Military Appeals under the All Writs Act.[9] The Manual for Courts-Martial, United States, 1984, also recognizes that the Court of Military Appeals has jurisdiction to entertain petitions for extraordinary writs and to grant such relief.[10]

Originally, the service courts of military review disagreed as to whether they possessed jurisdiction under the All Writs Act. The Army Court of Military Review was the first court of military review to assert such jurisdiction.[11] In doing so, the Army court went beyond the statutory basis for such powers and asserted that the issuance of such common law writs was an inherent power of the court.[12] The Air Force Court of Military Review acknowledged its extraordinary relief in Gagnon v. United States.[13]

In contrast to the Army and the Air Force, the Coast Guard Court of Military Review rejected the exercise of authority under the All Writs Act, finding that a court of military review is not a court established by an act of Congress.[14] The Navy Court of Military Review had extraordinary relief authority thrust upon it by the Court of Military Appeals.[15]

The issue was finally resolved by the Court of Military Appeals in Dettinger v. United States.[16] The Court of Military Appeals held that a court of military review is "unmistakably a court created by Congress"[17] and thus empowered to act under the All Writs Act. The MCM, 1984, also recognizes the extraordinary writ authority of the Courts of Military Review.[18]

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[1] 28 U.S.C. § 1651(a) (1982).
[2] United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966).
[3] *See* UCMJ art. 67(h) for authority to seek a writ of certiorari from the United States Supreme Court to review a decision by the Court of Military Appeals.
[4] *See,e.g.*, Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979).
[5] *See,e.g.*, Moye v. Fawcett, 10 M.J. 838 (N.M.C.M.R. 1981).
[6] Chapel v. United States, 21 M.J. 687 (A.C.M.R. 1985), discusses the basis for and limitations on the writ of error *coram nobis.*
[7] *See, e.g.*, Washington v. Greenwald, 20 M.J. 669 (A.C.M.R. 1985),*writ appeal den.* 20 M.J. 196 (C.M.A. 1985).
[8] Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967); United States v. Frischholz; UCMJ art. 67.
[9] Noyd v. Bond, 395 U.S. 683 (1969).
[10] R.C.M. 1204(a) discussion.
[11] United States v. Draughon, 42 C.M.R. 447 (A.C.M.R. 1970).
[12] *Id.* at 453.
[13] 42 C.M.R. 1035 (A.F.C.M.R. 1970).
[14] Combest v. Bender, 43 C.M.R. 899 (C.G.C.M.R. 1971).
[15] United States v. Ward, 5 M.J. 685 (N.C.M.R. 1978).
[16] 7 M.J. 216 (C.M.A. 1979).
[17] *Id.* at 219.
[18] R.C.M. 1203 discussion.

36–2. Relief in aid of the court's jurisdiction

A crucial aspect of the exercise of extraordinary relief authority under the All Writs Act requires that the writ be issued in aid of a court's jurisdiction. The Act does not increase the scope of any court's jurisdiction. There are, however, four separate concepts to consider in measuring the jurisdiction of the military appellate courts.

a. Actual jurisdiction. The actual extent or scope of the appellate jurisdiction of the Court of Military Appeals is defined in article 67, UCMJ. The actual jurisdiction of the courts of military review is set forth in article 66, UCMJ. Thus, cases subject to review by the courts under their respective statutory bases are eligible for extraordinary relief.[19]

b. Potential jurisdiction.[20] The concept of"potential jurisdiction" recognizes that in courts- martial practice, the jurisdiction of the appellate courts is determined by reference to the sentence as adjudged and approved. For much of the time a "case," in its pretrial and trial stages, is not yet certainly within the actual jurisdiction of an appellate court. Such a circumstance is awkward and judicially unhealthy. To remedy this problem, the Court of Military Appeals adopted the concept of potential jurisdiction. Simply put, so long as a case may become subject to review by the court, that case is within the court's "potential" jurisdictional scope for extraordinary relief.[21] Thus, only when some action has been taken that restricts the subsequent legal review of a case does potential jurisdiction over the case terminate. In United States v. Snyder,[22] the court described its jurisdiction under the All Writs Act as reaching "cases properly before us or which may come here eventually."[23]

c. Supervisory authority.[24] Strictly speaking, the concept of"supervisory authority" is not a form of jurisdiction. It is, however, a well- recognized basis upon which the Court of Military Appeals, in particular, asserts power to grant extraordinary relief. In McPhail v. United States,[25] the accused was tried by a special court-martial authorized to impose a bad conduct discharge. The adjudged sentence did not include a punitive discharge, rendering the case no longer subject to review by the military appellate courts. Following the denial of relief by the Air Force Judge Advocate General in his review pursuant to article 69, UCMJ, the accused sought extraordinary relief from the Court of Military Appeals. The court ordered relief even though the case was final in terms of appellate review. The court recognized that there are some (unstated) limits to its authority but held that "as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliances with applicable law from all courts and persons purporting to act under its authority."[26]

In Unger v. Zemniak,[27] First Lieutenant Unger found herself at a special court-martial for willful disobedience of an order. Because the special court-martial could not adjudge any confinement or a dismissal for the accused commissioned officer, the case could not qualify for review by the Army Court of Military Review or the Court of Military Appeals.[28] Nevertheless, the Court of Military Appeals held that "Congress never intended that this court sit by helplessly while courts-martial are misused in disregard of an accused servicemember's rights under the Constitution or the Uniform Code."[29] As it did in McPhail, the court used broad language in interpreting its extraordinary writ supervisory authority jurisdiction.[30]

d. Ancillary jurisdiction. In United States v. Montesinos,[31] the Army Court of Military Review remanded the case to the convening authority to order a limited evidentiary hearing to determine the validity of the sentence previously adjudged or to order a rehearing on sentence. The convening authority exceeded the scope of this remand (setting aside the findings of guilty and the sentence).[32] The Court of Military Appeals held that the Army Court of Military Review had retained ancillary jurisdiction over the case and could issue an extraordinary writ to set aside the convening authority's action to "preserve the integrity of its orders."[33] The Court of Military Appeals also noted that when the integrity of the judicial process is at stake, the courts of military review can issue extraordinary writs on their own motion.[34]

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[19] Moore v. Akins, 30 M.J. 249 (C.M.A. 1990).
[20] *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595 (1973).
[21] Moyer, Justice and the Military 64 (1972).
[22] 40 C.M.R. 192 (C.M.A. 1969).
[23] *Id.* at 195. *See also* U.S.N.M.C.M.R. v. Carlucci et al., 26 M.J. 328 (C.M.A. 1988).
[24] *See generally* Wacker, *The "Unreviewable" Courts-Martial: Supervisory Relief Under the All Writs Act From the Court of Military Appeals*, 10 Harv. C.R.–C.L. L. Rev. 33 (1975), *reprinted in* Mil. L. Rev. Bicent. Issue 609 (1976).
[25] 1 M.J. 457 (C.M.A. 1976).
[26] *Id.* at 463.
[27] 27 M.J. 349 (C.M.A. 1989).
[28] *See* arts. 66 and 67 UCMJ.
[29] 27 M.J. at 355.
[30] *See also* United States v. Gray, 32 M.J. 730 (A.C.M.R. 1991).
[31] 28 M.J. 38 (C.M.A. 1989).
[32] 28 M.J. at 41.
[33] 28 M.J. at 44 n.3. *See also* Boudreaux v. U.S.N.M.C.M.R., 28 M.J. 181 (C.M.A. 1989).

36–3. Writs agreeable to the usages and principles of

law Another prerequisite to the exercise of a court's extraordinary relief power under the All Writs Act is that such writs be employed in a manner that is agreeable to the usages and principles of law. Three factors have been identified as relevant to this determination. They are that the case must present extraordinary circumstances, the accused must have exhausted all other adequate remedies, and the exercise of extraordinary relief should result in judicial economy. These factors are discussed below.

a. Extraordinary circumstances. It should be obvious that the extraordinary relief powers of a court will be exercised only under exceptional circumstances. The Court of Military Appeals has described the requirement as follows:

> Since the action contemplated is extraordinary in nature, the conditions warranting resort to the remedies there provided for must also be extraordinary. A petitioner seeking relief in such a proceeding is required to demonstrate that the ordinary course of the proceedings against him through trial and appellate channels is not adequate.[35]

There is no better way to define the scope of extraordinary circumstances than to consider a small sampling of the cases in which relief has been granted. Petitioners have won relief from illegal pretrial confinement,[36] illegal post-trial confinement,[37] revocation of an improper waiver of appellate review,[38] attack on a convening authority's commutation of sentence,[39] release from post-trial confinement after a successful C.M.R. appeal,[40] and double jeopardy.[41] Relief has been granted for the existence of a lack of mental capacity that was not detected until after the accused's case became final.[42] The absence of court-martial jurisdiction has also produced relief.[43] Many more cases displaying exceptional circumstances have had substantial relief granted.[44] In this regard, the role of the advocate is critical in drafting a petition that fairly but adequately describes both the equities involved and the extraordinary circumstances the case presents.

b. Exhaustion of remedies. There was a time when a very strict exhaustion of remedies requirement was applied to requests for extraordinary relief.[45] The court not only expected a petitioner to employ administrative measures such as article 138,[46] but also to seek relief from the military judge at trial.[47] More recently, the courts have relaxed a strict application of the exhaustion of remedies requirement.[48] Additionally, the Court of Military Appeals has not required a petitioner to perform futile acts.[49] As an occasional remedy, however, the Court of Military Appeals has denied extraordinary relief in favor of ordering a trial judge to hold an article 39(a) session for litigation of the issue raised in the petition for extraordinary relief.[50]

The current practice of the Court of Military Appeals is not to require a complete exhaustion of any other available remedy before seeking extraordinary relief. The court does, nonetheless, encourage petitioners to seek initial relief before the service Courts of Military Review.[51] But that is not mandatory.[52] The drafters of the Manual for Courts-Martial also recommended that petitioners initially seek relief at the Court of Military Review level.[53]

In the final analysis, and in the absence of any mandatory requirement, the decision where to petition for relief is a pragmatic one. Which court or officer is the most likely and best source of the remedy being sought? Counsel should consider the appropriate military commander, the convening authority, the military judge, the Judge Advocate General, the Court of Military Review, and the Court of Military Appeals. Among other considerations that go into this determination will be the urgency of the remedy sought and the subject matter of the defect which is the cause of the complaint.

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[34] *Id.*
[35] Font v. Seaman, 43 C.M.R. 227, 230 (C.M.A. 1971).
[36] Berta v. United States, 9 M.J. 390 (C.M.A. 1980).
[37] Collier v. United States, 42 C.M.R. 113 (C.M.A. 1970).
[38] Clay v. Woodmansee, 29 M.J. 663 (A.C.M.R. 1989).
[39] Waller v. Swift, 30 M.J. 139 (C.M.A. 1990).
[40] Moore v. Akins, 30 M.J. 249 (C.M.A. 1990).
[41] Burt v. Schick, 23 M.J. 140 (C.M.A. 1986).
[42] United States v. Jackson, 17 C.M.A. 681 (1968).
[43] Duncan v. Usher, 23 M.J. 29 (C.M.A. 1986); Fleiner v. Koch, 19 C.M.A. 630 (1970).
[44] *See* Moyer, Justice and the Military 650-55 (1972).
[45] Catlow v. Cooksey, 44 C.M.R. 160 (C.M.A. 1971).
[46] UCMJ art. 138 (complaint of wrong by a commanding officer); Walker v. Commanding Officer, 19 C.M.A. 247, 41 C.M.R. 247 (1970); Dale v. United States, 19 C.M.A. 254, 41 C.M.R. 254 (1970).
[47] Font v. Seaman, 43 C.M.R. at 231.
[48] Kelly v. United States, 1 M.J. 172 (C.M.A. 1975); Porter v. Rochardson, 50 C.M.R. 910 (C.M.A. 1975) (Cook, J., dissenting).
[49] *See* Keyes v. Cole, 31 M.J. 228 (C.M.A. 1990).
[50] Phillipy v. McLucas, 50 C.M.R. 915 (C.M.A. 1975); Milanes-Canamero v. Richardson, 50 C.M.R. 916 (C.M.A. 1975).
[51] United States v. Redding, 11 M.J. 100, 106 (C.M.A. 1981).
[52] Pearson v. Cox, 10 M.J. 317, 319 (C.M.A. 1981).
[53] R.C.M. 1204(a) discussion.

c. Consistent with judicial economy. The notion of"judicial economy" simply means that the time, energy, and assets of the judicial system, at all levels, should be wisely husbanded as a finite resource. The concept that judicial economy might be a proper basis for a court to exercise its extraordinary relief powers is relatively new in military practice.[54] The doctrine has been best described in Shepardson v. Roberts:

> [I]n view of the special circumstances of this case, the time and energy that can be conserved here by reviewing promptly the trial judge's ruling and the opportunity to resolve promptly some recurrent issues that now have been thoroughly briefed and argued, we believe that it is proper to exercise our extraordinary writ jurisdiction by considering the petition on its merits.[55]

The court made use of the doctrine of judicial economy in Murray v. Haldeman.[56] There the accused sought a writ to prohibit his trial on a marijuana use charge. The only evidence the Government had in support of the charge was a urine test result. The case raised significant issues involving the service connection jurisdiction of a court-martial over an off-post offense and the fourth amendment aspects of the military services' compulsory urinalysis programs. The resolution of these issues would have a significant impact on the administration of the Department of Defense's efforts to combat drug abuse among the armed forces worldwide and would affect the military justice system of each of the services. Under these circumstances, the court determined that the case was ripe for resolution as a matter of judicial economy.[57]

36–4. Use of extraordinary relief by defense counsel

There are various ways in which defense counsel may use or attempt to use extraordinary relief in order to assist their clients. Counsel must recognize their"special responsibility to insure not only that their petition is timely but that it is complete and objective."[58] This responsibility derives from the fact that "[i]nitial action on a petition for extraordinary relief is usually based solely upon the representations contained in the petition."[59] Counsel should assume their partisan function only after fairly informing the court of the history and facts of their case.[60]

a. Pretrial proceedings. Extraordinary relief may be available to challenge the court-martial's jurisdiction.[61] A Government attempt to prosecute in violation of an immunity agreement might also be challenged with an extraordinary writ.[62] As discussed above, illegal pretrial confinement may be remedied through the court's extraordinary relief powers.[63]

b. Trial proceedings. The extraordinary powers of the courts may be invoked to challenge a denial of counsel[64] or compel production of witnesses.[65] The court's authority may also be employed to compel discovery or investigation of a case in appropriate circumstances.[66]

c. Post-trial proceedings. Unreasonable post-trial delay in processing a court-martial case may be remedied by seeking extraordinary relief.[67] The denial of a request to defer confinement is also subject to review via a petition for extraordinary relief.[68] When the accused is being held in confinement in excess of the lawful term of confinement imposed[69] or when the conviction underlying the sentence has been subsequently overturned,[70] relief is available via an extraordinary writ. Of course, even after the conviction is final, a petition for a writ of error coram nobis provides a possible source of relief from an unjust conviction.[71] Additionally, counsel should consider use of an extraordinary writ to seek release of the accused from post-trial confinement if the accused is successful in a C.M.R. appeal.[72]

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[54] Brookins v. Cullins, 49 C.M.R. 5 (C.M.A. 1974).
[55] 14 M.J. 354, 357 (C.M.A. 1983) (footnote omitted).
[56] 16 M.J. 74 (C.M.A. 1983).
[57] *Id.* at 77. *But see* Judge Fletcher's dissent at 83.
[58] Jameson v. Strom, 17 M.J. 808 (A.C.M.R. 1984).
[59] *Id.* at 809.
[60] *Id.*
[61] Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981).
[62] Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982).
[63] Fletcher v. Commanding Officer, 2 M.J. 243 (C.M.A. 1977). *See also* United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985) (extraordinary writ authority may be invoked to remedy illegal conditions in pretrial confinement facilities).
[64] Soriano v. Hosken, 9 M.J. 221 (C.M.A. 190).
[65] Davis v. Qualls, 7 M.J. 27 (C.M.A. 1979).
[66] Halfacre v. Chambers, 5 M.J. 1099 (C.M.A. 1976).
[67] Bouler v. United States, 1 M.J. 299 (C.M.A. 1976); Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974).
[68] *Pearson v. Cox*; United States v. Sitton, 5 M.J. 394 (C.M.A. 1978); Longhofer v. Hilbert, 23 M.J. 755 (A.C.M.R. 1986).
[69] Whitfield v. United States, 4 M.J. 289 (C.M.. 1978).
[70] Thomas v. United States, 1 M.J. 175 (C.M.A. 1975).
[71] Del Prado v. United States, 48 C.M.R. 748 (C.M.A. 1974); Chapel v. United States, 21 M.J. 687 (A.C.M.R. 1985).
[72] Moore v. Akins, 30 M.J. 249 (C.M.A. 1990).

36–5. Use of extraordinary relief by the Government

Prior to 1976, paragraph 67f of the Manual for Courts- Martial, United States, 1969 (rev. ed.), authorized the convening authority to reverse the legal ruling of a military judge. This provision was invalidated by the Court of Military Appeals in United States v. Ware.[73] Between 1976 and 1979, the Government had no mechanism to compel a legal review of a trial judge's ruling which dismissed charges or suppressed evidence but fell short of a finding of not guilty. The absence of such a review process was deemed"unhealthy from a judicial administration standpoint."[74] To fill this need, in 1979, the Court of Military Appeals approved the use by the Government of a petition for extraordinary relief seeking to overturn a trial judge's ruling which was or amounted to a dismissal of charges.[75] Over the next 5 years, the service courts of military review[76] and the Court of Military Appeals[77] struggled to define the limits of such powers. In United States v. LaBella,[78] a solution emerged.

The litigation is now, in large measure, a matter of only academic interest because the drafters of the Military Justice Act of 1983,[79] amended article 62, UCMJ, to authorize specifically an appeal by the Government of certain legal rulings by the military judge at trial. The statutory provisions are implemented by military regulations.[80] As the court said in Dettinger, "the presence of a right to appeal [by the Government] would make unnecessary proceedings for extraordinary relief."[81] Accordingly, the Government should have very few occasions to resort to the extraordinary relief mechanism because it can accomplish the same purposes via article 62 and R.C.M. 908.[82] Additionally, trial counsel, prior to filing an application for extraordinary relief, must coordinate with the Chief, Government Appellate Division.[83]

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[73] 1 M.J. 282 (1976).
[74] United States v. Rowel, 1 M.J. 289, 291 (C.M.A. 1976) (Fletcher, J., concurring).
[75] United States v. Dettinger, 7 M.J. 216 (C.M.A. 1979).
[76] *See*, *e.g.*, United States v. Bogan, 13 M.J. 768 (A.C.M.R. 1982); United States v. Wholley, 13 M.J. 574 (N.M.C.M.R.), *vacated*, 14 M.J. 284 (C.M.A. 1982); United States v. Pereria, 13 M.J. 632 (A.F.C.M.R. 1982).
[77] *See,e.g.*, United States v. Redding, 11 M.J. 100 (C.M.A. 1981); United States v. Caprio, 12 M.J. 30 (C.M.A. 1981).
[78] 15 M.J. 228 (C.M.A. 1984).
[79] Pub. L. No. 98–209, 97 Stat. 1393 (1983).
[80] R.C.M. 908; AR 27–10, para. 13–2.
[81] Dettinger, 7 M.J. at 222.
[82] *See supra* chap. 23.
[83] AR 27–10, para. 13–2.

Chapter 37
Collateral Review of Courts-Martial

37–1. Introduction

Prior to 1984 there was no method of direct review of judgments of courts-martial by the Federal courts. The military justice system established under the Uniform Code of Military Justice[1] is not a part of the judiciary of the United States within the meaning of article III of the Constitution. The Federal courts recognized this and, accordingly, held judgments by courts-martial not to be reviewable by direct appeal, writ of error, or certiorari by any appellate tribunal outside the military judicial system.[2] In this regard Colonel Winthrop expressed correctly the law regarding direct reviewability of courts-martial proceeding by the Federal court system. In part he wrote: "[T]he court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relation therewith, its proceedings are not subject to be directly reviewed by any Federal court, either by certiorari, writ of errors, or otherwise… "[3]

Federal statutes, providing for review by certiorari, appeal, and certified question generally do not apply to the Court of Military Appeals or other military tribunals.[4] Further, military courts are not administrative tribunals subject to review under the provisions of Public Law 89-554.[5]

Under the provisions of the Military Justice Act of 1983[6] Congress closed the gap of reviewability by providing discretionary review of decisions of the Court of Military Appeals by the Supreme Court of the United States. The Supreme Court may not review by writ of certiorari a decision of the Court of Military Appeals refusing to grant a petition for review.[7] What effect this grant of reviewability will have on the military justice system remains to be seen.

While there was no mechanism of direct review of court-martial judgments by the Federal courts prior to 1984, those courts have traditionally reviewed court-martial proceedings by use of petitions for extraordinary relief, particularly petitions for writs of habeas corpus. In addition, the Court of Military Appeals has held itself to be a "[court] established by act of Congress" within the meaning of the All Writs Act[8] and that it therefore may grant extraordinary writs necessary or appropriate in aid of its jurisdiction[9] including the writ of habeas corpus.[10] The power of the Court of Military Appeals to grant extraordinary relief in the form of a writ of habeas corpus was recognized by the United States Supreme Court in Noyd v. Bond.[11]

This chapter will examine the use of the writ of habeas corpus by the Federal courts to collaterally review court-martial proceedings.

37–2. The Writ of Habeas Corpus

a. Definition. Habeas corpus has been defined as"[a] writ… designed for the purpose of effecting a speedy release of persons who are illegally deprived of their liberty or illegally detained from the control of those who are entitled to the custody of them."[12] Historically, habeas corpus, as so defined, has constituted the primary means of collateral review of findings and sentences of courts-martial.[13]

b. Purpose. The purpose of a habeas corpus proceeding is to enable the court to inquire whether the petitioner is restrained of his or her liberty, and, if so, whether such restraint is unlawful.[14] In other words, the purpose of a writ of

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[1] 10 U.S.C. §§ 801–940 (1982).

[2] *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864).

[3] W. Winthrop, Military Law and Precedents 50 (2d ed. 1920). *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).*See also* Hiatt v. Brown, 339 U.S. 103, 110–12 (1950).

[4] 28 U.S.C. §§ 1252–1258 (1982).*See also* Hiatt v. Brown, 339 U.S. 103, 111 (1950); United States v. Grimley, 137 U.S. 147, 150 (1890); Smith v. Whitney, 116 U.S. 167, 177 (1886).

[5] 5 U.S.C. §§ 102, 551, 701–06 (1982); Shaw v. United States, 209 F.2d 811, (D.C. Cir. 1954); Goldstein v. Johnson, 184 F.2d 342, 343 (D.C. Cir.) *cert. denied*, 340 U.S. 879 (1950); Brown v. Royall, 81 F. Supp. 767 (D.D.C. 1949), *cert. denied,* 339 U.S. 952 (1950). *See also* W. Aycock & S. Wurfel, Military Law Under the Uniform Code of Military Justice 15 (1955).

[6] Pub. L. No. 98–209, 1983 U.S. Code Cong. & Admin. News (97 Stat.) 1393, 1405 (codified at 28 U.S.C. § 1259).

[7] UCMJ art. 67(h)(1). *See, e.g.*, Solorio v. United States, 107 S. Ct. 2924 (1987) (first case to reach oral argument before Supreme Court pursuant to Military Justice Act of 1983); United States v. Hershey, 20 M.J. 433 (C.M.A. 1985), *cert. denied,* 474 U.S. 1062 (1986) (closure of court-martial during testimony of minor prosecutrix); United States v. Spicer, 20 M.J. 188 (C.M.A. 1985), *cert. denied,* U.S. 106 S. Ct. 259, 88 L. Ed. 265 (1985) (prosecution under article 134, UCMJ, for negligent homicide using simple negligence standard); United States v. Holman, 19 M.J. 784 (A.C.M.R. 1984),*aff'd*, 21 M.J. 149 (C.M.A. 1985), *cert. denied*, U.S. 106 S. Ct. 809, 88 L. Ed. 2d 784 (1986) ("service-connected"jurisdiction for offenses committed overseas); United States v. Goodson, 14 M.J. 542 (A.C.M.R. 1982), *aff'd* 18 M.J. 243 (C.M.A. 1984), *cert. granted and judgment vacated*, U.S., 105 S. Ct. 2129, 85 L. Ed. 2d 493 (1985) (waiver of right to counsel made after petitioner previously requested counsel while awaiting interrogation).

[8] 28 U.S.C. § 1651(a) (1982).

[9] "These … decisions certainly tend to indicate that this Court is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts… ." United States v. Bevilacqua, 39 C.M.R. 10, 11–12 (C.M.A. 1968). *See also* Levy v. Resor, 37 C.M.R. 399 (C.M.A. 1967); Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967); United States v. Frischholz, 36 C.M.R. 306, 307–08 (C.M.A. 1966).

[10] Levy v. Resor, 37 C.M.R. 399 (C.M.A. 1967).

[11] 395 U.S. 683, 695 n.7 (1969).

[12] 39 Am. Jur. 2d *Habeas Corpus* § 1 (1968).

[13] Schlesinger v. Councilman, 420 U.S. 738, 747 (1975).

[14] Wales v. Whitney, 114 U.S. 564, 571 (1885).

habeas corpus is to terminate unlawful custody or restraint.

In a military case, the purpose of a Federal habeas corpus proceeding is to inquire whether the court-martial which tried and sentenced the accused had jurisdiction over the person and the offense charged, and whether, though having such jurisdiction, it had exceeded its powers in the sentence proceedings.[15] A habeas corpus proceeding is not concerned with the question of the guilt of innocence of the accused. Nor is it concerned with rulings on evidence or irregularities in the mode of conducting courts-martial proceedings. Such a proceeding, however, is concerned with "the protection of individuals against erosion of their rights to be free from wrongful restraints upon their liberty."[16]

c. Background. The petition for a writ of habeas corpus is the most common form of collateral attack testing the legality of a confinement imposed as the result of a court-martial sentence. The "Great Writ" long has been regarded as one of the primary safeguards against an arbitrary and overreaching government.[17] The availability of the remedy is guaranteed to all Americans, civilians and soldiers alike, by the Constitution which provides that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[18]

It was not until after the Civil War that the Supreme Court had its first opportunity to consider an application for habeas corpus to test the legality of a detention imposed by a military tribunal.[19] In the landmark case of Ex parte Milligan,[20] the Court unanimously agreed that a military commission lacked proper authority to try the petitioner, a civilian sentenced to death, and ordered that the petitioner be discharged from custody.

A few years later in Ex parte Yerger,[21] the Court issued a writ of certiorari to review a lower court decision which had refused to grant habeas corpus relief to a civilian being held for trial by a military commission on a murder charge. The Supreme Court held that it could consider the case and grant the writ of habeas corpus under its appellate jurisdiction as long as a lower Federal court had inquired into the legality of the confinement--even though the writ was directed to the military and not to a civil authority subject to the Federal courts.[22]

In 1879 the Supreme Court in Ex parte Reed,[23] heard its first case involving a habeas corpus attack upon a military court-martial. Although it denied the requested relief, the Court had no difficulty in fitting the case into the pattern established by other habeas corpus cases and the early trespass actions collaterally attacking court-martial judgments. It noted that "[e]very act of a court beyond its jurisdiction is void"[24] and is subject to collateral attack. The Court found that the Navy court-martial had jurisdiction over the person and the offense and that the court's verdict therefore could not be impeached on the basis of errors or irregularities of an administrative nature.[25]

Although the granting of habeas corpus relief in attacks on court-martial judgments has been relatively rare, the Supreme Court has granted relief where it has found that the court-martial lacked jurisdiction to try the case. In McClaughry v. Deming,[26] the Supreme Court granted relief to a petitioner who had been tried by a court-martial which was illegally constituted. In other cases petitioners have argued successfully to the Court that their convictions were void because the court-martial which tried them lacked jurisdiction either over their person, or the offenses with which they were charged.[27]

In Noyd v. Bond,[28] the Supreme Court continued to recognize the authority of the Federal courts to review the proceedings of courts-martial on petitions brought before them for writs of habeas corpus. After noting that the Court of Military Appeals had the power to issue writs of habeas corpus in cases in which it ultimately would review,[29] the

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[15] Hiatt v. Brown, 339 U.S. 103, 111–12 (1950) (Burton, J. concurring), *reh'g denied*, 339 U.S. 939 (1950); Humphrey v. Smith, 336 U.S. 695 (1949); *In re* Yamashita, 327 U.S. 1, 23 (1946); *Ex parte* Quirin, 317 U.S. 1, 25 (1942); Carter v. McClaughry, 183 U.S. 365, 387 (1902); Carter v. Roberts, 177 U.S. 496, 498 (1900); Swaim v. United States, 165 U.S. 553, 566 (1897); United States v. Grimley, 137 U.S. 147, 150 (1890); Dynes v. Hoover, 61 U.S. (20 How.) 65, 81 (1858). *See also* United States*ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949); Mullan v. United States, 212 U.S. 516, 520 (1909); Johnson v. Sayre, 158 U.S. 109, 118 (1895); *Ex parte* Reed, 100 U.S. 13, 23 (1879). *See generally* Rosen, *Civilian Courts and the Military Justice System; Collateral Review of Court-Martial*, 108 Mil. L. Rev. 5 (1985); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 Mil. L. Rev. 1 (1971); Bishop,*Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum. L. Rev. 40 (1961).

[16] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[17] Fay v. Noia, 372 U.S. 391, 399–402 (1963).

[18] U.S. Const., art. I, § 9, cl. 2. *See, e.g.*, W. Aycock & S. Wurfel, Military Law Under the Uniform Code of Military Justice 317 (1955).

[19] There is a brief discussion of the historical background regarding habeas corpus and the military in Calley v. Callaway, 519 F.2d 184, 194–98 (5th Cir. 1975).*See also* J. Bishop, Justice Under Fire, 113–60 (1974); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 470–71 (1963); Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum L. Rev. 40 (1961); Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 Ohio St. L. J. 193 (1966); McFeeley, *Habeas Corpus and Due Process: From Warren to Burger*, 28 Baylor L. Rev. 533 (1976); Weckstein,*Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 Mil. L. Rev. 1 (1971); Note,*Civilian Court Review of Court-Martial Adjudications*, 69 Colum. L. Rev. 1259 (1969); Note, *Servicemen in Civilian Courts*, 76 Yale L. J. 380 (1966). *See generally*Warren,*The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962).

[20] 71 U.S. (4 Wall.) 2 (1866).

[21] 75 U.S. (8 Wall.) 85 (1869).

[22] *Id.* at 98–103.

[23] 100 U.S. 13 (1879).

[24] *Id.* at 23.

[25] *Id.*

[26] 186 U.S. 49 (1902).

[27] O'Callahan v. Parker, 395 U.S. 258 (1969); Lee v. Madigan, 248 F.2d 783 (9th Cir. 1957), *rev'd on other grounds*, 358 U.S. 228 (1959).

[28] 395 U.S. 683 (1969).

[29] *Id.* at 695 n.7.*See* United States v. Bevilacqua, 39 C.M.R. 10, 11–12 (C.M.A. 1968).

Supreme Court held that a Federal district court could not grant a military accused relief from confinement until he had exhausted his appeals within the military system.[30]

In Schlesinger v. Councilman,[31] the Supreme Court again acknowledged the importance of habeas corpus as a means of attacking court-martial judgments. In addition, the court emphasized the importance of an accused exhausting his or her military remedies before challenging the integrity of court-martial decisions in the Federal court system.

In Councilman, the Supreme Court also addressed the problem presented by article 76 of the Code. Article 76 provides in part that, "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter … are final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all … courts … of the United States… "[32] In reviewing the legislative history of article 76, in addition to prior cases interpreting the effect of the article, the Court concluded that the provisions of article 76 did not preclude collateral attacks on court-martial judgments.[33] As a result of the cases discussed above, the right of Federal courts to consider collateral attacks against court-martial convictions upon petitioners' request for writs of habeas corpus is now firmly established. In view of the Councilman decision, however, an accused soldier must exhaust military remedies before using habeas corpus to collaterally attack court-martial proceedings.

The effect of the availability of review by the United States Supreme Court by writ of certiorari[34] under the Military Justice Act of 1983 is discussed in paragraph 37-5b, below. The argument has been made that the Military Justice Act of 1983, authorizing direct review of Court of Military Appeals decisions, precludes all collateral review of courts-martial. The argument has been soundly rejected by the courts. See Machado v. Commanding Officer, 860 F.2d 542 (2d Cir. 1988); Matias v. United States, 19 Cl. Ct. 635 (1990).

37–3. Nature of "Restraint" required to sustain habeas corpus

a. General. While the power of the Federal civil courts to grant habeas corpus relief to military prisoners is no longer open to question, controversy still exists regarding the amount of interference with personal liberty considered sufficient to satisfy the jurisdictional requirement that the prisoner be "in custody." The Federal habeas corpus statute[35] specifies that the United States district courts may issue writs of habeas corpus on behalf of prisoners who are, for example, "in custody in violation of the Constitution or laws or treaties of the United States."[36] In Hammond v. Lenfest the court noted:

> While the language of the Act indicates that a writ of habeas corpus is appropriate only when a petitioner is "in custody," the Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used."[37]

Unfortunately, a satisfactory all-inclusive definition of the term "in custody" is difficult to frame as "the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed."[38]

b. Moral restraint insufficient. It appears that"[s]omething more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it."[39] Thus, mere moral restraint is generally insufficient to warrant issuance of the writ.

(1) *Arrests.* In Wales v. Whitney,[40] the medical director of the Navy had been placed under arrest pending trial by court-martial and had been ordered to restrict himself to the limits of the city of Washington. In denying his petition

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[30] 395 U.S. at 698.

[31] 420 U.S. 738 (1975).

[32] UCMJ art. 76. Both Congress [S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949); Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 Ohio St. L. J. 193, 213 (1966)] and the Supreme Court [United States v. Augenblick, 393 U.S. 348, 349–50 (1969); Burns v. Wilson, 346 U.S. 137, 142 (1953); Gusik v. Schilder, 340 U.S. 128, 131–33 (1950)] have recognized that the finality provision in UCMJ art. 76, UCMJ, does not bar such action.

[33] 420 U.S. at 750–53. In aiding the accused in such a collateral attack, military counsel should be aware of restrictions placed on appearance in civilian forums. AR 27–40, para. 1–6a (4 Dec. 1985). See Bartley,*Military Law in the 1970's: The Effect of Schlesinger v. Councilman*, 17 A.F.L. Rev. Winter 1975, at 65. Similarly, Government counsel should be aware of their obligation to notify OTJAG when litigation against the Government is commenced. See AR 27–40, chap. 2.

[34] 28 U.S.C. §§ 1259, 2101 (1982); UCMJ art. 67(h).

[35] 28 U.S.C. §§ 2241–2256 (1982).

[36] *Id.* § 2241.

[37] Hammond v. Lenfest, 398 F.2d 705, 710 (2d Cir. 1968) (quoting Jones v. Cunningham, 371 U.S. 236, 238 (1963) (citations omitted).

[38] Wales v. Whitney, 114 U.S. 564, 571 (1885).

> Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*.

Id.

[39] *Id.* at 571–72.

[40] 114 U.S. 570 (1885).

for a writ of habeas corpus, the Court wrote:

> In a case of a man in the military or naval service, where he is . . . always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ… [41]

Something more than moral restraint is necessary to make a case for habeas corpus. Because the accused was under no physical restraint and not in the custody of anyone, the Supreme Court concluded that the accused's personal liberty was not restrained and hence, the Court found no reason to issue a writ of habeas corpus.

(2) *Sentence to confinement.* In at least one military case, the fact that the petitioners had already served their sentences including confinement and been released did not affect their right to challenge the underlying summary court-martial sentences by writ of habeas corpus.[42] In another case, a Federal court entertained a petition for a writ of habeas corpus attacking a court-martial conviction for which the sentence had been served. In that case the petitioner was serving time in a state prison and maintained that the state court took his military conviction into account in sentencing him.[43]

In Noyd v. Bond,[44] a different situation was presented to the Supreme Court for review. The Court ruled that an order of Mr. Justice Douglas to release an Air Force Captain from confinement, 2 days before his sentence expired, was sufficient to toll the running of the sentence. Because the petitioner still faced confinement, he was permitted to contest the military's exercise of restraint over him by writ of habeas corpus and avoid any problem of mootness which could be argued if he had served all of his sentence.

(3) *Parole.* In Jones v. Cunningham,[45] the Supreme Court held that the conditions and restrictions of civilian parole were a sufficient restraint of liberty to support a petition for habeas corpus. The Court, in explaining the meaning of custody, stated:

> History, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English speaking world to support the issuance of habeas corpus.[46]

The Court then noted with respect to the petitioner's parole that:

> While … [it] releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the"custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute… [47]

An accused who is in a parole status therefore can petition a Federal court for a writ of habeas corpus.

The decision in Cunningham caused many defendants in a parole status to submit habeas corpus petitions. For example, the Supreme Court received a petition from an accused who was released from state custody after his writ had been filed but while his case was still pending on appeal,[48] and from a prisoner attacking a state conviction for which he had not yet served his sentence.[49] Some courts have permitted habeas corpus attacks on criminal proceeding by petitioners on probation,[50] under suspended sentences,[51] or free on bail.[52]

In one case a Federal court held that a petitioner on Federal parole in a civilian status as a result an Air Force court-martial conviction was in "custody" for purposes of seeking relief by way of habeas corpus. In fact, the court also considered the accused's petition as it related to a prior court-martial conviction for which he was not on parole at the time of filing of his petition.[53]

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[41] *Id.* at 571–72.
[42] Betonie v. Sizemore, 496 F.2d 1001 (5th Cir. 1974).
[43] Robson v. United States, 279 F. Supp. 631 (E.D. Pa. 1968).
[44] 395 U.S. 683 (1969).
[45] 371 U.S. 236 (1963).
[46] *Id.* at 240.
[47] *Id.* at 243.
[48] Carafas v. La Valle, 391 U.S. 234 (1968).
[49] Peyton v. Rowe, 391 U.S. 54 (1968).
[50] Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968).
[51] Walker v. North Carolina, 262 F. Supp. 102 (W.D.N.C. 1966), *aff'd,* 372 F.2d 129 (4th Cir. 1967).
[52] Benson v. California, 328 F.2d 159 (9th Cir. 1964); Duncombe v. New York, 267 F. Supp. 103, 109 n.9 (S.D.N.Y. 1967).
[53] Lebron v. Secretary of the Air Force, 392 F. Supp. 219 (S.D.N.Y. 1975), *cert. denied,* 426 U.S. 905 (1976).*See* Calley v. Calloway, 519 F.2d 184, 191 n.5 (5th Cir. 1975). *But cf.* Brewster v. Secretary of the Army, 489 F. Supp. 85 (E.D.N.Y. 1980) (holding that damage to reputation as a result of court-martial conviction was not sufficient to constitute custody when petitioner filed his petition for habeas corpus 23 years after serving original sentence).

c. Involuntary military service.

(1) *Induction.* A person illegally inducted into the military service may obtain his release by writ of habeas corpus without any additional restraint being imposed upon him. In this regard the Supreme Court has noted that "Habeas corpus has … been consistently regarded by lower Federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service."[54] In addition, the Supreme Court has stated that an inductee's right to habeas corpus relief is based on the restrictive nature of military service.[55]

(2) *Expiration of term of service.* Mere subjection to military law is sufficient"restraint" to support a petition for a writ of habeas corpus where the petitioner alleges that he or she is being wrongfully held in the service after expiration of the required term of service.[56]

(3) *Enlistments by minors.* [57] Ordinarily a parent who has not consented to the enlistment of a minor child under the age of 18 may use a writ of habeas corpus to secure the discharge or release of the minor child.[58] In addition, a writ of habeas corpus can be used by the parent of a minor child to obtain the minor's release where the enlistment is absolutely void according to statute.[59] Where the minor has entered upon a "constructive enlistment" by continuing to serve after attaining the necessary age for enlistment, the writ of habeas corpus will be of no value in obtaining a release.[60]

(4) *Reservists.* Several Federal courts have extended the definition of custody to include the military status of inactive reservists in receipt of orders to report for active duty.[61] In Hammond v. Lenfest,[62] the petitioner challenged the legality of restraint to which he was subjected after having received orders to report to active duty for failure to attend regularly scheduled reserve meetings. In holding that the petitioner, Hammond, was subject to restraint, the Second Circuit Court of Appeals stated:"We recognize that the Government position is not lacking in support … but we believe the better reasoned and modern view is that a petitioner in Hammond's predicament is under sufficient restraint of his liberty to make appropriate habeas corpus jurisdiction."[63] The court concluded that the accused was "in custody" and directed that his petition for a writ of habeas corpus be granted.[64] This case has added significance in light of recent amendments to reserve jurisdiction provisions.[65] Article 2(d), UCMJ provides for involuntary activation of Reserve component members for punitive proceedings.[66] In these cases the only restraint on liberty was the status of being retained on active duty or, as in Hammond, about to be called to active duty.

37–4. Jurisdiction to entertain the petition

As early as 1866 the Supreme Court acknowledged that civil courts have the power to entertain writs of habeas corpus on behalf of military prisoners.[67] More recently in Burns v. Wilson[68] the Supreme Court observed that "the statute which vests Federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil courts."[69] In other words, the provisions of the Federal habeas corpus statute apply to soldiers serving in the Armed Forces as well as other citizens.

The Federal habeas corpus statute[70] "implements the constitution command that the writ of habeas corpus be made

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[54] Jones v. Cunningham, 371 U.S. 236, 240 (1963).*See* Billings v. Truesdell, 321 U.S. 542 (1944); Gibson v. United States, 329 U.S. 338, 359–60 (1946); United States*ex rel.* Goodman v. Hearn, 153 F.2d 186 (5th Cir. 1946);*Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952); United States *ex rel.* Steinberg v. Graham, 57 F. Supp. 938 (E.D. Ark. 1944).

[55] *See* Estep v. United States, 327 U.S. 114, 124 n.17 (1946).

[56] *See* Miley v. Lovett, 193 F.2d 712, 713 (4th Cir. 1952), *cert. denied*, 342 U.S. 919 (1952).*Cf.* Peavy v. Warner, 493 F.2d 748 (5th Cir. 1974) (habeas sought where petitioners reenlisted or enlisted on reliance on allegedly breached enlistment contracts); United States*ex rel.* Roman v. Schlesinger, 404 F. Supp. 77 (E.D.N.Y. 1975).

[57] *See supra* chap. 4.

[58] *Ex parte* Bakley, 148 F. 56 (E.D. Va. 1906), *aff'dsub nom*; Dillingham v. Bakley, 152 F. 1022 (4th Cir. 1907); *In re* Phillip's Petition, 167 F. Supp. 139 (S.D. Cal. 1958). *See* United States v. Overton, 26 C.M.R. 464 (C.M.A. 1958); United States v. Blanton, 23 C.M.R. 128 (C.M.A. 1957). *Contra Ex parte* Dunakin, 202 F. 290, 292 (E.D. Ky); *see* United States v. Bean, 32 C.M.R. 203 (C.M.A. 1962); United States v. Scott, 29 C.M.R. 471 (C.M.A. 1960)) (stating that the mother's actions constituted an implied consent to the enlistment).

[59] Hoskins v. Pell, 239 F. 279 (5th Cir. 1917).

[60] *Ex parte* Beaver, 271 F. 493 (N.D. Ohio 1921). *Seealso* Barrett v. Looney, 158 F. Supp. 224 (D.C. Kan. 1957), *aff'd,* 252 F.2d 588 (10th Cir. 1958).

[61] Harlin v. Clayton, 506 F. Supp. 642 (D.C. Kan. 1981); Santos v. Franklin, 493 F. Supp. 847 (D.C. Pa. 1980); Daly v. Clayton, 472 F. Supp. 752 (D.C. Mass. 1979).

[62] 398 F.2d 705 (2d Cir. 1968).

[63] *Id.* at 711.

[64] *See also* United States *ex rel.* Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968); Saunders v. Crouchley, 274 F. Supp. 505 (D. Neb. 1967); *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952); Altieri v. Flint, 54 F. Supp. 889 (D. Conn. 1943), *aff'd,* 142 F.2d 62 (2d Cir. 1944).

[65] *See* discussion in chap. 9, *infra.*

[66] Pilana v. Edson, 477 F.2d 1148 (9th Cir. 1973); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Adkins v. United States Navy, 507 F. Supp. 891 (D.C. Tex. 1981); Cywinsbe v. Benney, 488 F. Supp. 674 (D.C. Ind. 1980); Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968). *See also In re* Green, 156 F. Supp. 174 (S.D. Cal. 1957),*appeal dismissed as moot sub nom.* Green v. Secretary of the Navy, 264 F.2d 63 (9th Cir. 1959).

[67] *Ex parte* Milligan 71 U.S. (4 Wall) 2 (1866).

[68] 346 U.S. 137 (1953).*See* O'Callahan v. Parker, 395 U.S. 258 (1969); Kinsella v. United States *ex rel.*Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); McClaughry v. Deming, 186 U.S. 49 (1902).

[69] 346 U.S. at 139.

[70] 28 U.S.C. § 2241 (1982).

available."[71] Subsection (a) of the statute authorizes "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions" to grant writs of habeas corpus.[72] Subsection (b) authorizes the transfer of an application to the appropriate district court for hearing and determination.[73] Subsection (c) sets forth the specific situations in which habeas corpus will be granted. In pertinent part it provides that:

> The writ of habeas corpus shall not extend to a prisoner unless--
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;… .[74]

Accordingly, collateral attack by habeas corpus on a military judgment is within the power of the Federal courts, notwithstanding article 76 of the UCMJ which provides that judgments of military tribunals should be"final" and "conclusive" and "binding upon … [the] courts."[75] State courts, however, have no power to inquire into the legality of restraint upon a person held by United States military authority.[76]

37–5. The scope of inquiry in military habeas corpus cases

a. Scope of review. Once the issue of jurisdiction to entertain a petition for a writ of habeas corpus has been resolved, the question becomes the scope of consideration of issues raised by the petitioner as a basis for relief. In civilian cases the trend, for many years, was to expand the scope of review.[77] For instance, in civilian cases the Supreme Court held the following to constitute denials of fundamental rights guaranteed by the United States Constitution and accordingly reviewable by habeas corpus:

1. The court and jury were subject to mob domination;[78]
2. The prosecution knowingly used perjured testimony;[79]
3. The defendant did not intelligently waive counsel in a prosecution before a Federal court;[80]
4. The defendant's plea of guilty was coerced;[81]
5. The defendant did not intelligently waive the right to trial by jury in a prosecution in a Federal court;[82] and
6. The defendant was denied the right to consult with counsel.[83]

The leading case dealing with the scope of review of courts-martial is Burns v. Wilson.[84] In that case the Supreme Court was presented with the opportunity to pass on the question of whether the principle set forth in Johnson v. Zerbst[85] would be applied to collateral review of court-martial convictions.

The petitioners in Burns had been convicted by separate general courts-martial of rape and murder and sentenced to death. All appellate remedies available in the military had been exhausted, and the President had confirmed the death sentences. The petitioners alleged that they had been denied due process of law in their court-martial proceedings. The petitioners claimed that: "coerced confessions had been extorted from them; that they had been denied counsel of their choice and denied effective representation; that the military authorities … had suppressed evidence favorable to them,

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[71] Jones v. Cunningham, 371 U.S. 236, 238 (1963).
[72] 28 U.S.C. § 2241(a) (1982).
[73] 28 U.S.C. § 2241(b) (1982).
[74] 28 U.S.C. § 2241(c) (1982).
[75] UCMJ art. 76.
[76] United States v. Tarble, 80 U.S. (13 Wall) 397 (1872); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).
[77] *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963). *See also* Hawk v. Olson, 326 U.S. 271, 274–76 (1945).
[78] Moore v. Dempsey, 261 U.S. 86 (1923).
[79] Mooney v. Holohan, 294 U.S. 103, 110–12 (1935).
[80] Johnson v. Zerbst, 304 U.S. 458 (1938).
[81] Waley v. Johnston, 316 U.S. 101, 104 (1942).
[82] United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943).
[83] Hawk v. Olson, 326 U.S. 271, 274 (1945); House v. Mayo, 324 U.S. 42, 45–46 (1945); Powell v. Alabama, 287 U.S. 45, 53–58 (1932).
[84] 346 U.S. 137 (1953).*Cf.* Kehrli v. Sprinkle, 524 F.2d 328 (10th Cir. 1975) (review of Air Force colonel's conviction of possession, use, and transfer of marijuana).
[85] In Johnson v. Zerbst the Supreme Court stated:

> If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him his life or his liberty. A court's jurisdiction at the beginning of the trial may be lost "in the course of the proceedings" due to failure to complete the court ... by providing Counsel for an accused… . If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.* 304 U.S. 458, 468 (1938) (footnote omitted).

But see Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947). In *Shapiro*—the Court of Claims, applied*Johnson v. Zerbst* to invalidate a conviction by an otherwise properly constituted court-martial, on the ground that the unreasonably short time permitted the accused to prepare his defense deprived him of the effective assistance of counsel in violation of the sixth amendment. The court-martial was held to have lost"jurisdiction" to proceed.
Burns v. Wilson, 346 U.S. 844, 847 (1953) (opinion of Frankfurter, J., on motion for rehearing).

procured perjured testimony against them and otherwise interfered with the preparation of their defenses."[86]

The petitioners also charged that the "trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair play."[87]

The petitioners argued that their cases involved questions of denial of "basic rights guaranteed by the Constitution." The Supreme Court, however, held that the petition for habeas corpus was dismissed properly.[88]

In his majority opinion, Chief Justice Vinson noted that in reviewing military habeas corpus cases the Court applied three principles. The first principle was that "in military habeas corpus the inquiry, the scope of matters open for review, [is] always … more narrow than in civil cases."[89] The second principle was that the language in article 76, providing that final court-martial judgments shall be binding on Federal courts,[90] did not preclude a civil court from considering a military prisoner's habeas corpus application.[91] The third principle was that, in military habeas corpus cases, the function of the civil courts was limited to determining "whether the military has given fair consideration to [the petitioner's claims]."[92]

Mr. Justice Minton, concurring, thought that the sole function of the civil courts in dealing with a military prisoner's application for habeas corpus was to see that the military court had jurisdiction, and once this had been done, the civil court could not determine whether the military court had committed error in the exercise of that jurisdiction.[93]

Justice Frankfurter stated that he was unable either to concur with or dissent from the Court's decision because in his opinion, the case presented important issues regarding the nature of civilian review of military courts-martial, which were not fully explored by the parties in their arguments to the Court or by the justices in their decisions. In the opinion of Justice Frankfurter, this case raised the problem of balancing on the one hand "proper regard for habeas corpus, 'the great writ of liberty' [and] on the other hand the duty of civil courts to abstain from intervening in matters constitutionally committed to military justice."[94] With regard to this balance Justice Frankfurter stated he could not agree that:

> [T]he only inquiry that is open on an application for habeas corpus challenging a sentence of a military tribunal is whether that tribunal was legally constituted and had jurisdiction, technically speaking, over the person and the crime. Again, I cannot agree that the scope of inquiry is the same as that open to us on review of State convictions; the content of due process in civil trials does not control what is due process in military trials. Nor is the duty of the civil courts upon habeas corpus met simply when it is found that the military sentence has been reviewed by the military hierarchy… [95]

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[86] 346 U.S. at 138.

[87] *Id.* The district court dismissed the petitions for habeas corpus without receiving any evidence on the petitioner's allegations. The court was satisfied that the courts-martial had jurisdiction over the persons, and over the offenses as well as jurisdiction to impose the sentences adjudged. Dennis v. Lovett, 104 F. Supp. 310, 311–12 (D.D.C. 1952). The Court of Appeals affirmed, but only after broadening the scope of inquiry by reviewing the petitioner's allegations on the merits. Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952). The Supreme Court granted certiorari. *See* Burns v. Wilson, 346 U.S. 137 (1953).

[88] There were four opinions written in this case, none of which was concurred in by a majority of the Court. Chief Justice Vinson, announcing the judgment of the Court, was joined by Justices Reed, Burton and Clark. Mr. Justice Jackson concurred only in the result, with no written opinion. Mr. Justice Minton, in a separate opinion, concurred in the affirmance of the judgment. Mr. Justice Frankfurter believed that the case needed to be reargued, while Justices Black and Douglas dissented from the Court's decision.

[89] 346 U.S. at 139. Mr. Justice Frankfurter disagreed with this statement, finding it "demonstrably incorrect."*Burns v. Wilson*, 346 U.S. 844 (1953) (Mem.) (Separate opinion of Frankfurter, J.).

[90] UCMJ art. 76, specifically provides that:

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

[91] 346 U.S. at 142. In this regard, however, Chief Justice Vinson warned that in reviewing habeas corpus applications from military members, Federal courts should not "grant the writ simply to re-evaluate the evidence"where a military court "has dealt fully and fairly with an allegation raised in that application."*Id.* The Chief Justice continued by stating that the Court of Appeals"may have erred" in reweighing items of evidence presented at the accused's court-martial.*Id.* at 146.

[92] *Id.* at 144. If it appears that the military court has refused to consider an accused's claims—

> [T]he District Court [is] empowered to review [the claims] *de novo.* For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness… .

Id. at 142.

[93] *Id.* at 147 (Minton, J., concurring).

[94] *Id.* at 148 (Frankfurter, J., voting for reargument).

[95] *Id.* at 149. Mr. Justice Frankfurter further explained his position and traced the case development of this problem area in his separate opinion on the petition for rehearing. Burns v. Wilson, 346 U.S. 844 (1953) (Mem.).

Justice Frankfurter therefore wanted the Court to address specifically the issue of the extent to which Federal courts could review military decisions and he wanted the Burns case set for reargument.

Mr. Justice Douglas, joined by Mr. Justice Black, dissented, stating that, when a military reviewing agency has not fairly and conscientiously applied the standards of due process to the review of a military court, the civil courts should entertain a petition for habeas corpus.[96] The dissenters further believed that the undisputed facts in this case indicated a failure by the military reviewing agency to apply the principles of due process.[97]

The Court's opinion, while seeming to adhere to the Johnson standard as to the scope of review, limited its inquiry to the issue of whether the court-martial had jurisdiction. The Court indicated, however, that it would look to ensure that the military courts dealt fully and fairly with the matters raised by the defense in determining the existence of jurisdiction. Thus, the Court's ruling seems to permit courts to review more than jurisdiction in the technical sense.

b. Exhaustion of military remedies. Since Burns,[98] the Supreme Court has explicitly stated that review of courts-martial is limited to issues of constitutional dimension.[99]

Many lower Federal courts have discarded the "full and fair consideration" test of Burns and now review constitutional issues raised in courts-martial without regard to the decisions of military courts.[100] Other Federal courts, recognizing the uniqueness of the military and expertise of military tribunals, give considerable weight to the resolution of constitutional issues by military courts.

Another problem regarding the issuance of writs of habeas corpus to military soldiers concerns when Federal district courts should be permitted to grant habeas corpus relief. More specifically, the problem is whether soldiers serving in the Armed Forces should be required to exhaust their military remedies before seeking habeas corpus relief in the Federal courts, or whether they are entitled to petition the Federal courts prior to being tried by the military in an effort to enjoin military authorities from proceeding. In Schlesinger v. Councilman,[101] the Supreme Court resolved the dilemma in deciding that Federal district courts must not intervene in pending court-martial proceedings.

Councilman, an Army captain, was charged at Fort Sill with possession of marijuana off post and with selling and transferring marijuana to an enlisted man off post. At his general court-martial, Councilman requested that the charges and specifications against him be dismissed on the grounds that the court-martial lacked jurisdiction over offenses involving the sale, transfer, and possession of drugs off post.[102] His motion was denied and his request for a continuance was granted.

During the recess the accused went to the Federal District Court for the Western District of Oklahoma where he brought suit to enjoin the military authorities from proceeding with his court-martial. The district court granted a permanent injunction against the following persons enjoining them from proceeding with Captain Councilman's court-martial: the Secretary of Defense; the Secretary of the Army; the commanding general of Fort Sill; and the staff judge advocate of Fort Sill.

The Government appealed the district court's decision to the Tenth Circuit Court of Appeals. The court of appeals concluded that the offenses with which Councilman was charged were not service connected and therefore were not triable by court-martial; the court then affirmed the district court's injunction.

The Tenth Circuit Court's decision was consistent with the majority of Federal court decisions which held that off-post possession, use, transfer or sale of dangerous drugs were not service-connected offenses and cannot be tried by court-martial. The decision of the circuit court was contrary to a long line of military cases dating back to United States v. Beeker,[103] decided in 1969, which held that off-post use, sale, transfer and possession of dangerous drugs were service-connected offenses triable by court-martial.

Because of the conflict between the decisions of the Federal circuit courts on the one hand, and the military courts on the other hand over the issue of whether drug related offenses involving soldiers were service-connected offenses, the Solicitor General filed a petition for a writ of certiorari with the Supreme Court of the United States.

The Court reviewed the service-connection issue and then "requested supplemental briefs 'on the issues of (1) the jurisdiction of the District Court, (2) exhaustion of remedies, and (3) the propriety of a Federal district court enjoining a pending court- martial proceeding.'"[104] After hearing argument on these issues, the Court held that "when a

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[96] *Id.* at 154 (Douglas and Black, JJ., dissenting).

[97] *Id.* For a discussion as to the result of another *Burns* case, *see* Pearl, *The Applicability of the Bill of Rights to a Court-Martial Proceeding*, 50 J. Crim L.C. & P.S. 559 (March–April 1960).

[98] 346 U.S. 137 (1953).

[99] United States v. Augenblich, 393 U.S. 348 (1969). *See also* Middendorf v. Henry, 425 U.S. 25 (1976); Parker v. Levy, 417 U.S. 733 (1974).

[100] Schlormann v. Nalston, 691 F.2d 401 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 1229 (1983); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); Kauffman v. Secretary of the Air Force, 415 F.2d 991 D.C. Cir.), *cert. denied*, 396 U.S. 1013 (1970).

[101] 420 U.S. 738 (1975).

[102] *See supra* chap. 11.

[103] 18 C.M.A. 563, 40 C.M.R. 275 (1969).

[104] 420 U.S. at 743–44.

serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the Federal district courts must refrain from intervention, by way of injunction or otherwise."[105]

With the Military Justice Act of 1983[106] providing for discretionary review by the U.S. Supreme Court of decisions of the Court of Military Appeals, the question under Councilman becomes the necessity to file a petition for a writ of certiorari to the Supreme Court and a denial of the petition as a prerequisite to filing a petition for a writ of habeas corpus in a lower Federal court. While such a prerequisite does not appear to exist in habeas corpus cases arising out of state court convictions,[107] the same may not be true for habeas corpus proceedings attacking courts- martial as a different jurisdiction statute is applicable.[108]

What effect the Military Justice Act of 1983 will have on the use of the writ of habeas corpus remains to be seen. Litigation in this area is likely to continue unabated as questions concerning the proper scope of review of courts-martial by the Federal courts and exhaustion of remedies provide fertile ground for such litigation efforts.

37–6. The doctrine of waiver

a. General. The doctrine of waiver is one of forfeiture: where a claimant fails to raise an issue in military court proceedings, he is barred from raising the issue in a subsequent collateral challenge in the federal courts. Waiver generally entails a procedural default. The doctrine arises where the failure to assert an issue during the course of military proceedings precludes subsequent adjudication of the issue in a military forum.

b. Waiver before Burns v. Wilson. Since the early 19th Century, the civilian courts have applied waiver principles in collateral challenges to court-martial proceedings. This application, however, was never entirely consistent. As a general rule, nondiscretionary statutory prerequisites for jurisdiction, such as the minimum size of the court, the character of the membership, and the existence of jurisdiction over the subject-matter and the accused, could not be waived; the theory was that jurisdiction could not be created by consent.[109] On the other hand, potential jurisdictional requirements, which were partially discretionary in nature, such as size of a court-martial within its statutory limits and other matters of defense, could be waived.[110]

c. Waiver under Burns v. Wilson. After the Supreme Court's decision in Burns, and when application of the"full and fair" consideration test was at its height, claims not raised in military courts were not considered when presented for the first time in collateral proceedings. As the Tenth Circuit succinctly noted in Suttles v. Davis:[111] "Obviously, it cannot be said that [the military courts] have refused to fairly consider claims not asserted."

d. Waiver after the demise of Burns v. Wilson.

(1) With the demise of the "full and fair" consideration test and the concomitant expansion of collateral review, the courts turned to civilian habeas jurisprudence for an alternative waiver doctrine. From 1963 until the mid-1970's, application of the doctrine of waiver was governed in the civilian sphere by the Supreme Court's decision in Fay v.

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[105] There are two interesting points in the *Councilman*case which are noteworthy. First, Justice Powell, in the majority opinion, commented favorably on the administration of criminal justice in the military. In part he stated:

> [I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.

Id. In dissent, Justice Brennan, however, disagreed:"[i]t is virtually hornbook law that 'courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.' "*Id.* at 765 (Brennan, J., dissenting).

The second interesting point is found in footnote 29 of Justice Powell's original opinion. *See* Schlesinger v. Councilman, at 43 U.S.L.W. 4432, 4437 (March 25, 1975). In footnote 29 he concluded, "Indeed, it is doubtful that, if convicted, Councilman would be incarcerated pending review within the military system.*See* 10 U.S.C. § 871(c)."*Id.* Section 871(c) is article 71 of the Code, which provides that:

> No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for one year or more, may be executed until affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals.

Clearly, soldiers who receive sentences to confinement at hard labor, are incarcerated pending review within the military system and Justice Powell's statement to the contrary was erroneous. In the United States Reports copy of the court's opinion, Justice Powell's original footnote 29 was deleted and the remaining footnotes were renumbered. *Cf.* Martinez v. Rowe, 401 F. Supp. 1391 (D. Kan. 1975) (case dismissed where appellate review was still pending).

[106] 28 U.S.C. § 1259, UCMJ art. 67(b).

[107] Ulster County Court v. Allen, 442 U.S. 140 (1979); Stone v. Powell, 428 U.S. 465, n.38 (1976); Fay v. Noia, 372 U.S. 391 (1963). *See also* Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 1 (1985).

[108] 28 U.S.C. § 2255;*Application* of Galante, 437 F.2d 1164 (3rd Cir. 1971); Crismond v. Blackwell, 333 F.2d 344 (3rd Cir. 1971); Graham v. Blackwell, 396 F. Supp. 889 (N.D. Ga. 1969).

[109] *See, e.g.*, Ver Mehren v. Sirmyer, 36 F.2d 876 (8th Cir. 1929); United States v. Brown, 41 Ct. Cl. 275 (1906), *aff'd,* 206 U.S. 240 (1907).

[110] *See, e.g.*, Mullan v. United States, 212 U.S. 516 (1909); Bishop v. United States, 197 U.S. 334 (1905); Aderhold v. Memefee, 67 F.2d 345 (5th Cir. 1933).

[111] 215 F.2d 760, 763 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954). *See also* Harris v. Ciccone, 417 F.2d 479, 484 (8th Cir. 1969), *cert. denied,* 397 U.S. 1078 (1970); United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968), *rev'd on other grounds*, 395 U.S. 258 (1969); Branford v. United States, 356 F.2d 876 (7th Cir. 1966); Kubel v. Minton, 275 F.2d 789 (4th Cir. 1960).

Noia.[112] In Fay, the Court ruled that a federal habeas court is not precluded from reviewing a federal constitutional claim simply because the habeas petitioner failed to raise the issue in the state courts. The Court blunted its ruling to some extent by developing the so-called"deliberate bypass" rule; that is, where a petitioner deliberately bypassed the orderly procedure of the state courts by failing to raise his claim, the federal habeas judge had the discretion to deny relief. A number of federal courts applied the Fay "deliberate bypass" rule in collateral proceedings from military convictions.[113]

(2) In a series of decisions beginning in 1973, the Supreme Court began chipping away at the Fay v. Noia "deliberate bypass" test, and charted a course that would significantly restrict the availability of habeas relief. In Davis v. United States,[114] the Supreme Court denied collateral relief to a federal prisoner, who had challenged the makeup of the grand jury which indicted him, because he had failed to preserve the issue by a motion before his trial as required by the criminal procedure rules. The Court held that absent a showing of cause for the noncompliance and some demonstration of actual prejudice, the claim would be barred in a collateral proceeding. Three years later, in Francis v. Henderson,[115] the Supreme Court was faced with a similar challenge to a grand jury by a state prisoner, who had failed to preserve the issue in the state courts. Following its decision in Davis, the Court held that the petitioner was barred from raising his claim in a federal habeas proceeding, unless he could show cause for his failure to preserve the issue in the state courts and demonstrate actual prejudice.

(3) Whatever vitality was left in the"deliberate bypass" rule was virtually gutted by subsequent Supreme Court decisions in Wainwright v. Sykes,[116] and Engle v. Isaac.[117] In Sykes, the Court held that the "cause and actual prejudice" standard set forth in Davis and Francis also applied to a defendant who failed to object to the admission of an allegedly illegally-procured confession at his state trial. The Court expressly noted that the "cause and prejudice" standard was narrower than the "deliberate bypass" rule of Fay. In Engle, the Supreme Court applied the "cause and prejudice" test to bar a habeas claim based on state courts' improper allocation of the burden of proof. The Court reaffirmed its adherence to the standard "that any prisoner bringing a constitutional claim to the federal courthouse after state procedural default must demonstrate cause and actual prejudice before obtaining relief"[118] or demonstrate that failure to consider the claim would result in a "fundamental miscarriage of justice."[119]

The Supreme Court's cases since Sykes have consistently applied the "cause and prejudice" standard to the failure to raise a particular claim in the state court proceedings.[120] In these cases, however, the Court left open the question of whether the Fay"deliberate bypass" standard continued to apply where, as in Fay, the state petitioner had defaulted the entire appeal.[121] In Harris v. Reed,[122] the Court strongly hinted that Fay had been overruled. In Coleman v. Thompson,[123] the Supreme Court took the last step and expressly announced the complete demise of the "deliberate bypass" standard:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Fay was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after Fay that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

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[112] 375 U.S. 391 (1963).

[113] *See, e.g.*, Angle v. Laird, 429 F.2d 892, 894 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971). *See generally*, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1481–87 (2d ed. 1973).

[114] 411 U.S. 233 (1973).

[115] 425 U.S. 536 (1976).

[116] 433 U.S. 72 (1977).

[117] 456 U.S. 107 (1982). *See generally*Comment, *The Burger Court & Federal Review for State Habeas Corpus Petitioners After Engle v. Isaac*, 31 Kan. L. Rev. 605 (1983).

[118] 456 U.S. at 129. *See also* Morris v. Kemp, 809 F.2d 1499 (11th Cir. 1987); Way v. Wainwright, 786 F.2d 1095 (11th Cir. 1986); Young v. Herring, 777 F.2d 198, 203 (5th Cir. 1985); Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir.), *cert. denied,* 474 U.S. 975 (1985); Cantone v. Superintendent New York Correctional Facility, 759 F.2d 207, 218 (2d Cir.), *cert. denied,* 474 U.S. 835 (1985); Wiggins v. Procunier, 753 F.2d 1318, 1321 (5th Cir. 1985); Leroy v. Marshall, 757 F.2d 94, 97–100 (6th Cir.), *cert. denied,* 474 U.S. 831 (1985).

Because *Wainwright v. Sykes*did not expressly overrule*Fay v. Noia*, whether *Fay* had any lasting effect was unclear for a considerable period of time. Some courts, notably the 10th Circuit, limited *Fay* to its facts, applying its "deliberate bypass" rule to instances when the habeas petitioner had not sought an appeal in the state courts. *See* Holcomb v. Murphy, 701 F.2d 1307, 1310 (10th Cir.), *cert. denied*, 463 U.S. 1211 (1983). Other courts, like the 6th Circuit, distinguished decisions normally made by the criminal defendant's counsel with consultation with the defendant and those made without consultation, and applied the *Fay*"deliberate bypass" test to the former. Maupin v. Smith, 785 F.2d 135, 138 n.2 (6th Cir. 1986);(Crick v. Smith, 650 F.2d 860, 867 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982). Other courts abandoned the*Noia* standard. *E.g.*, Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905 (9th Cir. 1986). The Supreme Court, in *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), recently resolved the split, expressly holding that the deliberate bypass standard applied "[i]n all cases." *Id.* at 2565.

[119] 456 U.S. at 135.

[120] *See* Harris v. Reed, 489 U.S. 255 (1989); Murray v. Carrier, 477 U.S. 478 (1986).

[121] *See* Murray v. Carrier, 477 U.S. 478, 492 (1986).

[122] 489 U.S. 255, 262 (1989).

[123] 111 S. Ct. 2546, 2565 (1991).

(4) Generally, waiver under the "cause and prejudice" standard is dependent upon a federal or state procedural rule that requires assertion of a claim, defense, or objection at a particular point in a criminal proceeding and, absent assertion, mandates waiver of the claim, defense, or objection.[124] Examples of procedural default rules in courts-martial are Military Rules of Evidence 304(d)(2)(A) (admission of evidence obtained in violation of right against self-incrimination), 312(d)(2)(A) (admission of evidence obtained in violation of right against unlawful searches and seizures), and 321(a)(2) (admission of evidence of unlawful eyewitness identification). When a state or federal court reviews a nonasserted claim, defense, or objection on its merits despite a procedural default rule, a federal court may similarly review the merits of claim, defense, or objection in a collateral proceeding.[125] If, however, the federal or state court rejects a nonasserted claim, defense, or objection both because of a lack of merit and because of the petitioner's failure to abide by the applicable procedural rule, most federal courts will deem the claim, defense, or objection waived in a subsequent collateral proceeding.[126] Finally, if a habeas petitioner presents the "substance" of a federal constitutional claim to a state or federal court and the court ignores the claim, the claim is not waived.[127]

(5) Once a federal habeas court determines that a procedural rule was not complied with and that this was the ground for rejecting a petitioner's claim, defense, or objection, the petitioner must show cause for not following the procedural rule and actual prejudice from the alleged error.[128] "'Cause' is a legitimate excuse for default; 'prejudice' is actual harm resulting from the alleged constitutional violation."[129] Rather than provide these terms precise content, the federal courts have applied them on an ad hoc basis.[130] For example, in Reed v. Ross,[131] the Supreme Court found that the"novelty" of a constitutional claim may constitute sufficient cause for default.[132] In Murray v. Carrier,[133] the Court held that mere attorney ignorance or inadvertence is insufficient cause to avoid a procedural default; [134] however, if an attorney's performance falls below minimum constitutional standards,[135] cause may be inferred. [136] The element of prejudice is similarly fact-specific. [137]

(6) The Tenth Circuit, in Wolff v. United States,[138] applied the "cause and prejudice" standard to a habeas petitioner challenging, for the first time, the form of immunity given a key prosecution witness at a court-martial. The petitioner's counsel at the court-martial did not object to the witness' testimony. Finding no good cause for the failure to object, the

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[124] Engle v. Isaac, 456 U.S. 107, 129 (1982); Washington v. Lane, 840 F.2d 443 (7th Cir. 1988); Alexander v. Dugger, 841 F.2d 371 (11th Cir. 1988) (cause and prejudice standard applies to pro se litigants). Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986). Some courts require that the state procedural rule serve a legitimate state interest. Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986). *See generally* Henry v. Mississippi, 379 U.S. 443, 446–48 (1965).

[125] *See* Ulster County Court v. Allen, 442 U.S. 140 (1979); Harris v. Reed, 822 F.2d 684 (7th Cir. 1987),*rev'd*, 489 U.S. 255 (1989); Walker v. Endell, 828 F.2d 1378 (9th Cir. 1987); Cooper v. Wainwright, 807 F.2d 881, 886 (11th Cir. 1986); Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985); Phillips v. Smith, 717 F.2d 44 (2d Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984). *Cf.* Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987) (state should have waived procedural bar); Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984) (review proper where state courts would not apply procedural default rule). *But see* Puleio v. Vose, 830 F.2d 1197, 1200 (1st Cir. 1987) (a nonasserted procedural claim which is thereby waived, is not cured for federal court review in a habeas corpus proceeding, where the state court reviewed the claim under a standard different from that which would be used by the federal court).

[126] *See* Harris v. Reed, 489 U.S. 255, 264 n.10 (1989). However the state or federal court must "clearly and expressly" state that its judgment rests on the procedural bar. *Id.* at 263. *See also*United States *ex rel.* Weismiller v. Lane, 815 F.2d 1106, 1109 (7th Cir. 1987); Phillips v. Lane, 787 F.2d 208, 211 (7th Cir. 1986); Goins v. Lane, 787 F.2d 248, 251 (7th Cir. 1986); Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985).*Cf.* McBee v. Grant, 763 F.2d 811, 813 (6th Cir. 1985) (merits of claim, defense, or objection waived if procedural default was at least a "substantial basis" for the decision). *But see* Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985).

[127] *See* Anderson v. Harless, 459 U.S. 4 (1982); United States *ex rel.* Sullivan v. Fairman, 731 F.2d 450, 453 (7th Cir. 1984).

[128] *See*Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986); Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986). The Supreme Court has also indicated that, alternatively, a petitioner may obtain collateral review by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice."Coleman, 111 S. Ct. at 2565. The Court has never applied this alternative basis for review, however.

[129] Magby v. Wawrzaszek, 741 F.2d 240, 241 (9th Cir. 1984). *See also* Preston v. Maggio, 741 F.2d 99, 101 (5th Cir. 1984), *cert. denied*, 471 U.S. 1104 (1985).

[130] See Farmer v. Prast, 721 F.2d 602, 606 n.6 (7th Cir. 1983).

[131] 468 U.S. 1 (1984).

[132] *See* also Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987); United States v. Griffin, 765 F.2d 677, 682 (7th Cir. 1985). *Accord* Weaver v. McKaskle, 733 F.2d 1103, 1106 (5th Cir. 1984).

[133] 477 U.S. 478 (1986).

[134] *See also*United States *ex rel.* Weismiller v. Lane, 815 F.2d 1106, 1109 (7th Cir. 1987); Jones v. Henderson, 809 F.2d 946, 950 (2d Cir. 1987); Cartee v. Nix, 803 F.2d 296, 380-01 (7th Cir. 1986).

[135] *See*Strickland v. Washington, 466 U.S. 668 (1984).

[136] Murray v. Carrier, 477 U.S. 478 (1986). Where, however, there is no constitutional right to counsel (*e.g.*, in state post-conviction proceedings), there can be no deprivation of the right to effective assistance of counsel and hence no "cause" for purposes of the test for waiver. *Coleman v. Thompson*, 59 U.S.L.W. 4789, 4797 (U.S. Jun. 24, 1991) (No. 89–7662).

[137] *See, e.g.*, United States v. Frady, 456 U.S. 152, 168 (1982); United States *ex rel.* Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987); Ferguson v. Knight, 807 F.2d 1239, 1242 (6th Cir. 1987); Henry v. Wainwright, 743 F.2d 761, 763 (11th Cir. 1984); Francois v. Wainwright, 741 F.2d 1275, 1283 (11th Cir. 1984). *See generally*Comment, *Habeas Corpus—The Supreme Court Defines the Wainwright v. Sykes "Cause" and "Prejudice"Standard*, 19 Wake Forest L. Rev. 441 (1983). The "plain error" rule is inapplicable in collateral proceedings. United States v. Frady, 456 U.S. 152 (1982); Henderson v. Kibbe, 431 U.S. 145 (1977).

[138] 737 F.2d 877 (10th Cir.), *cert. denied*, 496 U.S. 1076 (1984).

court refused to consider the merits of the claim. Importantly, the court explicitly rejected the petitioner's contention that the "cause and prejudice" standard was inapplicable in collateral attacks on courts-martial. [139] The Wolff decision has been followed by the courts in the Ninth [140] and Federal[141] Circuits in challenges to courts-martial convictions.

[139] *Id.* at 879.
[140] Davis v. Marsh, 876 F.2d 1446 (9th Cir. 1989).
[141] Martinez v. United States, 914 F.2d 1486 (Fed. Cir. 1990).

Part 6
Professional Responsibility

Chapter 38
Professional Responsibility

38–1. Standards applicable to military counsel

a. General. Ethical standards are generally thought of, and spoken of, as though they represent categorical imperatives which reflect moral choices shared by a substantial majority of the legal profession.[1] Thinking of ethical standards in these terms can only promote dissatisfaction with any codification of ethical standards because individual moralities, public expectations of professional conduct, and inter-professional expectations of professional conduct are not matters susceptible to bright line consensus positions.[2]

In any situation involving a potential "ethical issue" there are three components the attorney must consider:

(1) Standards of professional responsibility, the violation of which a lawyer risks disciplinary action;

(2) Personal moral and ethical standards; and

(3) The expectations of superiors and peers.[3]

Unfortunately, the attorney is occasionally faced with a Hobson's choice because in some situations no course of conduct can satisfy all three components.[4] In those situations, the attorney is free to choose any course of conduct so long as he or she recognizes that the consequences of that choice may be a troubled conscience, caused by compromising personal standards; professional discipline and possible restrictions on the future practice of law imposed for violating prevailing ethics standards; or the approbation of friends, associates, or employers because the attorney's choice deviated from group expectations. Fortunately these situations do not arise often.

b. Regulatory standards. The Manual provides that The Judge Advocate General of each service may prescribe rules "to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the Code and this Manual."[5]

On 1 October 1987, The Judge Advocate General of the Army adopted the Rules of Professional Conduct for Lawyers[6] [hereinafter Army Rules] to govern all lawyers over whom he has supervisory responsibility and all civilian lawyers who appear before Army courts- martial.[7] These rules are based on the American Bar Association (ABA) Model Rules of Professional Conduct,[8] with appropriate changes to meet the needs of Army practice.[9] In addition to the Army Rules, military judges, counsel, and clerical support personnel are also governed by the ABA Standards for

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[1] For a general discussion of the moral issues various commentators ascribe to ethics standards see D'Amato & Eberle, *Three Models of Legal Ethics*, 27 St. Louis U.L.J. 761 (1983).

[2] Nowhere have these controversies and disagreements been more evident than in the debates concerning the ABA Model Rules of Professional Conduct. *See*, e.g., Panel Discussion, 35 U. Miami L. Rev. 639 (1981). *See also* A. Kaufman, Problems in Professional Responsibility 30 (1976); Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 Geo. Wash. L. Rev. 244 (1968). ("It is nothing new that even sacrosanct ethical and legal standards may bear little relation to actual behavior… and that what most people agree is good or is wicked may not be any approximation of their actual behavior").

Instead, ethical standards reflect jurisdictional compromises concerning the minimum acceptable conduct permitted of an attorney licensed to practice by that particular jurisdiction. Collaterally, they represent an attempt to give the attorney guidance on how a voting plurality of that jurisdiction's bar would"order" their practice. This is necessarily so because, to the extent that categorical imperatives do exist within the legal profession as norms, they inevitably come into direct conflict in the actual practice of law.

In addition, ethical standards reflect compromise because each licensing jurisdiction is ultimately free to strike its own balance between competing norms and because voting within each jurisdiction reflects the relative power of specific interest groups in that jurisdiction. For a summary of some of the positions taken by competing interest groups during the debate on the ABA Model Rules see *ABA Moves Closer to Adoption of New Model Rules of Conduct*, 32 Crim. L. Rep. (BNA) 2431 (Feb. 15, 1983).

[3] *See* Model Rules of Professional Conduct, Preamble (1980) ("Many of a lawyer's professional responsibilities are legal duties and are prescribed in the Rules of Professional Conduct or other law. However, a lawyer is also guided by personal conscience and the approbation of professional peers.").

[4] Although many ethical dilemmas arise during the course of criminal practice, the most controversial involve the obligation of defense counsel when the client intends to commit perjury; the defense counsel duty to report future crimes involving the client; trial counsel's duty to disclose evidence and other information to the defense; and the obligation of an attorney to report the ethical violations of other attorneys.

[5] R.C.M. 109(a).

[6] AR 27–26 (Dec. 1987) [hereinafter Army Rules].

[7] *See* Army Rules, Preamble.

> These Rules of Professional Conduct are in tended to govern the ethical conduct of lawyers as defined in these Rules. "Lawyer" means a person who is a member of the bar of a Federal court, or the highest Court of a State or Territory, or occupies a comparable position before the courts of a foreign jurisdiction and who practices law under the disciplinary jurisdiction of The Judge Advocate General. This includes judge advocates, members of the Judge Advocate Legal Service, and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial.

See also AR 27–1, para. 7–4 (15 Sept. 1989), AR 27–10, para. 5–8 (22 Dec. 1989).

[8] In August 1983, the American Bar Association adopted the Model Rules of Professional Conduct [hereinafter Model Rules]. These Model Rules replaced the Code of Professional Responsibility as the official code of ethics of the ABA.

[9] Army Rules, Preamble (1987). *See also* Ingold, An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers, 124 Mil. L. Rev. 1 (1989).

Criminal Justice,[10] unless the ABA standards are clearly inconsistent with the UCMJ, the Manual for Courts-Martial, or with applicable departmental regulations.[11]

c. Extraterritorial application of State standards.

(1) General. It is generally accepted that the licensing, regulation, and disciplining of the legal profession is a State function.[12] The growth of multi-state practice has resulted in a number of cases challenging State autonomy, but control of the legal profession remains primarily a function of the State and local bar.[13] Military attorneys are faced with the question "Whose rules do I follow … the military's … my licensing state's . … or the rules of the state where I am assigned?"

(2) Extraterritoriality provisions. In the past it has been generally accepted that an attorney licensed to practice in State X who engages in unprofessional conduct while practicing in State Y can be disciplined by the licensing State.[14] In this sense a State's professional ethical standards have extraterritorial application. Fortunately, since 1969 all States have had relatively homogeneous ethical standards[15] and disciplinary action by one State has generally been recognized by other interested States as a matter of comity.[16] Promulgation of the Army Rules and adoption of the new ABA Model Rules of Professional Conduct[17] by some, but not all, States raises the prospect of jurisdictional conflicts concerning significant ethical issues.

Army Rule 8.5 expressly addresses extra-territoriality. It states that lawyers (as defined in the Army Rules) shall be governed by the Army Rules. The comment to Army Rule 8.5 recognizes that while lawyers serving the Army remain subject to the governing authority of the jurisdiction in which they are licensed, they are also subject to the Army Rules, and the Army Rules supersede any conflicting rules applicable in the jurisdictions in which the lawyer may be licensed. The only exception noted in the comment to Rule 8.5 is that when a lawyer appears in a State or Federal civilian court proceeding, he or she must abide by the rules adopted by that court during the proceedings.[18]

38–2. Professional responsibility complaints

a. General. The Judge Advocate General has the ultimate responsibility for supervising and disciplining military and civilian attorneys assigned to the Judge Advocate Legal Service (JALS).[19] Allegations that a member of the JALS has committed an ethics violation are processed in accordance with Army Regulation 27-1.[20]

b. The duty to report lawyer misconduct. Although much has been written about the legal profession's obligations as a self-policing institution,[21] many civilian jurisdictions have been severely criticized for their failure to aggressively

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[10] American Bar Association Standards for Criminal Justice (1980).

[11] AR 27–10, para. 5–8.

[12] *See, e.g.*, Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423, 434 (1982) ("The State… has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys"). Although the regulation of the legal profession is traditionally viewed as a "State function," there is disagreement whether the licensing and disciplining of attorneys should be a function of the judiciary or of the legislature. *See generally* 1 ABA/BNA Lawyer's Manual on Professional Conduct sec. 201:101 (1984).

[13] Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) (Federal courts should abstain from reviewing State disciplinary actions against an atttorney so long as constitutional claims of the respondent can be determined in the State proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance).

[14] *See also* Comm. on Legal Ethics of W.Va. State Bar v. Blair, 327 S.E. 2d 671 (W.Va. 1984); Office of Disciplinary Counsel v. Cashman, 63 Hawaii 382, 629 P.2d 105 (1981); *In re* Neff, 83 Ill. 2d 20, 413 N.E. 2d 1282 (1980); *In re* Major, 275 S.C. 251, 269 S.E.2d 345 (1980); *In re* Cook, 67 Ill. 2d 26, 364 N.E.2d 86 (1977); State v. Pounds, 525 S.W.2d 547 (Tex. Civ. App. 1975); *In re* Van Bever, 55 Ariz. 368, 101 P.2d 790 (1940). It is equally clear that a State has no jurisdiction to discipline a lawyer who is not licensed to practice in that State. Sperry v. Florida, 373 U.S. 379 (1963).

[15] *See* generally Chaos? Breakdown of Ethics Uniformity Seen in Rules Adoption Process, The Nat'l L.J., Jan. 16, 1984, at 10, col. 1.

[16] *See, e.g.*, Copren v. State Bar, 64 Nev. 364, 183 P.2d 833 (1947); *In re* Van Bever, 55 Ariz. 368, 101 P.2d 790 (1940); *In re* Leverson, 195 Minn. 42, 261 N.W. 480 (1935); *In re* Brown, 60 S.D. 628, 245 N.W. 824 (1932). Disciplinary action by a State is not entitled to full faith and credit and some jurisdictions do not adopt another State's disciplinary sanctions. *In re* Isserman, 345 U.S. 286 (1953) (the Supreme Court refused to give comity to a State disbarment determination).

[17] Thirty-eight States have adopted some version of the Model Rules and three other States have incorporated some of the substance of the Model Rules.*See* BA/BNA Lawyers' Manual on Professional Conduct (ABA/BNA) § 1, at 3–4 (1990).

[18] Army Rule 8.5, comment (1987).

[19] *See generally* UCMJ art. 6 (assignment of judge advocates for duty and supervision of the administration of justice); UCMJ art. 26 (designation of military judges); UCMJ art. 27 (certification of trial and defense counsel); R.C.M. 109 (professional supervision of military judges and counsel), AR 27–1, para. 2–2(t) (duties of The Judge Advocate General). For a complete listing of who comprises the Judge Advocate Legal Service *see* AR 27–1, para. 1–5.

[20] AR 27–1, para. 7–6a.

[21] *See, e.g.*, Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?* 1974 U. Ill. L. Rev. 193; Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of Standards of the Legal Profession*, 1976 Utah L. Rev. 95; Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 Ariz. L. Rev. 509 (1978).

discipline lawyer misconduct.[22] Recognizing that the integrity of the legal profession depends on effective disciplinary procedures, The Judge Advocate General personally supervises the disposition of complaints alleging unethical conduct by an attorney of the JALS.[23]

Attorneys assigned to the JALS have an affirmative obligation to report violations of the Rules of Professional Conduct or other applicable ethical standards to an authority empowered to investigate the violation.[24] This duty to report ethics violations is both a regulatory requirement[25] and an ethical obligation.[26]

(1) What must be reported? The Army Rules require lawyers to report those violations of the Army Rules that raise a "substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."[27]

The obligation to report ethical misconduct does not extend to matters which are otherwise privileged.[28] Arguably an attorney may be obligated to report his or her own misconduct unless the disclosure would be protected by the privilege against self-incrimination.[29]

(2) The standard for disclosure. The Army Rules require disclosure when an attorney has knowledge of misconduct which should be reported.[30]

Although the language of the regulation could be clearer, the standard for mandatory reporting imposed by the regulation appears to be broader than the standard imposed by the Army Rules. Army Regulation 27-1 provides that "information or allegations indicating a possible violation … will be referred" to the appropriate official (emphasis added).[31]

(3) Filing the complaint with the appropriate official. Army Rule 8.3 requires lawyers to disclose ethical misconduct pursuant to regulations promulgated by The Judge Advocate General. Regulatory standards require reporting to a designated "preliminary screening official."[32] The "preliminary screening official" for allegations involving a trial counsel or a judge advocate performing noncriminal law functions is the staff or command judge advocate with supervisory responsibility over the subject attorney.[33] Allegations against a trial defense counsel or a military trial judge should be referred to a "preliminary screening official" within their independent organizations. Regional defense counsel are the "preliminary screening officials" for ethical complaints involving trial defense counsel,[34] and chief circuit judges are the "preliminary screening officials" for ethical complaints against members of the trial judiciary.[35] Allegations concerning Reserve Component judge advocates should be referred to the Commandant, The Judge Advocate General's School.[36] Finally, allegations concerning conduct of National Guard Judge Advocates not committed while performing federal duties under Title 10, U.S. Code, will be referred to the Office of the Judge Advocate, National Guard Bureau.

c. Processing a professional responsibility complaint. After The Judge Advocate General authorizes an inquiry into an allegation of professional misconduct, the case is thoroughly investigated by the initial inquiry official and a formal report is rendered to the subject attorney's MACOM SJA, the chief trial judge, or the chief, U.S. Army Trial Defense

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[22] In 1970, Mr. Justice Clark headed an ABA Committee which evaluated the legal profession's disciplinary enforcement. The committee report called the legal profession's self-policing mechanisms "scandalous," concluding that:

> With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors…. The committee emphasizes that the public dissatisfaction with the bar and the courts is much more intense than is generally believed within the profession.

Clark, ABA Special Committee on Evaluation of Disciplinary Enforcement: Problems and Recommendations in Disciplinary Enforcement (1970). Fifteen years later, Chief Justice Burger was asked to comment on progress made since Judge Clark's assessment. He responded as follows:

> Discipline has improved some, but not nearly enough. The ABA should press more vigorously since it promulgated the standards. It varies from state to state. In some states it is much better than in others. But it is far from what it should be, and we do not help our profession by pretending all is well.

Q&A with the Chief Justice, 71 A.B.A.J. 91, 9 4 (1985).

[23] AR 27–1, para. 7–2.

[24] AR 27–1, para. 7–7a.

[25] *Id.*

[26] Army Rule 8.3a (1987). Military judges are required to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Code of Judicial Conduct Canon 3B(3) (1972).

[27] Army Rule 8.3a (1987).

[28] Army Rule 8.3(c) (1987).

[29] *See generally* UCMJ art. 31; Comm. on Ethics and Professional Responsibility, Informal Op. 1279 (1973) (the obligation of an attorney to report his or her own misconduct exists only to the extent that the disclosure would not be protected by the privilege against self-incrimination). Note, however, that Army Rule 8.3(a) (1987) only requires an attorney to report"another" lawyer's violation.

[30] Army Rule 8.3(a) (1987).

[31] AR 27–1, para. 7–7a(1).

[32] *Id.*

[33] AR 27–1, para. 7–7a(1)(a). Allegations that a legal assistance officer engaged in professional misconduct should be reported to the supervising staff judge advocate, not the local bar association. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 343 (1977).

[34] AR 27–1, para. 7–7a(1)(b).

[35] AR 27–1, para. 7–7a(1)(c).

[36] AR 27–1 para. 7–7a(2).

Service (as appropriate).[37] Before disciplinary action is taken in any case, the allegations are investigated or reviewed at several levels, which may include an investigation pursuant to Army Regulation 15-6 if required,[38] and the subject attorney is given an opportunity to submit matters for consideration.[39] Serious allegations which appear to be supported by the facts developed by the investigation are referred to the Professional Responsibility Committee for an advisory opinion.[40]

The Professional Responsibility Committee, consisting of three officers senior in rank to the subject attorney,[41] has no investigative powers of its own.[42] Its purpose is to review the case file developed concerning an ethics complaint and render an opinion whether applicable ethical standards have been violated. The Committee's opinion is purely advisory.[43] The ultimate action on all ethics violations is determined by The Judge Advocate General.[44] Before sanctions are imposed, the subject attorney receives notice of the proposed action and is provided an opportunity to show cause why such action should not be taken.[45] When appropriate, The Judge Advocate General may also direct that a report of the disciplinary action be sent to the subject attorney's licensing State bar.[46] Actions taken by The Judge Advocate General are final and may not be appealed.[47]

38–3. Judge advocates in an organizational context

a. Restrictions on the practice of law. Judge advocates, are faced with a number of constraints on their independence to enter into attorney-client relationships and to otherwise practice law in the same manner as civilian counterparts residing in the same area. These constraints generally fall into two categories: (1) prohibitions against the unauthorized civilian practice of law, and (2) limitations on their discretion in dispensing legal services within the military community.

(1) Prohibitions against the unauthorized practice of law. Regardless where they are stationed, judge advocates are authorized to represent military personnel before military tribunals,[48] and to provide other legal services (short of representation) to qualifying members of the military community.[49] Judge advocates not licensed to practice law in a State are prohibited from representing military clients in that State's tribunals[50] absent special arrangements.[51] A judge advocate is prohibited from engaging in the private civilian practice of law in a jurisdiction in which he or she is not licensed, even though he or she may be stationed there.[52] Even if a judge advocate is licensed to practice law in the State where he or she is stationed, the private civilian practice of law is prohibited without the prior written approval of The Judge Advocate General.[53]

(2) Limitations on dispensing legal services within the military community. As a general proposition, judge advocates serve the United States Army. Their client is the organization, thus the obligation of loyalty and service due a client is owed to the Army as an entity. Of course, one function of the organization is to provide legal services to individuals.[54] The Judge Advocate General establishes the guidelines under which judge advocates obtain individual clients for representation in criminal,[55] administrative,[56] or legal assistance matters.[57] Judge advocates are permitted to establish attorney-client relationships only when authorized by applicable regulations.[58]

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[37] AR 27–1, para. 7–7b(1).
[38] *See generally* AR 15–6, AR 27–1, para. 7–7.
[39] *Id.*
[40] AR 27–1, para. 7–9b.
[41] AR 27–1, para. 7–10a.
[42] AR 27–1, para. 7–10b(1).
[43] AR 27–1, para. 7–12.
[44] AR 27–1, para. 7–12*a. See also* R.C.M. 109 (The Judge Advocate General's (TJAG's) power to suspend counsel and military judges from court-martial practice).
[45] AR 27–1, para. 7–12*a.*
[46] AR 27–1, para. 7–12*c.*
[47] AR 27–1, para. 7–12*b.*
[48] *See generally* UCMJ art. 27; AR 27–10, chap. 5.
[49] *See, e.g.*, AR 27–10, chap. 6; AR 27–3, chap. 2 (10 Mar. 1989).
[50] AR 27–40, para. 1–4 (2 Dec. 1987) (except as specifically authorized, military personnel are prohibited from appearing as counsel before any civil court, administrative tribunal, regulatory body, or governmental agency).
[51] The most notable exception is that judge advocates are authorized to perform "extended legal assistance" in selected jurisdictions. *See* AR 27–3, para. 2–5.
[52] Army Rule 5.5(a) (1987) ("A lawyer shall not: (a) except as authorized by a appropriate military department, practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction….").
[53] AR 27–1, para. 4–3*e.*
[54] Model Code of Professional Responsibility EC 5–18 (1980) ("A lawyer employed… by a corporation or similar entity owes his allegiance to the entity and not to a[n]… officer, employee, representative, or other person connected with the entity.").
[55] AR 27–10, chap. 6.
[56] AR 635–200, para. 2–4e (1 Dec. 1988).
[57] AR 27–3, para. 2–5.
[58] AR 27–1, para. 2–5a ("JA officers represent individual clients only when detailed or made available to do so…. They may not, without permission of superiors, represent service members or advise clients so as to enter into attorney-client relationships."); AR 27–10, para. C–1*c* ("Military attorneys will normally confine their activities to proceedings provided for in the UCMJ and Army regulations.").

Once a valid attorney-client relationship is established pursuant to governing regulations, the judge advocate's primary loyalty is to the individual client, rather than the organization.[59]

b. Judge advocates serving as legal advisors. It is clear that Army lawyers detailed to represent soldiers at trials by court-martial, at administrative proceedings, or assigned to render legal assistance to military and dependent clients owe primary allegiance to the individual clients whom they represent.[60] Many duty assignments for judge advocates involve not being the lawyer for an individual client but, rather, being the primary source of legal advice and representation for a particular entity within the organization which is the United States Army. Of course, each of the commands, agencies, or other entities acts through its duly authorized officials, such as commanders and the heads of Army agencies or activities; however, the lawyer-client relationship exists between the lawyer and the Army--not the lawyer and the official.[61] The official must be acting within the scope of the official business of the organization in order to invoke the attorney-client privilege,[62] and the attorney-client relationship[63] can only be invoked for the benefit of the Army, not for the benefit of the head of the organization.[64]

If an Army lawyer knows that an official ("officer, employee, or other member associated with the Army") is acting or refusing to act in a matter related to the Army, and the official's conduct is a violation of law or of the official's legal obligation, the lawyer must proceed in a manner which is in the best interest of the Army.[65] Any action taken by the lawyer must be designed to minimize disruption of the Army and the risk of revealing information relating to representation to persons outside the Army.[66] Among the actions that the lawyer may take are: (1) asking the official to reconsider; (2) advising that another legal opinion be sought; (3) referring the matter to or seeking guidance from higher authority in the technical chain of command; and (4) advising the official or the head of the organization that his or her personal legal interests are at risk and that he or she should consult personal counsel.[67] If, despite the lawyer's efforts in accordance with this rule, the official persists in acting or refusing to act in a matter related to the Army that is a clear violation of the law, the lawyer may terminate representation with respect to the matter in question, and in no event shall the lawyer participate or assist in the illegal activity.[68]

c. Judge advocates with supervisory responsibility. In addition to personal responsibility for their own conduct, judge advocates in supervisory and management positions have an ethical obligation to supervise the work of subordinate lawyers and nonlawyer assistants, and under certain circumstances, may be responsible for the misconduct of such persons.

(1) Subordinate lawyers. Under the Army Rules, a supervisory lawyer has an ethical obligation to ensure that subordinate lawyers conform to the Army Rules.[69] In fulfilling this obligation, supervisory lawyers must take "reasonable measures" to ensure compliance with the rules.[70] The measures required depend on such factors as the office structure and the nature of its practice.[71] While informal supervision might be sufficient in a small office, in a large office more elaborate measures may be necessary-- for example, a continuing legal education program on professional responsibility.[72] In providing advice to subordinates, supervisory lawyers must be careful to avoid conflicts of interest.[73]

Under certain circumstances supervisory lawyers may be held responsible for the unethical conduct of subordinate lawyers. The supervisory lawyer can be held responsible: (1) if the supervisory lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.[74]

In short, the Army Rules make the supervisory lawyer responsible for ordering or knowingly ratifying another lawyer's misconduct and also impose an obligation on the supervisory lawyer to intervene to prevent avoidable consequences of misconduct if the supervisory lawyer knows that the misconduct occurred.[75] The extent of the intervention by the supervisory lawyer depends on the immediacy of the supervisor's involvement and the seriousness of the misconduct.[76]

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[59] Army Rules 1.1, 1.3, 1.6, 1.7.
[60] Army Rule 1.13(f).
[61] Army Rule 1.13(a).
[62] *Id.*
[63] To include the benefits of the relationship, such as the rule of confidentiality. *See* Army Rules 1.6 and 1.13(a).
[64] Army Rule 1.13(a).
[65] Army Rule 1.13(o).
[66] *Id.*
[67] *Id.*
[68] Army Rule 1.13(d).
[69] Army Rule 5.1.
[70] *Id.*
[71] Army Rule 5.1, comment.
[72] *Id.*
[73] *Id.*
[74] Army Rule 5.1(c).
[75] *Id.*
[76] *Id.*

A subordinate lawyer who acts at the direction of a supervisor is not necessarily relieved of responsibility for a violation of the Army Rules, although that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules.[77] If the question can reasonably be answered only one way, the duty of both lawyers is clear, and they are equally responsible for the conduct.[78] If, however, the question is reasonably arguable, a subordinate lawyer who acts in accordance with a supervisory lawyer's reasonable resolution of the question does not violate the Army Rules.[79]

(2) Nonlawyer assistants. Lawyers generally use assistants in their practice to help in the performance of some legal functions. These assistants may include paralegals, secretaries, clerks, investigators, law student interns, and others.[80] A lawyer's ethical duty regarding these assistants generally parallels the duty regarding subordinate lawyers.[81] A senior supervisory lawyer must make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the conduct of assistants will be compatible with the Army Rules.[82] A lawyer with direct supervisory authority over the nonlawyer must make reasonable efforts to ensure that the assistants' conduct is compatible with the Army Rules.[83] "A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their performance, particularly regarding the obligation not to disclose information relating to representation of the client and should be responsible for their work product."[84] A lawyer is responsible for the conduct of assistants if such conduct violates the Army rules and if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[85]

38–4. The initiation and disposition of charges

a. The military trial counsel's obligation to seek justice. As every lawyer and law student knows, the role of the prosecutor is to seek justice, not merely to convict.[86] Perhaps the best articulation of this concept was penned by the Supreme Court, which used the following passage to describe the role of the Federal prosecutor:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[87]

What "seeking justice" means to Army trial counsel is that they must comply with applicable ethical standards relating to the initiation of charges and the prosecution of cases.[88] "Seeking justice" does not mean that the trial counsel is free to substitute his or her own judgment of the appropriate disposition of a case for the judgment of the convening authority.[89] At trial the military trial counsel must zealously represent the interests of the convening authority even though those interests might differ from the personal opinions of the trial counsel.[90]

b. The exercise of prosecutorial discretion.

(1) Role of the convening authority vis-a-vis the staff judge advocate. The convening authority exercises unfettered prosecutorial discretion in disposing of cases at summary and special courts- martial.[91] Although there is no formal requirement that a judge advocate review the case prior to referral to inferior levels of courts- martial,[92] most commands follow the sounder practice of obtaining an informal legal review of a case before referring it to trial.

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[77] Army Rule 5.2, comment.
[78] *Id.*
[79] Army Rule 5.2(b).
[80] Army Rule 5.3, comment.
[81] Annnotated Model Rules of Professional Conduct Rule 5.3 (1984) [hereinafter Annnotated Model Rules].
[82] Army Rule 5.3(a).
[83] Army Rule 5.3(b).
[84] Army Rule 5.3, comment.
[85] Army Rule 5.3(c).
[86] Army Rule 3.8, comment.
[87] Berger v. United States, 295 U.S. 78, 88 (1935).
[88] AR 27–10, para. 5–8.
[89] The trial counsel may make appropriate disposition recommendations to the staff judge advocate or the convening authority, but the trial counsel has no independent authority to make any disposition of a case.
[90] For example, a trial counsel who believes that a case should have been disposed of with a nonjudicial level of punishment should not usurp the convening authority's judgment that general court-martial punishment is appropriate by arguing at trial for nonjudicial type punishment.
[91] UCMJ arts. 23, 24. *But cf.* Standards for Criminal Justice 3–2.1 (1986) ("The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline."); Standards for Criminal Justice 3–3.4(a) (1979) ("The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.").
[92] UCMJ arts. 23, 24.

Before an offense can be referred to a general court-martial, the convening authority must receive a pretrial advice from the staff judge advocate.[93] Although prosecutorial discretion still resides with the convening authority, it is limited in the sense that no charge may be referred to a general court-martial if the staff judge advocate concludes in the pretrial advice that: (1) the specification does not allege an offense under the UCMJ; (2) a court-martial would not have jurisdiction over the accused or the offense; or (3) the specification is "not warranted by" the evidence indicated in the report of the article 32 investigation.[94] Neither the UCMJ nor the Manual sets out an express standard against which the evidence must be weighed. The best view is that the charges must be supported by that "quantum of evidence … which would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it."[95]

As a layperson, the convening authority may refer a case to trial if he or she has "reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it."[96]

(2) The role of the trial counsel. Even though the trial counsel exercises no direct control over the convening authority's exercise of prosecutorial discretion, the ethical standards do not absolve the military trial counsel from all responsibility in the charging process.

A military trial counsel may not personally prefer court-martial charges against an accused unless counsel has personal knowledge of, or has investigated, the matters set forth in the charges and believes that the charges are true in fact to the best of counsel's knowledge and belief.[97]

Military trial counsel (and staff judge advocates) are ethically precluded from instituting criminal charges or causing criminal charges to be instituted when they know or it is obvious that the charges are not supported by probable cause.[98] It is likewise unprofessional conduct for a trial counsel to permit the continued pendency of criminal charges when he or she knows that the charges are not supported by probable cause.[99] Finally, a trial counsel should not[100] institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.[101]

A military trial counsel does not have prosecutorial discretion and cannot preclude the convening authority from going forward with charges which are not supported by probable cause. The military trial counsel fulfills his or her ethical obligation by informing the convening authority of the defects in the charges, or deficiencies in the evidence supporting the charges, and advising against prosecution.[102] If the convening authority considers the advice and nevertheless orders the prosecution of the case, the trial counsel should seek advice from the supervisory attorney.[103]

(3) Factors considered in the charging process. Prosecutors who exercise prosecutorial discretion may decline to prosecute some cases even though there is sufficient evidence available to support a conviction.[104] ABA Standard for Criminal Justice 3-3.9 contains an illustrative list of factors which a prosecutor may properly consider in deciding whether or not to prosecute a case.[105] Factors which the prosecutor may properly consider include:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

In the military, disposition of criminal charges must be made after an individualized evaluation of the accused and the offense.[106] Factors the commander should consider include:

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[93] UCMJ art. 34.
[94] UCMJ art. 34; R.C.M. 406.
[95] United States v. Engle, 1 M.J. 387, 389 n.4 (C.M.A. 1976).
[96] R.C.M. 601(d)(1).
[97] R.C.M. 307(b)(2) discussion.
[98] Army Rule 3.8(a).
[99] Standards for Criminal Justice 3–3.9(a) (1986).
[100] Standards for Criminal Justice 3–3.9(a) commentary (1986) indicates that violating this provision should not be the basis for disciplinary action because of the difficulty in assessing the existence of "sufficient admissible evidence".
[101] Standards for Criminal Justice 3-3.9(a) (1986).*Accord* Dep't of Justice, Principles of Federal Prosecution (1980) (a Federal prosecutor should not seek indictment unless there is a probability of conviction).
[102] Army Rule 3.8(a). *Accord* R.C.M. 502(d)(5)(A) discussion ("Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers… [and]… should bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons."). *See also* United States v. Phare, 21 C.M.A. 244, 45 C.M.A. 18 (1972) (after the military judge granted a defense motion suppressing Government evidence, it was prejudicial error for trial counsel to allow the unprovable charges to be brought to the court member's attention; it was the trial counsel's duty to advise the convening authority about the lack of available proof).
[103] *Id.*
[104] Standards for Criminal Justice 3–3.9(b) (1986).
[105] *Id.*
[106] *See* R.C.M. 306(b) discussion.

(A) the character and military service of the accused;
(B) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
(C) appropriateness of the authorized punishment to the particular accused or offense;
(D) possible improper motives of the accuser;
(E) reluctance of the victim or others to testify;
(F) cooperation of the accused in the apprehension or conviction of others;
(G) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
(H) availability and admissibility of evidence;
(I) existence of jurisdiction over the accused and the offense; and
(J) likely issues.

The guiding principle governing level of disposition is that each case should be tried before the lowest level empowered to adjudge an appropriate punishment.[107] The factors listed in ABA Standard for Criminal Justice 3-3.9 are valid considerations in the disposition of military cases.

The decision to prosecute a case by court-martial cannot be the product of "vindictive prosecution" or impermissible "selective prosecution."

(a) Selective prosecution. The Government has broad discretion in deciding whom to prosecute[108] so long as there is probable cause to believe that the accused committed an offense defined by statute.[109] While this broad discretion necessarily includes the right to choose not to prosecute all known criminal violations,[110] the selection process may not be deliberately based upon an unjustifiable standard such as race, religion,[111] or any other arbitrary classification including the exercise of protected statutory and constitutional rights.[112]

There is a strong presumption that the prosecution of a criminal case is undertaken in good faith.[113] The defense bears the burden of establishing a prima facie showing both that the accused was singled out for prosecution when others similarly situated were not prosecuted[114] and that the selection of the accused was motivated by a discriminatory purpose.[115] To meet this burden, the defense must show more than discriminatory impact even if the decision maker was aware of the discriminatory impact.[116] Instead, the defense must show that the decision maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group."[117]

Once the defense satisfies this two-prong prima facie threshold, the burden shifts to the prosecution to establish by compelling evidence that it is prosecuting without invidious or unlawful discrimination.[118] If the Government cannot meet this burden, the accused has been deprived of due process and the charges must be dismissed.[119]

(b) Vindictive prosecution. Impermissible prosecution occurs when an accused is prosecuted, or is otherwise "punished," in retaliation for the accused's exercise of a legal right.[120] Because it is difficult to ascertain the actual motives of a decision maker the defense initially has the burden of showing circumstances which indicate a "realistic likelihood of vindictiveness."[121] As a general proposition, the courts are more willing to find a likelihood of

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[107] R.C.M. 506(b).
[108] United States v. Goodwin, 457 U.S. 368 (1982); Oyler v. Boles, 368 U.S. 448 (1962).
[109] Bordenkircher v. Hayes, 434 U.S. 357 (1978). *See also supra* para. 30–4(2).
[110] Standards for Criminal Justice 3–3.9(b) (1986).
[111] Yick Ho v. Hopkins, 118 U.S. 356 (1886).
[112] Wayte v. United States, 105 S. Ct. 1524 (1985) (exercise of first amendment rights should not be the basis for prosecution selection).
[113] United States v. Falk, 479 F.2d 616 (7th Cir. 1973).
[114] Yick Ho v. Hopkins, 118 U.S. 356 (1886). *See also* Wayte v. United States, 105 S. Ct. 1524 (1985). In *Wayte*, the accused alleged that he had been singled out for prosecution because he had been a vocal Selective Service nonregistrant. Of approximately 674,000 nonregistrants only 16 were indicted. These 16 were selected for prosecution because they: (1) sent a letter to the Selective Service System refusing to register *and* (2) refused to comply with warning letters offering them a second chance to register. The Court held that under these circumstances, the Government had prosecuted all "similarly situated" violators.
[115] Wayte v. United States, 105 S. Ct. 1524 (1985).*But see* United States v. Garwood, 16 M.J. 863 (N.M.C.M.R. 1983). In *Garwood* the court expanded this second prong to include selections made on "arbitrary classifications," holding that the Government must base selections for prosecution on an objective standard of reasonableness. *Id.* at 873.
[116] *See, e.g.*, United States v. Tatum, 17 M.J. 757 (C.G.C.M.R. 1984). In *Tatum*, the accused alleged that a discriminatory purpose had been established"statistically." Six individuals were jointly investigated for drug offenses. Three black individuals (including Tatum) were given general courts-martial while three caucasians were given special courts-martial or nonjudicia l punishment. The court held that these statistics created no more than an "implication" of discriminatory selective prosecution. *Id.* at 761.
[117] Wayte v. United States, 105 S. Ct. 1524 (1985) (citing Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
[118] United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).
[119] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[120] *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969) (judicial vindictiveness for court to increase an accused's sentence at a second proceeding merely because the accused had successfully appealed the first conviction).
[121] Blackledge v. Perry, 417 U.S. 21 (1974).

vindictiveness when the Government "ups the ante" after an initial disposition of the case[122] than they are when the Government changes the disposition prior to any initial trial.[123]

Once the defense shows circumstances indicating a"realistic likelihood" of vindictiveness, there is a presumption of vindictive prosecution that the Government must rebut.[124] If the defense is unable to show circumstances indicating a realistic likelihood of vindictiveness, there is no presumption and the defense can prevail only by showing actual vindictiveness.[125]

38–5. Disclosure obligations

a. Compliance with discovery procedures. The UCMJ specifically provides that the trial counsel and the defense counsel "shall have equal opportunity to obtain witnesses and other evidence."[126] The Manual has long provided for what approximates an "open file" system of pretrial discovery for the accused.[127] Only recently has the Manual created pretrial discovery opportunities for the trial counsel.[128] The expanded disclosure and discovery procedures have"ethical significance" for both trial and defense counsel who are ethically required to comply in good faith with applicable constitutional, statutory, and regulatory discovery procedures.[129]

b. Standards governing prosecutorial disclosure. Trial counsel must be careful not to confuse constitutional standards regarding prosecutorial disclosure with the stricter ethical requirements for prosecutorial disclosure. Case law which addresses the issue of prosecutorial disclosure examines whether an accused's criminal conviction must be reversed because the prosecutor failed to disclose information to the defense. While it should go without saying that trial counsel must comply with the constitutional standards for disclosure, the ethical propriety of the trial counsel's conduct will be judged by applicable ethical requirements for prosecutorial disclosure.

(1) Constitutional standards. Constitutional disclosure standards are embodied in two Supreme Court cases applicable to military practice. In Brady v. Maryland,[130] the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[131]

In United States v. Agurs,[132] the Court expanded its discussion of prosecutorial disclosure and outlined three separate standards. First, if there is a pretrial request for specific information in the possession of the Government it must be disclosed "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists."[133] Per Agurs, evidence is material if it"might have affected the outcome of the trial."[134] The Court of Military Appeals has interpreted this rule as meaning that the evidence will be considered material unless failure to disclose can be demonstrated to be harmless beyond a reasonable doubt.[135]

The second situation is when the defense has made no request for disclosure or has made only a general request for

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[122] *See, e.g.*, Blackledge v. Perry, 417 U.S. 21 (1974) (realistic likelihood of vindictiveness when prosecution changed charges from misdemeanor to felony after the accused appealed the misdemeanor conviction); Thigpen v. Roberts, 104 S. Ct. 2916 (1984).

[123] *See* United States v. Goodwin, 457 U.S. 368 (1982). In *Goodwin* the prosecution changed misdemeanor charges into a felony indictment after the accused refused to plead guilty to the misdemeanor. The Court refused to apply a presumption of vindictiveness to the pretrial negotiations stage of the proceedings. At the post-trial stage a prosecutor has much to lose if the accused wins an appeal and forces the Government to re-try the case. On the other hand, the accused's failure to plead guilty at the pretrial stage does not place any unnecessary burden on the prosecution. The fact there is less to be gained by vindictive prosecution during the pretrial stages, combined with the increased need for prosecution flexibility during the initial stages of the charging process, reduces the "realistic likelihood of vindictiveness." *See also* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (no vindictiveness presumption when prosecution decided to charge a bad check offense under habitual offender provisions because the defense refused to plead guilty); United States v. Bass, 11 M.J. 545 (A.C.M.R. 1981) (not vindictive prosecution to refer rape charges to a general court-martial after the accused turned down nonjudicial punishment).

[124] Thigpen v. Roberts, 104 S. Ct. 2916 (1984); Blackledge v. Perry, 417 U.S. 21 (1974) (a so-called"*Blackledge* presumption" applies whenever the prosecution "ups the ante" after a successful defense appeal).

[125] United States v. Goodwin, 457 U.S. 368 (1982).

[126] UCMJ art. 46.

[127] *See, e.g.*, R.C.M. 701; Mil. R. Evid. 304(d)(1); Mil. R. Evid. 311(d)(1); Mil. R. Evid. 321(d)(1). As a general rule "military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian criminal prosecution." United States v. Franchia, 32 C.M.R. 315, 320 (C.M.A. 1962). *But cf.* Civiletti, *The Prosecutor as Advocate*, 25 N.Y.L. Sch. L. Rev. 6 (1979) (Department of Justice provides the defense with "open file" discovery as a *policy matter*). A military accused, upon proper request, is *entitled* to discover all items that are "relevant to the case and can be reasonably provided." United States v. Toledo, 15 M.J. 255 (C.M.A. 1983) (the accused was deprived of military due process when the Government failed to provide the defense with transcripts of a key Government witness' testimony at two prior Federal trials. The transcripts were necessary for impeachment purposes (prior inconsistent statements and rebuttal)); United States v. Mougenel, 6 M.J. 589, 592 (A.F.C.M.R. 1978) (the accused was entitled to discover the polygraph results of the Government's confidential informant where there was a "distinct likelihood that the results may have been effectively utilized in preparing the cross-examination of the informant, or by leading to evidence regarding the informant's reliability").

[128] *See, e.g.*, R.C.M. 701(b) (Disclosure by the defense); R.C.M. 914 ("Reverse" Jencks Act).

[129] Standards for Criminal Justice 3–3.11(b) (1986) (Trial counsel obligation); Standards for Criminal Justice 4–4.5 (1986) (Defense counsel obligation).

[130] 373 U.S. 83 (1963).

[131] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[132] 427 U.S. 97 (1976).

[133] United States v. Agurs, 427 U.S. 97, 106 (1976).

[134] *Id.* at 104. In applying this standard the court must necessarily evaluate each case based on its particular facts. In evaluating the potential impact that the undisclosed evidence would have on a case the courts require more than "a mere possibility" that the undisclosed evidence could have had some impact. United States v. Horsey, 6 M.J. 112, 115 (C.M.A. 1979); United States v. Jenkins, 18 M.J. 583 (A.C.M.R. 1984).

[135] United States v. Hart, 29 M.J. 407, 408 (C.M.A. 1990).

discovery. Then the accused's conviction will be reversed only if the evidence would have created a reasonable doubt that did not otherwise exist.[136] The Court of Military Appeals states the rule as being that the failure to disclose when there is no request or only a general request will be material only if there is a reasonable probability that a different verdict would result from disclosure of the evidence.[137]

Finally, there is a third standard which applies where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew or should have known of the perjury."[138] In this situation, the conviction will be set aside if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[139]

Although the constitutional standard for disclosure is not well developed by case law, it is clear that at least in some circumstances evidence affecting the credibility of a key Government witness "might affect the outcome" of a case[140] and arguably might even be so significant that it could "create a reasonable doubt that otherwise did not exist."[141] In all situations "the prudent prosecutor [should] resolve doubtful questions in favor of disclosure."[142]

A disclosure under Brady or Agurs is timely if it allows the defense "to use the favorable material effectively in the preparation and presentation of its case."[143]

(2) Ethical standards. Trial counsel's ethical obligation to disclose evidence to the defense is broader than the constitutional obligation. Trial counsel have an ethical obligation to "make timely disclosure" to the defense of all evidence that "tends to negate the guilt of the accused or mitigate the offense, and in connection with sentencing, … all unprivileged mitigating information."[144] This standard clearly encompasses all evidence which must be disclosed under the constitutional standards. In addition, it is obvious that the trial counsel has an ethical obligation to disclose evidence which "might affect the outcome" of the case regardless of whether there has been a specific defense request for the information.[145]

To be "timely," disclosure of favorable defense evidence must be made at the "earliest feasible opportunity."[146]

The ABA Standards for Criminal Justice also endorse an "open file" discovery policy and enumerate a number of items the prosecution should disclose in every case.[147]

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[136] United States v. Agurs, 427 U.S. 97, 112 (1976).

[137] United States v. Hart, 29 M.J. 407, 408 (C.M.A. 1990).

[138] *Id.* at 103.

[139] *Id.*

[140] Giglio v. United States, 405 U.S. 150 (1972); United States v. Toledo, 15 M.J. 255 (C.M.A. 1983) (error not to provide transcripts which could be used as prior inconsistent statements); United States v. Webster, 1 M.J. 216 (C.M.A. 1975) (error not to disclose immunity or leniency affforded a Government witness in exchange for testimony); United States v. Jenkins, 18 M.J. 583 (A.C.M.R. 1984) (error not to disclose Government witness' conviction for forgery of ration cards); United States v. Mougenel, 6 M.J. 589 (A.F.C.M.R. 1978) (error not to disclose polygraph test results of Government witness).

[141] *Cf.* United States v. Brickey, 16 M.J. 258, 267 n.8 (C.M.A. 1983).

[142] United States v. Agurs, 427 U.S. 97, 108 (1976).

[143] United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976).

[144] Army Rule 3.8(d); Standards for Criminal Justice 3–3.11(a) (1986).

[145] The ethical obligation to disclose evidence also includes the obligation to disclose matters affecting the credibility of an important Government witness. *See, e.g.*, Professional Responsibility Opinion: Cases 82–3, 82–4, The Army Lawyer, Aug. 1983, at 37.

[146] Standards for Criminal Justice 3–3.11(a) (1986).

[147] Standards for Criminal Justice 11–2.1 (1986) provide that:

> (a) Upon the request of the defense, the prosecuting attorney shall disclose to defense counsel all of the material and information within the prosecutor's possession or control including but not limited to:
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> (i) the names and addresses of witnesses, together with their relevant written or recorded statements;
> (ii) any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant;
> (iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses;
> (iv) any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
> (v) any books, papers, documents, photographs, tangible objects, buildings, or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and
> (vi) any record of prior criminal convictions of the defendant or of any codefendant.
>
> (b) When the information is within the prosecutor's possession or control, the prosecuting attorney shall inform defense counsel:
>
> (i) if relevant recorded grand jury testimony has not been transcribed;
> (ii) if the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping);
> (iii) if the prosecutor intends to conduct scientific tests, experiments, or comparisons which may consume or destroy the subject of the test, or intends to dispose of relevant physical objects; and
> (iv) if the prosecutor intends to offer (as part of the proof that the defendant committed the offense charged) evidence of other offenses.
>
> (c) The prosecuting attorney shall disclose to defense counsel any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.
> (d) The prosecuting attorney's obligations under this standard extend to material and information in the possession or control of members of the prosecutor's staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or, with reference to the particular case, have reported to the prosecutor's office.

38–6. The attorney-client relationship

a. Formation of an attorney-client relationship. Judge advocates are precluded from entering into attorney-client relationships except as specifically authorized by applicable regulations.[148] Normally only judge advocates assigned to the United States Army Trial Defense Service may establish an attorney-client relationship with service personnel seeking defense counsel services.[149] In the military, the attorney-client relationship is normally created when counsel is assigned or detailed to represent the particular soldier.[150] The establishment of an attorney-client relationship does not guarantee that the lawyer's services will be provided in any subsequent legal proceedings;[151] however, if an attorney-client relationship is established concerning matters related to criminal charges the attorney will ordinarily be considered available to act as individual military counsel should the accused so request.[152] Once an attorney-client relationship is established the attorney has the ethical obligation to represent the client competently[153] and diligently;[154] and the attorney is ethically bound to protect information relating to representation of the client.[155]

b. Withdrawal from an attorney-client relationship. Once a judge advocate has been detailed as defense counsel, he or she may not withdraw from representation without the permission of the appointing authority or the military judge.[156] A lawyer is required to seek withdrawal if:

(1) The representation will result in violation of the Rules of Professional Conduct for Lawyers or other law or regulation;
(2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) The lawyer is dismissed by the client.[157]

A lawyer is permitted to seek withdrawal only if:[158] withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyers's services that the lawyer reasonably believes is criminal or fraudulent;
(2) the client has used the lawyer's services to perpetrate a crimes or fraud;
(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyers services and has been given reasonable warning that the lawyer will seek to withdraw unless the obligation is fulfilled;
(5) the representation will result in unreasonable financial burden on the lawyer or has been rendered unreasonably

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[148] AR 27–1, para. 4–3e. Lawyers who are in the military but who are not serving as judge advocates are precluded by statute from representing anyone in a proceeding in which the United States is a party. 18 U.S.C. § 205 (1982).

[149] AR 27–10, para. 6–2. The staff judge advocate can designate non-USATDS counsel to provide defense counsel services if the situation requires immediate action and no USATDS counsel is available. AR 27–10, para. 6–8(g). The accused can request assignment of non-USATDS counsel by filing a request for individual military counsel pursuant to AR 27–10, para. 5–7.

[150] Mere conversation between a lawyer and someone with legal difficulties does not create an attorney-client relationship between them. Military cases finding that an attorney-client relationship was formed involve both a formal assignment of the attorney and active representation. United States v. Eason, 45 C.M.R. 109, 113 (C.M.A. 1972); United States v. Rachels, 6 M.J. 232 (C.M.A. 1979); United States v. Hanson, 24 M.J. 377 (C.M.A. 1987). The Court of Military Appeals has expressed some question about whether such a relationship was formed with an attorney who was not so assigned, despite confidential communication by the client and the lawyer's assistance in the preparation of the client's defense:

> We also have doubts as to whether the relationship between Saenz and [the former judge advocate now serving as a line officer] can be characterized as that of attorney-client. Certainly such a relationship cannot be created unilaterally. There is a question as to whether such relationship could be created [with the former judge advocate] in view of his duty assignment. Thus [the former judge advocate] was treading a narrow ethical line when he undertook to assist the accused in his plea-bargaining attempts.

United States v. Saenz, 18 M.J. 327, 329 (C.M.A. 1984).

Note that the confidentiality of the communication does not depend on whether the lawyer does ultimately represent the client (e.g. United States v. Dennis, 843 F.2d 652 (2d Cir. 1988)), or even whether the lawyer is really a lawyer. There is *no question* that client communication with someone who the client reasonably believed was authorized to render legal services is privileged, regardless of the actual status of the"lawyer." See para. 38–7.

[151] AR 27–10, app. C, para. C–1b(1).

[152] AR 27–10, para. 5–7(e). *See also* United States v. Eason, 45 C.M.R. 109, 113 (C.M.A. 1972) ("Circumstances which would justify the denial of the services of… requested counsel on the basis of nonavailability, may not necessarily justify denial of the aid of counsel who has established a bona fide attorney-client relationship and has engaged actively in the preparation and pretrial strategy of a case"); United States v. Saenz, 18 M.J. 327, 330 n.1 (C.M.A. 1984) (Everett, J., concurring) ("The standard for determining the availability of a requested lawyer differs from that for determining whether an existing attorney-client relationship may be severed").

[153] Army Rule 1.1.

[154] Army Rule 1.3.

[155] Army Rule 1.6. The defense counsel's duty to preserve the confidential information relating to the representation of a client persists even after the attorney-client relationship is severed. Army Rule 1.6, comment.

[156] Army Rule 1.16, comment. The appointing authority may grant permission to withdraw prior to trial; the military judge may grant permission once trial begins.

[157] Army Rule 1.16(a).

[158] Normally the military judge should document the reasons for the withdrawal request and should question the accused about his or her feelings and desires.*See, e.g.*, United States v. Timberlake, 46 C.M.R. 117 (C.M.A. 1973); United States v. Harrel, 17 M.J. 675 (A.C.M.R. 1983).

difficult by the client; or
(6) other good cause for withdrawal exists.[159]

Even if good cause exists for withdrawal, a lawyer may nevertheless be ordered by a tribunal or other competent authority to continue representation.[160] If withdrawal is permitted, a lawyer must take reasonable steps to mitigate the consequences to the client and to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled.[161]

c. Severance of the attorney-client relationship. Once an attorney-client relationship is established, the Government may not sever that relationship except upon a showing of "good cause."[162] "Good cause" is defined as "a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship."[163] Military administrative convenience,[164] financial or logistical burdens,[165] and normal reassignment of counsel[166] generally are not legitimate bases for severing the attorney-client relationship. The separation of counsel from military service generally will terminate the accused's right to continued representation by that counsel at Government expense.[167] A trial defense counsel's duty to represent a client and maintain the attorney-client relationship extends after the trial until continued representation has been rendered unnecessary because the accused has waived his or her appellate rights[168] or because appellate defense counsel has been substituted and begun representation of the accused.[169]

d. Discharge by the client. The comment to Army Rule 1.16 provides:

> A client has a right to discharge a lawyer with or without cause. Where future disputes about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.
> Whether a client can release appointed counsel may depend on applicable law. A client seeking to release appointed counsel should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself or herself.
> If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event, the discharge may be seriously adverse to the client's interests.[170]

38–7. The duty to preserve the confidentiality of information.

a. General. A fundamental principle of the lawyer- client relationship is that the lawyer maintain confidentiality of information relating to representation of the client.[171] Without this duty, the relationship could not survive in its present form, and the adversary system as we now know it could not function.[172] There are two overlapping aspects of the duty of confidentiality. First, the disclosure of some communications is protected by an evidentiary attorney-client privilege.[173] Second, there is a broader ethical duty to preserve and protect information relating to representation of the client.[174] All communications covered by the evidentiary privilege are also covered by the ethical duty to preserve confidentiality.[175] Matters covered only by the ethical duty to preserve confidentiality but not covered by the evidentiary privilege must still be protected from unauthorized disclosure. The main distinction between the two categories is that the court may order disclosure of matters not covered by the evidentiary attorney-client privilege.[176]

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[159] Army Rule 1.16(b).
[160] Army Rule 1.16(c).
[161] Army Rule 1.16(d).
[162] United States v. Eason, 45 C.M.R. 109, 113 (C.M.A. 1972). *See also* United States v. Saenz, 18 M.J. 327 (C.M.A. 1984) (If an attorney-client relationship had been formed, good cause was shown to sever it where the attorney had a conflict of interest which the Government did not waive).
[163] United States v. Iverson, 5 M.J. 440, 442 (C.M.A. 1978).
[164] United States v. Eason, 45 C.M.R. 109, 114 (C.M.A. 1972) (no good cause existed where counsel was denied based on his busy workload).
[165] *Id.* (the fact that the Government would incur additional witness expenses by providing the accused with requested counsel did not amount to "good cause").
[166] United States v. Murray, 42 C.M.R. 253 (C.M.A. 1970); United States v. Tellier, 32 C.M.R. 323 (C.M.A. 1962). A reassignment of counsel to a military judge position is "good cause" to sever the attorney-client relationship because of the strong policy requiring neutrality of military judges. United States v. Rachels, 6 M.J. 232 (C.M.A. 1979); United States v. Wallace, 14 M.J. 1019 (A.C.M.R. 1982); United States v. Thomas, 45 C.M.R. 908 (N.M.C.M.R. 1972).
[167] AR 27–10, app. C, para. C–1b(2).
[168] UCMJ art. 61(a).
[169] United States v. Palenius, 2 M.J. 86 (C.M.A. 1977).
[170] Army Rule 1.16, comment.
[171] Army Rule 1.6, comment.
[172] The underlying purpose of the confidentiality obligation is to encourage clients to freely and fully discuss their legal problems with an attorney.
[173] Mil. R. Evid. 502.
[174] Army Rule 1.6.
[175] Army Rule 1.6, comment; *see also* Annotated Model Rule 1.6, 65–66.
[176] Mil. R. Evid. 502. For an overview of the ethical and evidentiary rules, *see* Holland, Confidentiality: The Evidentiary Rule Versus the Ethical Rule, The Army Lawyer, May 1990, at 17.

b. The evidentiary attorney-client privilege (Military Rule of Evidence 502).

(1) General rule. "A client has a privilege to refuse to disclose or to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[177] "Client" is broadly defined to include organizations and entities which receive legal services from a lawyer.[178] In this context communications made by officials of the organization to the lawyer would be within the privilege.[179]

The privilege applies to communications made to a lawyer detailed to represent the accused[180] and to representatives of a lawyer assigned to the lawyer to assist in providing legal services.[181] Communications made to a judge advocate who is not technically authorized to enter into an attorney-client relationship are nevertheless privileged if the client reasonably believed that the judge advocate was authorized to act as his or her attorney.[182]

The attorney-client privilege belongs to the client to assert or to waive,[183] but the attorney is presumed to have authority to assert the privilege on behalf of the client.[184]

(2) Exceptions. There are five main exceptions to the attorney-client privilege.

(a) Communications not made for the purpose of receiving legal advice. Not all discussions with an attorney automatically become privileged communications. The threshold requirement is that the communication must be made for the purpose of receiving legal advice.[185]

(b) Communications intended to be disclosed to third persons. A communication is only confidential under the attorney-client privilege if it is treated as confidential by the client. Accordingly, the communication must have been intended only for the lawyer or others involved in the rendition of professional legal services.[186]

(c) Future crimes or fraud. Communications that clearly contemplate the future commission of a fraud or crime are not protected by the attorney-client privilege.[187] Likewise, when a lawyer discovers after the fact that the client used the lawyer's services to commit what the client knew or should have known was a fraud or crime, communications which were made for that purpose are not privileged.[188]

(d) Claims by the client that the attorney breached his or her duty. If the client alleges that the attorney breached his or her professional duties by ineffectively handling the case (or otherwise), the attorney-client privilege is impliedly waived by the client,[189] but only to the extent necessary for the attorney to defend against the specific allegations made by the client.[190]

(e) Client identity. The identity of a client and information relating to the identity of the client, such as address, telephone number, or location are generally not protected by the lawyer-client privilege.[191] Logically, an attorney who is refusing to disclose information because he or she is asserting the attorney-client privilege on behalf of a client[192] should be required to disclose the name of the client on whose behalf the privilege is being asserted. Technically, a client's identity is usually not a communication being made for the purpose of receiving legal services and thus would not fit within the definition of a "confidential communication."[193] Innovative law enforcement authorities seeking to use attorneys as an investigative tool have caused the courts to examine this general rule more closely.

The Federal appellate courts have fashioned a number of different standards for determining when a client's identity

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[177] Mil. R. Evid. 502(a).

[178] Mil. R. Evid. 502(b)(1).

[179] For a discussion of the obligations and responsibilities of a judge advocate in an organizational context see *supra* para. 30–3. *See also* Graham, *Evidence and Trial Advocacy Workshop—The Lawyer-Client Privilege*, Crim. L. Bull. 513 (1984).

[180] Mil. R. Evid. 502(a).

[181] *Id.*"Representatives" of a lawyer include clerical support personnel and personnel serving in a paralegal capacity. MCM, 1984, Mil. R. Evid. 502(b)(3) (1980 analysis).

[182] Mil. R. Evid. 502(b)(2); United States v. Henson, 20 M.J. 620 (A.C.M.R. 1985) (if the client's belief is"reasonable," it is controlling and the attorney-client privilege applies notwithstanding the lawyer's personal beliefs about the nature of the relationship).

[183] Mil. R. Evid. 502(c).

[184] *Id.*

[185] Mil. R. Evid. 502(a). *See also* United States v. Durnen, 13 M.J. 690 (N.M.C.M.R. 1982) (communications made to an enlisted clerk who provided an information booklet and answered questions on how to fill out a form were not covered by the atttorney-client privilege because they were not made for the purpose of receiving legal advice from a *lawyer*).

[186] Mil. R. Evid. 502(b)(4).

[187] Mil. R. Evid. 502(d)(1).

[188] *Id.*

[189] Mil. R. Evid. 502(d)(3).

[190] Army Rule 1.6(c); AR 27–10, app. C., para. C–2e.*See also* United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957); United States v. Ridley, 12 M.J. 675 (A.C.M.R. 1981) (where the accused sent letters to his congressman and to the convening authority attacking the defense counsel's competence, the defense counsel was entitled to defend his reputation by revealing communications which otherwise would have been privileged; the defense counsel was not limited to disclosing only information specifically addressing the client's allegations but was entitled to disclose any matters directly relevant to dispelling doubts about his reputation and integrity).

[191] Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Gannet v. First National State Bank of New Jersey, 546 F.2d 1072 (3d Cir. 1976). *See generally* Note, *The Attorney-Client Privilege as a Protection of Client Identity: Can Defense Attorneys Be the Prosecution's Best Witnesses*?, 21 Am. Crim. L. Rev. 81 (1983); Comment, *Evidence-Attorney Client Privilege-The Identity of the Client*, 59 Ky. L.J. 229 (1970); Annotated Model Rule 1.6, 66.

[192] Mil. R. Evid. 502(c).

[193] Mil. R. Evid. 502(d)(1).

is protected by the attorney-client privilege. No military appellate court has decided the issue. The earliest exception was defined in Baird v. Koerner.[194] Under Baird if "so much of the actual communication has already been established, that to disclose the client's name would disclose the essence of a confidential communication" then the client's identity is privileged.[195]

The Baird test was refined in United States v. Hodge& Zwieg[196] to preclude a disclosure whenever there was a "strong probability" that the information sought would implicate the client in the very criminal activity for which legal advice was sought.[197]

The Fifth Circuit articulated a "last link" exception in In re Grand Jury Proceedings (Pavlick).[198] Pavlick stands for the proposition that a client's identity need not be disclosed if it supplies "the last link in an existing chain of incriminating evidence likely to lead to the client's indictment."[199]

An alternative formulation was announced by the same circuit in an earlier decision, In re Grand Jury Proceedings (Jones).[200] In Jones, the court held that client identity is protected "when so much of the substance of the communication is already in the Government possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions."[201]

Military counsel faced with the issue have little guidance on whether client identity must be disclosed. The safest course of action would be to treat client identity as privileged until a contrary ruling is rendered by the trial judge or until the military otherwise adopts a formal position on the issue.[202]

c. The ethical duty to protect confidential information.

(1) General rule. A lawyer has an ethical duty not to disclose "information relating to representation of a client."[203] This confidentiality rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.[204] A lawyer may not disclose such information except as authorized or required by the Army Rules or other lawful order, regulation, or statute.[205] This ethical rule is broader than the evidentiary lawyer-client privilege of Military Rule of Evidence 502,[206] which means that certain information known to the lawyer is outside the strict lawyer-client privilege and is protected only by the ethical rule of confidentiality. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, the lawyer should invoke both the evidentiary attorney-client privilege and the ethical rule of confidentiality; however, the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.[207]

(2) Exceptions. There are four main exceptions to the lawyer's ethical obligation to preserve information relating to representation of the client.

(a) Client consent. Like the evidentiary lawyer-client privilege, the ethical rule of confidentiality is subject to exception if the client consents. Client consent may be express or implied.[208] Consent is implied when it is necessary to effect the purposes of the representation, except to the extent the client's instructions or special circumstances limit that authority.[209] Thus, without a client's express consent, a lawyer may disclose to supervisory lawyers and to paralegals, information relating to the client, or during negotiation with opposing counsel, the lawyer may disclose information about the client that facilitates a satisfactory conclusion.[210]

(b) Future crimes. If a lawyer learns that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm, or significant impairment of national security or of the readiness or capability of a military unit, vessel, aircraft, or weapon system, the lawyer has a professional obligation to reveal information to the extent that the lawyer reasonably believes necessary to prevent such consequences.[211] Any such

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[194] 279 F.2d 623 (9th Cir. 1960).

[195] *Id.* at 631–32. *See also* Phaksvan v. United States (*In re* Grand Jury Subpoena for Osterhoudt), 722 F.2d 591 (9th Cir. 1983) (*Baird* applied to disclosure of fee arrangements); United States v. Jeffers, 532 F.2d 1101 (7th Cir. 1976); Grand Jury Empaneled February 14, 1978 (Markowitz), 603 F.2d 469 (3d Cir. 1979).

[196] 548 F.2d 1347 (9th Cir. 1977).

[197] *Id.* at 1353. *See also In re* Grand Jury Proceedings (Lawson), 600 F.2d 215 (9th Cir. 1979); *In re* Grand Jury Proceedings (Fine), 641 F.2d 199 (5th Cir. 1981).

[198] 680 F.2d 1026 (5th Cir. 1982).

[199] *Id.* at 1027.*But see In re* Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983) (rejecting the "last link" exception, the court required disclosure of the client's identity even though the FBI made clear their intent to arrest the client once the identity was revealed).

[200] 517 F.2d 666 (5th Cir. 1975).

[201] *Id.* at 674.

[202] If client identity is not privileged, the attorney loses nothing by waiting for court-ordered disclosure. Once a court orders disclosure, the attorney may safely disclose without breaching any ethical obligations.

[203] Army Rule 1.6(a).

[204] Army Rule 1.6, comment.

[205] *Id.*

[206] Army Rule 1.6, comment; Annotated Model Rule 1.6, 65–66.

[207] *Id.*

[208] Army Rule 1.6(a). Express consent can be given only "after consultation." The extent of the consultation is not stated, but presumably, the client would be advised of the possible consequences of the disclosure.

[209] Army Rule 1.6(a), comment.

[210] *Id.*

disclosure should be no greater than the lawyer reasonably believes necessary to the purpose.[212]

(c) To establish a claim or defense on behalf of the lawyer. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.[213] Any such disclosure should be no greater than the lawyer reasonably believes is necessary and should be made in a manner which limits access to the information to the tribunal or other persons having a need to know.[214]

(d) Required by law or court order. Notwithstanding the rule of confidentiality and the lawyer-client privilege, a lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.[215] Moreover, under certain circumstances the Army Rules permit or require a lawyer to disclose information relating to the representation.[216]

38–8. Defense counsel handling of evidence or

contraband from the client One of the most troublesome ethical problems for a lawyer arises when a client seeks to give the lawyer illegal contraband or physical evidence associated with a crime.[217] Army Rule 3.4(a) prohibits a lawyer from unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value.[218] The comment to Army Rule 3.4 makes it clear that a lawyer who receives[219] an item of physical evidence implicating the client in criminal conduct shall disclose the location of or deliver it to proper authorities "when required by law or court order."[220] The term "when required by law or court order" is sometimes clear, but at other times it is not so clear. For example, it is clear that if a lawyer receives contraband, the lawyer has no legal right to possess it and must surrender it to lawful authorities.[221] Likewise, if the lawyer receives stolen property, the lawyer must surrender it to the owner or to lawful authority to avoid violating the law.[222] Similarly, a lawyer cannot secrete a weapon used by a client to injure or kill the victim. To do so would violate the express provision of Army Rule 3.4(a) prohibiting the concealment of material having potential evidentiary value.[223] When there are pending charges (or a pending civil or administrative matter), it is clear that items which are evidence are not protected by the attorney-client privilege merely because they came into possession of the attorney, even by way of the client. A letter from the client to a spouse detailing a bank robbery with which the client is charged may be protected by the husband-wife privilege,[224] but an identical letter from the client to a best friend is not encompassed by any privilege recognized in military law. Failure to disclose the letter to the friend violates Army Rule 3.4(a) and may well constitute obstruction of justice.[225] In the absence of pending charges, civil or administrative proceedings, it is not clear whether or not a particular item which might under other circumstances have evidentiary value is required to be disclosed, or to whom. Unfortunately, the Army Rules do not give a clear answer to this dilemma; and accordingly, the comment to Army Rule 3.4 suggests that lawyers facing this dilemma discuss the matter with a supervisory lawyer.[226]

When a lawyer determines that disclosure of the evidence is ethically required, the lawyer then faces the question of how to best carry out this obligation. Disclosure of the location of or delivery of an item of physical evidence to proper authorities must be done in a way best designed to protect the client's interest.[227] "The lawyer should consider methods of return or disclosure which best protect: (a) the client's identity; (b) the client's words concerning the item; (c) other

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[211] Army Rule 1.6(b). "Examples of conduct likely to result in the significant impairment of the readiness or capability of a military unit, vessel, aircraft, or weapon system include: divulging the classified location of a special operations unit such that the lives of members of the unit are placed in immediate danger; sabotaging a vessel or aircraft to the extent that the vessel or aircraft and crew will be lost; compromising the security of a weapons site such that the weapons are likely to be stolen or detonated."Paragraph (b) is not intended to and does not mandate the disclosure of conduct which may have a slight impact on the readiness or capability of a unit, vessel, aircraft, or weapon system. Examples of such conduct are: absence without authority from a peacetime training exercise; intentional damage to an individually assigned weapon; and intentional minor damage to military property. Army Rule 1.6, comment.

[212] Army Rule 1.6, comment.

[213] Army Rule 1.6(c).

[214] Army Rule 1.6, comment. Appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[215] *Id.*

[216] *Id. See, e.g.*, Army Rule 3.3, which requires the disclosure of client perjury. *See also* Army Rules 2.2, 2.3, and 4.1.

[217] *See, e.g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966); Note, *Legal Ethics and the Destruction Evidence*, 88 Yale L.J. 1665 (1979).

[218] A lawyer is also prohibited from assisting another person in doing such acts. Army Rule 3.4(a).

[219] "Receives" means in the lawyer's possession. Army Rule 3.4, comment.

[220] Army Rule 3.4, comment. *See, e.g.*, United States v. Rhea, 33 M.J. 413 (C.M.A. 1991).

[221] *Id.*

[222] *Id.* To retain the stolen property would be a violation of article 134, UCMJ, knowingly receiving stolen property.

[223] The concealment would be unlawful because it would be in violation of article 134, UCMJ, obstructing justice.

[224] Mil. R. Evid. 504(b).

[225] Art. 134, UCMJ.

[226] *But see* United States v. Rhea, 29 M.J. 991 (A.F.C.M.R. 1990) (defense counsel have the affirmative obligation to surrender to the prosecution evidence in their possession which implicates their client).

[227] Army Rule 3.4, comment.

confidential information; and (d) the client's privilege against self- incrimination."[228] The lawyer should also consider methods which will best protect the lawyer's own personal legal interests and which minimize the risk of a "misunderstanding" or of altering the evidentiary quality of the item.[229] The most difficult dilemma arises when the authorities choose to pursue the matter by questioning the attorney about the source of the item and the circumstances under which the attorney came into possession of it. Since there are no military cases, or other military guidance, defining the limits of client confidentiality in this situation the attorney should probably assert the attorney-client privilege until the issue is resolved by some competent authority. This resolution actually must address two issues. First, whether the client's identity is protected by the attorney-client privilege,[230] and second, whether the client's transfer of the item was a communication made for the purpose of receiving legal advice.[231]

In some instances, a client will inform the lawyer about incriminating physical evidence in the client's possession, but the client will retain possession of the evidence. When this occurs, the lawyer should inform the client of the lawyer's legal and ethical obligations regarding the evidence.[232] It is further suggested that the lawyer refrain from either taking possession of the evidence or advising the client what course of action to take regarding it.[233]

38–9. The duty to competently and diligently represent the client

a. General. The primary duty of the defense counsel is "to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law."[234] Counsel may not refrain from exerting every reasonable legitimate effort on behalf of the client regardless of his or her personal feelings[235] or potentially adverse personal consequences.[236]

The general duties of defense counsel are outlined in the discussion to R.C.M. 502 as follows:

> Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize.[237]

b. Competent trial defense counsel.

(1) Ethical requirement. A defense counsel is ethically required to ensure that he or she provides competent representation.[238] Competent representation requires the legal knowledge, skill, thoroughness, preparation, and diligence[239] reasonably necessary for the representation.

(2) Constitutional requirement. The accused's constitutional right to be represented by counsel necessarily means that the accused has a right to"effective assistance."[240] "Effective assistance" means that the accused is entitled to reasonably competent counsel who exercises that competence throughout the trial.[241] An accused's conviction will not be reversed due to an allegation of ineffective assistance unless the accused can demonstrate that there was a specific deficiency in the trial defense counsel's performance and the accused can also show that the deficiency actually resulted in prejudice at trial.[242]

The accused bears the burden of demonstrating on appeal that the trial defense counsel was ineffective.[243] Complaints must be supported by factual allegations (preferably in affidavit form) rather than mere conclusory allegations of incompetence.[244]

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[228] *Id.* at 28.
[229] The best procedure is probably to immediately call the local law enforcement officials and ask them to come to your location to pick up the item. Transporting the contraband or evidence from the place where it was received to the law enforcement officials carries the risk that the lawyer may be "intercepted" (e.g., in a gate search) or that the evidentiary quality of the item may be changed.
[230] *See supra* para. 30–7(b)(2)(e).
[231] *See, e.g.*, Hughes v. Meade, 453 S.W.2d 538 (Ky. Ct. App. 1970) (attorney's role in arranging for the delivery of a stolen typewriter to authorities did not involve the rendition of legal services).
[232] Army Rule 3.4, comment.
[233] *Id.*
[234] Standards for Criminal Justice 4–1.1(b) (1986).
[235] Standards for Criminal Justice 4–1.6 (1986).
[236] *Id.*
[237] R.C.M. 502(d)(6) discussion.
[238] Army Rule 1.1.
[239] *Id.*
[240] Powell v. Alabama, 287 U.S. 45 (1932); United States v. Rivas, 3 M.J. 282 (C.M.A. 1977).
[241] United States v. Jefferson, 13 M.J. 1 (C.M.A. 1982). *Accord* United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979).
[242] Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984).
[243] United States v. Zuis, 49 C.M.R. 150 (A.C.M.R. 1974).
[244] United States v. Aubin, 13 M.J. 623 (A.F.C.M.R. 1982); United States v. Ridley, 12 M.J. 675 (A.C.M.R. 1981).

Once an allegation of ineffective assistance is raised on appeal, the trial defense counsel must cooperate with the appellate defense counsel by providing the accused with unprivileged material contained in the case file[245] and by answering questions about the representation posed by the appellate defense counsel.[246] Alleging ineffective assistance constitutes a waiver of the attorney-client privilege,[247] but only to the extent necessary for the trial defense counsel to defend against the allegations.[248]

Although allegations of ineffective assistance of counsel are easily made by disgruntled convicts,[249] the appellate courts rarely find that such allegations are founded.[250] The trial defense counsel is granted considerable freedom to make strategic and tactical decisions regarding the presentation of a case and appellate courts will second guess trial defense counsel only where there is no realistic strategic or tactical basis for the counsel's action.[251]

c. Competent appellate defense counsel. Appellate defense counsel must act with the competence reasonably expected of an attorney rendering appellate legal services[252] and are judged by the same general competence standards applicable to trial defense counsel.[253] The appellate defense attorney-client relationship begins when the Chief, Defense Appellate Division, designates an attorney assigned to the Division to represent an accused.[254] The representation continues until the accused terminates it,[255] the appellate defense counsel is assigned other duties,[256] or the appellate process is completed.[257] Appellate defense counsel are obligated to contact their clients and to discuss the appellate case with the accused.[258] Although the counsel ultimately determines appellate strategy,[259] the appellate defense counsel must bring to the attention of the Court of Military Review any error that the accused desires to have raised on his or her behalf.[260]

d. Conflicts of interests.

(1) General. One aspect of providing competent representation is embodied in the constitutional[261] and ethical requirement[262] that an attorney's representation of an accused must be conflict-free. There are many specific ways that a conflict of interest may arise. In the representation of the criminally accused, conflicts generally arise in three contexts: (1) multiple representation of co- accused; (2) trading off the interests of one client to gain an advantage for another client; and (3) using confidential communications of one client to gain an advantage for another client.

As a general rule, a conflict of interest can be waived if all affected clients agree. A waiver may only be given after consultation between the lawyers and each client.[263] Some conflicts are so likely to compromise a client's interests that they cannot be waived.[264]

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[245] United States v. Dupas, 14 M.J. 28 (C.M.A. 1982). In *Dupas* Chief Justice Everett, writing for himself and Justice Fletcher, saw only two limitations on appellate defense counsel's access to trial defense counsel's file, neither of which applied in *Dupas*: any costs of reproduction or of access need not be borne by trial defense counsel, and information acquired with the promise to a third party of confidentiality. *Id.* at 31.

[246] *Id.*

[247] Army Rule 1.6(c).

[248] *See supra* para. 30–7C(2)(c).

[249] *See, e.g.*, United States v. Kelley, 19 M.J. 946 (A.C.M.R. 1985) (defense counsel failed to interview a potential defense witness); United States v. Garcia, 18 M.J. 716 (A.F.C.M.R. 1984) (failure of defense counsel to object to portions of the trial counsel's direct and cross-examination); United States v. Jones, 18 M.J. 713 (A.C.M.R. 1984) (defense counsel inactive during trial except for delivery of a sentencing argument); United States v. Robertson, 17 M.J. 846 (N.M.C.M.R. 1984) (during sentencing argument defense counsel conceded appropriateness of dismissal of accused from the service); United States v. Bowie, 17 M.J. 821 (A.C.M.R. 1984) (defense counsel inadequately investigated the case and failed to call certain witnesses at trial); United States v. Pegg, 16 M.J. 796 (C.G.C.M.R. 1983) (failure of defense counsel to make a motion to suppress Government evidence); United States v. Jefferson, 17 M.J. 728 (N.M.C.M.R. 1983) (failure of defense counsel to research legal issue important to the case); United States v. Mann, 16 M.J. 571 (A.C.M.R. 1983) (failure to interview potential defense witnesses).

[250] *See supra* note 246. None of the allegations cited in those cases was held to constitute ineffective assistance of counsel. *But see* United States v. McNally, 16 M.J. 32 (C.M.A. 1983) (ineffective assistance where defense counsel argued that the accused should receive a punitive discharge); United States v. Titsworth, 13 M.J. 147 (C.M.A. 1982) (ineffective assistance where defense counsel failed to submit a clemency petition after the trial judge indicated he would join in one); United States v. Radford, 14 M.J. 322 (C.M.A. 1982) (ineffective assistance where defense counsel disclosed the client's intent to commit perjury to the fact finder); United States v. Rivas, 3 M.J. 282 (C.M.A. 1977) (ineffective assistance where defense counsel failed to make a motion to strike the Government witness' direct examination after the witness invoked the right against self-incrimination on cross-examination); United States v. Jackson, 18 M.J. 753 (A.C.M.R. 1984) (ineffective assistance where defense counsel failed to raise statute of limitations as a defense); United States v. Black, 16 M.J. 507 (A.F.C.M.R. 1983) (ineffective assistance where defense counsel failed to adequately respond to the post-trial review); United States v. Kleopfer, 49 C.M.R. 68 (A.C.M.R. 1974) (ineffective assistance where defense counsel advised his client to submit to a CID polygraph exam).

[251] United States v. Rivas, 3 M.J. 282 (C.M.A. 1977); United States v. Watson, 15 M.J. 784 (A.C.M.R. 1983). United States v. Polk, 32 M.J. 150 (C.M.A. 1990).

[252] United States v. Hullum, 15 M.J. 261 (C.M.A. 1983).

[253] *Id.*

[254] AR 27–10, app. C, para. C–3a(1).

[255] AR 27–10, app. C, para. C–3a(1)(a).

[256] AR 27–10, app. C, para. C–3a(1)(b).

[257] AR 27–10, app. C, para. C–3a(1)(c).

[258] AR 27–10, app. C, para. C–3a(3).

[259] United States v. Arroyo, 17 M.J. 224 (C.M.A. 1984); United States v. Hullum, 15 M.J. 261 (C.M.A. 1983).

[260] United States v. Knight, 15 M.J. 202 (C.M.A. 1983); United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[261] Holloway v. Arkansas, 435 U.S. 475 (1978).

[262] Army Rules 1.7, 1.8, and 1.9.

[263] *Id.*

[264] Army Rule 1.7, comment.

(2) Multiple representation. Although multiple representation of co-accused in a criminal case is not per se unconstitutional,[265] the practice is fraught with problems and is strongly discouraged in both civilian[266] and military practice.[267] Army judge advocates are precluded from knowingly establishing an attorney-client relationship with two or more co-accused without gaining the approval of appropriate higher authority.[268] Counsel representing co-accused is required to bring the matter to the attention of the trial judge[269] who then has the burden of determining whether the counsel can provide adequate representation to each co-accused.[270] Absent such an inquiry by the military judge, there is a rebuttable presumption that multiple representation involves an actual conflict of interest.[271]

(3) Trading the interests of one client to gain advantage for another client. Any attorney who represents a number of clients in one jurisdiction is inevitably faced with the situation where two clients seemingly cannot both be "fully represented" even if they are charged in unrelated criminal matters. The defense counsel's obligation to represent his or her clients zealously extends to each client as an individual.[272] Thus, an attorney may not forego advancing a claim or position on behalf of one client merely because such an act might adversely affect the interests of another client.

Unfortunately, this general rule is not always easy to apply in practice. While a defense counsel clearly cannot offer a plea bargain trading a harsh sentence in one case for a lenient sentence in another case, most potential "trade-offs" arise much more subtly.[273] Applicable ethical standards do not provide counsel with any guidance for dealing with these more subtle conflicts.[274]

(4) Using the confidential information from one client to gain advantage for another client. A lawyer should be alert to avoid situations in which his or her duties to one client conflict with his or her duties to other clients, past or present. Typically this problem arises where a past or present client may be a witness against another present client. Clearly the attorney cannot use confidential information to impeach the client-witness;[275] and the attorney cannot restrict the representation of the present client.[276] Although this situation does not necessarily require the attorney to withdraw from representation,[277] it can create appearance problems as well as obvious ethical conflicts.[278]

The same problem arises when a trial counsel is called upon to prosecute a soldier who he or she previously represented in a legal assistance or defense counsel capacity. Again, the trial counsel cannot use confidential matters gained in the previous relationship to the disadvantage of the accused.[279] The trial counsel is not per se disqualified from prosecuting a former client, but the potential for ethical conflicts and the appearance of unfairness dictate that this practice should be avoided whenever possible.

38–10. Defense counsel control of the case

a. Defense counsel's relationship with the client. The attorney-client relationship is founded on agency principles;[280] the client agrees to have the attorney act on his or her behalf and the attorney agrees to represent the client's interests. The professional responsibility standards and case law serve to order the division of responsibilities between the attorney and the client by dividing up control over the litigation of a case.

(1) The attorney's responsibilities. The attorney is charged with diligently representing the interests of the client at all times.[281] At the outset of the attorney-client relationship it is imperative that the attorney endeavor to create rapport with the client and that the client understand the nature of the relationship. In creating this atmosphere of trust the attorney should always be honest and straightforward with the client.[282]

The attorney should explain the necessity for full disclosure of all facts by the client,[283] and the duty of confiden-

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[265] United States v. Breese, 11 M.J. 17 (C.M.A. 1981).
[266] Standards for Criminal Justice 4–3.5 (1986); *see generally* Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L.J. 1075 (1979).
[267] AR 27–10, app. C, para. C–2a; United States v. Evans, 1 M.J. 206 (C.M.A. 1975); United States v. Faylor, 26 C.M.R. 327 (C.M.A. 1958).
[268] AR 27–10, app. C, para. C–2a(3).
[269] Army Rule 1.7, comment; United States v. Russaw, 15 M.J. 801 (A.C.M.R. 1983).
[270] Cuyler v. Sullivan, 446 U.S. 335 (1980); United States v. Breese, 11 M.J. 17 (C.M.A. 1981); United States v. Davis, 3 M.J. 430 (C.M.A. 1977); United States v. Brewer, 15 M.J. 597 (A.C.M.R. 1983); United States v. Augusztin, 30 M.J. 707 (N.M.C.M.R. 1990).
[271] United States v. Breese, 11 M.J. 17 (C.M.A. 1981).
[272] Army Rule 1.3; United States v. Newak, 24 M.J. 238 (C.M.A. 1987).
[273] For example a particular trial tactic may work only one time because the element of surprise is critical to its success. How should a defense counsel choose which case to use the tactic?
[274] While the absence of any standard directly addressing the issue means there is little guidance available for counsel, it also means that counsel has wide latitude to deal with the situation.
[275] Army Rules 1.7(b), 1.8(b), and 1.9(b); United States v. Thornton, 23 C.M.R. 281 (C.M.A. 1957); United States v. Lovett, 23 C.M.R. 168 (C.M.A. 1957).
[276] Army Rule 1.3.
[277] *See* Army Rule 1.16(a) (mandatory withdrawal provisions).
[278] *See, e.g.*, United States v. Thornton, 8 C.M.A. 57, 23 C.M.R. 281 (1957); United States v. Newak, 24 M.J. 238 (C.M.A. 1987).
[279] Army Rule 1.9.
[280] *See* Annotated Model Rule 1.2, 23.
[281] Army Rule 1.3.
[282] Standards for Criminal Justice 4–5.1(a) (1986).
[283] Standards for Criminal Justice 4–3.2 commentary (1986) ("The lawyer who is ignorant of the facts of the case cannot serve the client effectively.").

tiality which protects the client's communications against further disclosure unless permitted by the client.[284]

The client should also be advised of his or her fundamental right, such as the rights to counsel;[285] the right to trial by court with members[286] (including the right, where applicable, to enlisted soldiers on the court)[287] or to request trial by military judge alone;[288] the right to plead not guilty,[289] and the meaning and effect of plea of guilty;[290] the right to present evidence both on the merits[291] and, in the event of conviction, during the sentencing proceedings;[292] the right to testify[293] or not[294] during the proceedings; and the right to present any proper defense[295] or objection.[296] The initial interview with the accused should be conducted as soon as reasonably possible.[297]

The next obligation of the defense counsel is to conduct a thorough investigation of the charges.[298] This duty to investigate exists even though the accused has expressed a desire to plead guilty to all charged offenses.[299] After a thorough investigation, the defense counsel should advice the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.[300] Defense counsel should recognize that many accused are impressionable and can be manipulated and thus the attorney may not intentionally understate or overstate the prospects of the case or exert other undue influence on the accused's decision as to plea.[301] The defense counsel should seek out alternative, nonjudicial dispositions of a case where appropriate,[302] and should keep the client advised regarding developments in, and the progress of, the case.[303]

When a case goes to trial, the lawyer is charged with the responsibility for exercising his or her independent professional judgment in the handling of the case.[304] While the lawyer must abide by the client's decisions regarding the objectives of representation, the lawyer decides the means to be used in pursuing those objectives.[305] Hence, matters of trial strategy and tactics are the exclusive province of the lawyer after consultation with the accused.[306] The lawyer should determine what motions to make,[307] which court members to select,[308] which witnesses to call,[309] how cross-examination will be conducted,[310] and what evidentiary objections should be made.[311] If the accused disagrees with defense counsel's tactical or strategic decisions, the defense counsel should document the disagreement[312] and advise the client of options regarding the employment of another attorney.[313]

(2) The client's decisions. The client has the final decision regarding the plea,[314] the forum,[315] whether to testify,[316]

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[284] *See generally* Army Rule 1.6; Mil. R. Evid. 502.
[285] R.C.M. 502(d); AR 27–10, paras. 5–7 through 5–9.
[286] R.C.M. 903.
[287] R.C.M. 903(a)(1).
[288] R.C.M. 903(a)(2).
[289] R.C.M. 910(a)(1).
[290] *See generally* R.C.M. 910.
[291] R.C.M. 913(c).
[292] R.C.M. 1001(c).
[293] R.C.M. 913(c).
[294] UCMJ art. 31.
[295] *See generally* R.C.M. 916.
[296] *See generally* Mil. R. Evid. 103.
[297] Standards for Criminal Justice 4–3.6 (1986).
[298] Standards for Criminal Justice 4–5.1(a) (1986); United States v. Polk, 32 M.J. 150 (C.M.A. 1991).
[299] Standards for Criminal Justice 4–6.1(b) (1986) ("Under no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.").
[300] Standards for Criminal Justice 4–5.1(a) (1986).
[301] Standards for Criminal Justice 4–5.1(b) (1986).
[302] Standards for Criminal Justice 4–6.1 (1986).
[303] Standards for Criminal Justice 4–3.8 (1986) ("The lawyer has a duty to keep the client informed of the developments in the case and the progress of preparing the defense.").
[304] AR 27–10, para. 6–11b(2).
[305] Army Rule 1.2, comment.
[306] Standards for Criminal Justice 4–5.2(b) (1986).
[307] *Id. See, e.g.*, United States v. Gholston, 15 M.J. 582 (A.C.M.R. 1983); United States *ex rel.* Cruz v. LaVallee, 448 F.2d 671, 679 (2d Cir. 1971) ("A lawyer must be able to determine questions of strategy during trial; and unless there are exceptional circumstances or unless the lawyer is so incompetent as to deprive the defendant of the right to effective assistance of counsel, his decision regarding trial strategy must be binding.").
[308] *Id.*
[309] *Id. See, e.g.*, United States v. Watson, 15 M.J. 784 (A.C.M.R. 1983) (defense counsel's decision not to call certain "defense witnesses" did not deprive the accused of effective assistance of counsel).
[310] *Id. See, e.g.*, United States v. Jones, 14 M.J. 700 (N.M.C.M.R. 1982) (defense counsel's decision to conduct less than vigorous cross-examination did not deprive the accused of effective assistance of counsel).
[311] *Id. See, e.g.*, United States v. Dicupe, 14 M.J. 915 (A.F.C.M.R. 1982) (defense counsel's failure to make certain evidentiary objections did not deprive the accused of effective assistance of counsel).
[312] Standards for Criminal Justice 4–5.2(c) (1986).
[313] *See generally* Army Rule 1.16 ("Declining or Terminating Employment").
[314] Army Rule 1.2(a); Standards for Criminal Justice 4–5.2(a) (1986). *See also* Boykin v. Alabama, 395 U.S. 238 (1969) (plea of guilty must be intelligently and voluntarily made by the accused); Brookhard v. Janis, 384 U.S. 1 (1966) (accused has right to plead not guilty); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (military judge must conduct a providence inquiry to ensure the accused is knowingly and voluntarily waiving the right to plead not guilty).
[315] *Id. See also* Adams v. United States, 317 U.S. 269 (1942) (Accused's waiver of a jury trial must be his/her own decision and not the decision of counsel).
[316] *Id. See also* United States v. Brickey, 8 M.J. 757, 761 (A.C.M.R. 1980) ("The decision whether to testify in his or her own behalf is one to be made by an accused and the burden is unmistakably on counsel to provide full and careful advice in the matter.").

and whether to enter into a pretrial agreement.[317] The attorney is required to assist the client in making these decisions by offering professional advice,[318] but the ultimate decision must be made by the client.[319]

b. Representation by multiple counsel. Whenever two or more counsel are assigned or employed to represent one client, the client should determine the relationship between counsel by designating one counsel as "chief counsel" or designating all counsel as "co- counsel."[320] If counsel disagree about trial strategy and tactics, the views of the chief counsel prevail.[321] In the absence of a chief counsel, the client should resolve conflicts between co-counsel.[322]

If one counsel determines that the other counsel is violating (or about to violate) applicable ethical standards, the matter should first be discussed between counsel.[323] If the matter cannot be resolved, the accused should be consulted.[324] If the accused approves of the unethical conduct, the attorney should ask to be relieved of responsibilities as counsel.[325]

38–11. Advocacy ethics

a. General. As members of the legal profession, both the trial counsel and the defense counsel serve as"officers of the court."[326] As officers of the court both generally have the same ethical obligations regarding their behavior in the courtroom, their relationship with witnesses, their relationship with the military judge and court members, their relationship with opposing counsel, and their duty of candor toward the tribunal.

b. Maintaining proper decorum in the courtroom. As officers of the court, both trial[327] and defense counsel[328] must respect the dignity and decorum of the court. The Judge Advocate General or specified designees may make rules of court to supplement the Manual for Courts-Martial.[329]

(1) Interviewing witnesses. Despite the common practice of referring to witnesses as either a"prosecution witness" or a "defense witness," no such distinction is recognized legally or ethically. As a legal matter, counsel for either side may properly interview any witness or prospective witness (except the accused) without the consent of the opposing counsel.[330] Counsel for both sides must have equal access to the evidence and witnesses in the case.[331] Counsel may not ethically advise prospective witnesses to refuse to give information to the opposing counsel.[332]

If counsel know that a witness they seek to interview is represented by a lawyer, they must seek the consent of the witness' attorney before conducting an interview.[333] Whenever counsel for either side knows or has reason to believe that the conduct of a witness to be interviewed may be the subject of a criminal prosecution,[334] the witness should be advised of his or her rights against self-incrimination and the possible need for counsel.[335] Counsel should not affirmatively urge the witness to exercise his or her right to remain silent in an effort to suppress evidence.[336]

During an interview, counsel may not encourage a witness to suppress, or deviate from, the truth in his or her

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[317] Army Rule 1.2(a).
[318] Army Rules 1.2(a) and 1.4(b).
[319] Army Rule 1.2(a); Standards for Criminal Justice 4–5.2(a) (1986).
[320] AR 27–10, app. C, para. C–2*b*(3).
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] AR 27–10, app. C, para. C–2*b*(3)(b). *See also* Army Rule 1.16.
[326] Standards for Criminal Justice 3–1.1; 4–1.1 (1986).
[327] Standards for Criminal Justice 3–5.2(a) (1986) ("The prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.").
[328] Standards for Criminal Justice 4–7.1(a) (1986).
[329] R.C.M. 108; *see* DA Pam 27–9, app. H.
[330] Although there is no legal prohibition to interviewing witnesses, other than UCMJ art. 31 protection against self-incrimination, there may not be any authority for an attorney to order a potential witness to cooperate in the interview. *See generally* United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980).
[331] UCMJ art. 46; R.C.M. 703(a).
[332] Army Rule 3.4(e) ("A lawyer shall not:… request a person other than a client to refrain from voluntarily giving relevant information to another party…"; Standards for Criminal Justice 3-3.1(c) (1986) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give."); Standards for Criminal Justice 4-4.3(c) (1986) ("A lawyer should not discourage or obstruct communications between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person, other than a client, or cause such person to be advised to decline to give to the prosecutor or counsel for codefendants information which such person has a right to give.").
[333] *See* also Professional Responsibility, The Army Lawyer, June 1977 (trial counsel breached his ethical obligations by conducting a post-trial interview of the accused without getting the defense counsel's permission).
[334] *See* UCMJ art. 31(b) ("No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him" of his rights against self-incrimination).
[335] Standards for Criminal Justice 3–3.2(b) (1986) ("Whenever a prosecutor knows or has reason to believe that the conduct of a witness to be interviewed may be the subject of a criminal prosecution, the prosecutor… should advise the witness concerning possible self-incrimination and the possible need for counsel."). Standards for Criminal Justice 4–4.3(b) (1986) indicates that "[i]t is not necessary for the… [defense counsel]… in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel."This provision has been rejected by the Court of Military Appeals. United States v. Milburn, 8 M.J. 110 (C.M.A. 1979) (UCMJ art. 31 and military due process require a higher standard from military defense counsel, at least "when incriminating statements are deliberately sought from a witness suspect unrepresented by counsel.").
[336] Army Rule 3.4.

testimony[337] or to make himself or herself unavailable for trial.[338] Therefore, an attorney must exercise care when interviewing witnesses. The line between refreshing a prospective witness' recollection or assisting the witness to articulate what he or she already knows, and improperly implanting ideas or furthering distortions, is extremely thin.[339] Although transgressions are not easily detected, the integrity of the system depends heavily on the integrity of individual attorneys in not promoting false testimony.[340]

Ordinarily, counsel should interview witnesses only in the presence of a third party unless counsel is willing to forego possible impeachment of the witness with statements made by the witness, or is willing to withdraw as counsel in order to present such evidence.[341]

(2) Presenting witnesses at trial. It is improper to call a witness in the presence of the court members when the counsel knows that the witness will claim a privilege not to testify.[342] The issues of whether the witness will claim the privilege, and whether its assertion is valid, should be resolved at an out-of-court hearing.[343]

(3) Cross-examination of witnesses. The ethical standards recognize that cross-examination is a powerful weapon that can be abused.[344] Neither the trial counsel nor the defense counsel may ask questions designed solely to embarrass or intimidate a witness.[345] The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness.[346]

If a trial counsel knows that the witness testifying is telling the truth, the trial counsel should not use the power of cross-examination to discredit or undermine the witness.[347] If the trial counsel does not know that the witness is testifying truthfully but merely believes that the witness is telling the truth, cross-examination may be used to impeach the witness.[348] A defense counsel who knows or believes that a witness is telling the truth is not precluded from conducting a vigorous and complete cross-examination.[349] The defense counsel should take the witness' truthfulness into account, if possible.[350] Neither counsel may ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.[351]

c. Relationship with the military judge or court members.

(1) Pretrial. Counsel must scrupulously avoid ex parte conversations about a pending or impending case with the military judge or potential court members.[352] The prohibition against ex parte conversations does not preclude administrative communications limited to notifying the judge or members of the place, time, and proper uniform for a trial. If it is necessary to discuss other matters with the military judge, such as a problem likely to affect the duration, progress, or orderly disposition of a case, opposing counsel should be afforded the opportunity to be present.

(2) Trial. At trial, the military judge must be treated with the respect due his or her position irrespective of the relative rank of the participants.[353] All persons in the courtroom, without regard to rank or grade, must rise when the military judge is entering or leaving the courtroom. Counsel will address the military judge as "Judge" or"Your Honor." Unless otherwise directed, counsel should always rise when addressing the military judge.

After the trial judge has announced his or her decision upon an objection, counsel should not make further comment or argument except with the express permission of the trial judge.

(3) Post-trial. Court members are bound by an oath not to reveal "the vote or opinion of any particular member of the court unless required to do so in due course of law."[354] Counsel should respect that oath and should not encourage a court member to violate it. Court member notes and ballots that are left in the deliberation room or the courtroom should be disposed of after trial without being read. Under limited circumstances it is permissible for counsel to discuss a concluded case with court members in order to seek self-improvement,[355] but this should be coordinated by the

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[337] *Id.*

[338] *Id.*

[339] Interviewing techniques such as the witness"songfest," wherein a group of eyewitnesses are gathered together to share their observations and compare notes, usually results in having all the witnesses on the "same sheet of music." It does, however, create the opportunity for false or perjured testimony.

[340] Although no ethical standard specifically precludes the witness songfest, this interviewing technique is improper if the attorney knows or reasonably should know that it will result in false evidence. *See* Army Rules 1.2(d) and 3.4(b).

[341] Standards for Criminal Justice 3–3.1(f), 4–4.3(d) (1986).

[342] Standards for Criminal Justice 3–5.7(c) (1986) ("A prosecutor should not call a witness who the prosecutor knows will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in codes of professional responsibility, doing so will constitute unprofessional conduct."); Standards for Criminal Justice 4–7.6(c) (1986).

[343] Standards for Criminal Justice 3–5.7 commentary (1986); Standards for Criminal Justice 4–7.6 commentary (1986).

[344] *Id.*

[345] Standards for Criminal Justice 3–5.7(a) (1986); Standards for Criminal Justice 4–7.6(a) (1986).

[346] *Id.*

[347] Standards for Criminal Justice 3–5.7(b) (1986).

[348] *Id.* (*But* the belief that the witness is testifying truthfully "may affect the method and scope of cross-examination.").

[349] Standards for Criminal Justice 4–7.6(b) (1986).

[350] *Id.*

[351] Standards for Criminal Justice 3–5.7(d) (1986); Standards for Criminal Justice 4–7.6(d) (1986).

[352] *See* Army Rules 3.5(a) and 4.4; United States v. Copening, 34 M.J. 28 (C.M.A. 1992).

[353] *See* DA Pam 27–9, app. h ("Local Rules of Court may be prescribed by chief circuit judges for courts-martial within their circuits." Certain rules can be found in all Local Rules of Courts and are generally observed in all military courts-martial.

[354] R.C.M. 807(b)(2) discussion.

[355] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 319 (1967).

military judge or some other neutral judge advocate in a supervisory position and great care must be taken to avoid the appearance of prying into the deliberations.[356] It is unprofessional conduct for a counsel to criticize the verdict rendered by either the military judge or the court members.[357]

d. Relationship with opposing counsel. Counsel for both sides must assist the military judge in maintaining a quiet and dignified trial atmosphere.[358] Counsel should avoid personal references to opposing counsel or colloquies with opposing counsel in the courtroom. If it becomes necessary for opposing counsel to confer during the course of the trial, they should first seek the permission of the military judge. In the interest of promoting public confidence in the military justice system, counsel should refrain from any familiarity among themselves in the presence of the accused or of other trial participants.

e. The lawyer as a witness. As a general rule, a lawyer should not appear as a witness in a case in which he or she is counsel. Most situations in which counsel may become a potential witness are easily avoided through foresight and planning. The most common such situations are those in which counsel has become part of a chain of custody; counsel has injected himself or herself into the law enforcement investigative functions, for example, by interrogating suspects; or counsel seeks to impeach a witness with statements made by the witness to counsel. In some cases appearing as a witness may be unavoidable. A lawyer may permissibly testify in his or her own case only if: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and quality of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.[359] In all other situations a lawyer must either forego testifying or withdraw from the case.[360]

f. The duty of candor toward the tribunal.

(1) False or perjured testimony. Counsel may not intentionally misstate facts,[361] or inject facts not in evidence by way of argument[362] or questions for which there is no proper foundation.[363] During witness interviews, counsel must be careful not to participate in the creation of false evidence.[364]

It is unprofessional conduct for a lawyer to knowingly use perjured testimony or false evidence.[365] This rule applies to military trial counsel even though they do not exercise prosecutorial discretion.[366] The convening authority may order the trial counsel to prosecute a case[367] but cannot lawfully order a trial counsel to put perjured testimony into evidence.[368] This rule also applies to defense counsel[369] except that there are special procedures that apply to perjury by the accused.[370]

When counsel becomes aware, after the fact, that perjury has been committed on the court by someone other than his or her client, counsel has a duty to bring the matter to the attention of the court or the appropriate convening authority.[371]

(2) Disclosure of adverse legal authority. A lawyer filing a legal brief with a tribunal or arguing a legal issue before a tribunal must disclose legal authority from a controlling jurisdiction if the authority is directly adverse to the position of his or her client and the authority has not been disclosed by opposing counsel.[372] A lawyer should disclose adverse legal authority from a collateral jurisdiction[373] if the legal issue being litigated has not been decided by the controlling jurisdiction and the judge "would reasonably consider it important to resolving the issue being litigated."[374] Once adverse legal authority from either a collateral or a controlling jurisdiction is disclosed counsel is free to argue that the authority should be reversed or that it can be distinguished.[375]

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[356] *See* Army Rules 3.5(a) and 4.4.
[357] Standards for Criminal Justice 3–5.10 (1986) ("A prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.").
[358] Army Rule 3.5(c) and comment.
[359] Army Rule 3.7(a); *see* United States v. Baca, 27 M.J. 110 (C.M.A. 1988).
[360] Army Rules 1.7(b) and 3.7(a).
[361] Army Rules 3.3(a)(1), 4, and 8.4(c).
[362] Army Rules 3.1 and 3.4(d).
[363] *See* Army Rules 3.4(d) and 4.4.
[364] Army Rules 1.2(d) and 3.4(b).
[365] Army Rule 3.3(a)(4).
[366] *See supra* note 131 and accompanying text.
[367] *Id.*
[368] *See generally* UCMJ art. 131; MCM, 1984, Part IV, para. 57.
[369] Army Rule 3.3(a)(4); AR 27–10, para. 5–8.
[370] *See infra* para. 38–12.
[371] Army Rule 3.3(a). However, this obligation exists only if counsel becomes aware of the false testimony before the conclusion of the proceeding. Army Rule 3.3(b) and comment.
[372] Army Rule 3.3(a)(3).
[373] For Army judge advocates, decisions from the Air Force Court of Military Review, the Navy-Marine Court of Military Review, the Coast Guard Court of Military Review, all Federal district courts and circuit courts of appeal, and all State appellate courts, would be decisions from a "collateral jurisdiction."
[374] Army Rule 3.3, comment; ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84–1505 (1984).
[375] *Id.*

(3) Handling evidence in court. Counsel may not offer or display in open court evidence which they know will be inadmissible,[376] nor should they display evidence or items in view of court members before such items are properly admitted into evidence.[377]

(4) Improper opening statements and closing arguments. In the opening statement counsel may not"state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."[378] Likewise closing arguments must be confined to facts in evidence and reasonable inferences therefrom.[379] Counsel should not attempt to inflame the passions of the jury,[380] and counsel should refrain from stating their personal opinions about the case.[381]

38–12. Client perjury

a. General. One of the most controversial and controverted ethical issues is "client perjury."[382] The most recent evidence of professional disagreement in this area was the highly publicized debate over the ABA Model Rules of Professional Conduct.[383]

At the root of the client perjury issue lies an inevitable tension among various ethical and constitutional guarantees, each of which is deemed to be fundamental to our system of criminal justice. Although this tension has been described differently by various commentators,[384] the ethical dilemma centers around the competing principles of"confidentiality of client communications"[385] and"candor toward the tribunal."[386] Any system of rules designed to guide defense counsel in dealing with client perjury necessarily must address the extent to which the attorney may or must disclose confidential communications to prevent or remedy fraud upon the court.

For criminal cases, the ethical issue is further complicated by the fact that, depending on the circumstances, constitutional issues such as the right of the accused to testify,[387] the due process right to trial by an unbiased fact finder,[388] the right against compulsory self-incrimination,[389] and the right to effective assistance of counsel[390] may have an impact upon whether, and in what way, the ethical values can be compromised.

In addressing the specific standards applicable to Army lawyers, it is necessary to divide the standards into three categories: the duties of the defense counsel in preparing his or her case; the duties of the defense counsel when the client insists on taking the stand to commit perjury; and the duties of the defense counsel when the perjury is discovered after it has been presented.

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[376] Standards for Criminal Justice 3–5.6(d) (1986) ("It is unprofessional conduct to tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration… unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained."); Standards for Criminal Justice 4–7.5(d) (1986).

[377] Standards for Criminal Justice 3–5.6(c) (1986); Standards for Criminal Justice 4–7.5(c) (1986).

[378] Army Rule 3.4(d).

[379] *Id.*

[380] Standards for Criminal Justice 3–5.8(c) (1986); Standards for Criminal Justice 4–7.8(c) (1986).

[381] Army Rule 3.4(d); Standards for Criminal Justice 3–5.8(b) (1986); Standards for Criminal Justice 4–7.8(b) (1986).

[382] Over a hundred law review articles have been written discussing the normative principles in the client perjury area. *See generally* Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951); Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 Stan. L. Rev. 349 (1952); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966); Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Counsel's Dilemma*, 6 Hofstra L. Rev. 665 (1978); Reichstein, *The Criminal Law Practitioner's Dilemma: What Should the Lawyer Do When His Client Intends to Testify Falsely?*, 71 J. Crim. L. C. & P.S. 1 (1970); Wolfram, *Client Perjury*, 50 S. Cal. L. Rev. 809 (1977); Comment, *The Failure of Situation-Oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 Wash. L. Rev. 211 (1979).

[383] *See generally* Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A.J. 429 (1982); Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A.J. 1116 (1981); Wolfram,*Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 A.B.A. Found. Res. J. 964. *See also* Stone, *Are Lawyers So Special*, U.S. News & World Rep., Feb. 28, 1983, at 76.

[384] *See, e.g.*, Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 Den. L.J. 1 (1981) (the issue is framed in the broader context of "the role of the defense counsel as an officer of the court" versus "the role of the defense counsel as a trained advocate for the accused"); Sampson, *Client Perjury: Truth, Autonomy, and the Criminal Defense Lawyer*, 9 Am. J. Crim. L. 387 (1981) (the client perjury issue is seen as a conflict between the "values of truth seeking" and the "protection of individual autonomy and dignity").

[385] Army Rule 1.6.

[386] Army Rule 3.3.

[387] Although there is considerable debate over whether there is a "right to testify" or whether it is a privilege, at least some authority exists that the freedom to testify has constitutional implications.*See, e.g.*, United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 119 (3d Cir. 1977); Robinson, *The Perjury Dilemma in an Adversary System*, 82 Dick. L. Rev. 545, 554-61 (1978); Standards for Criminal Justice 4–5.2(a) (1979); *Compare* Harris v. New York, 401 U.S. 222, 225 (1971) (where Chief Justice Burger wrote that "every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury") *with* Brooks v. Tennessee, 406 U.S. 605, 612 (1972) (where Chief Justice Burger in dictum stated"[W]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

[388] *See* Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978) (accused was denied a fair trial where counsel's actions were equivalent to telling the trier of fact that his client was lying); Butler v. United States, 414 A.2d 844 (D.C. App. 1980).

[389] *See generally* Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 Mo. L. Rev. 601, 624–39 (1979).

[390] Lowery v. Cardwell, 575 F.2d 727, 739 (9th Cir. 1978) (Hufstedler, J., concurring); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977); United States v. Radford, 14 M.J. 322, 327 (C.M.A. 1982).

b. The duties of the defense counsel in preparing the case. In the pretrial preparation stage of a case, client perjury issues involve the role of the defense counsel in promoting perjury. It is clear that counsel cannot actively encourage the client to commit perjury. Article 134, UCMJ, makes it a crime for a defense counsel to "influence, persuade, or cause" the client to commit perjury.[391] The Army Rules expand upon the criminal prohibition and hold that a lawyer "shall not counsel … or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[392] Although these standards are couched in general terms, they do serve to circumscribe any active involvement of the attorney in the creation of perjured testimony.

The prohibitions against active and knowing involvement in the client's creation of perjured testimony represent the easy case. The more difficult issue for defense counsel is the extent to which they may structure the interview process, or tactically use"inaction," when to do so naturally increases the opportunity for the client to create a false story. For example, would it be proper for counsel to describe the evidence that the Government has and to explain the substance of defenses which "seem to be likely" before the attorney permits the client to relate the client's version of the events?[393] Alternatively, is it proper for counsel to simply defer a detailed interview of the client until after the client has had the opportunity to hear the Government witnesses' version of events presented at an article 32 hearing?

The only guidance available for resolving this "grey area" issue is found in the ABA Standards for Criminal Justice (Defense Functions), which prohibits the lawyer from instructing the client or intimating to the client that he or she should not be candid in revealing facts so as to afford the lawyer free rein to take actions which might otherwise be precluded.[394] The Defense Functions also suggest that "as soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses."[395] The commentary indicates that the reason for the standard is that honesty is essential to ensure that the lawyer will be able to present an effective defense.

It is obvious from the nonmandatory nature of the language ("should"), and the subjective orientation of the standard ("seeking to influence"), that counsel have a great deal of discretion in this area as long as they have legitimate reasons for delaying the interview of their client such as a need for time to develop rapport and trust with the client in order that the client will be willing to speak candidly. Likewise, the "education" of a client about the case is easily justified because it is arguably required by the Defense Functions.[396] Although the premise that"honesty is essential to an effective defense" is often correct, it is not universally true. Recognizing the realities--that false testimony can result in acquittal, that the defense rarely benefits from presenting its case at the article 32 hearing, and that most clients can be subtly manipulated, it is disconcerting that a more definite standard does not exist. Under the current standards, the defense counsel's conduct is improper only if the motive is to encourage perjury or if the manner in which the interview is conducted is obviously suggestive of a desired fabrication. These are virtually unenforceable standards.

c. The duties of the defense counsel when the client insists on taking the stand to commit perjury. Before addressing the standards governing the defense counsel's conduct when the client insists upon committing perjury, it is necessary to discuss the threshold question of "How certain must the defense counsel be that the client will commit perjury before any ethical obligations are triggered?" This includes the issue of when a defense counsel must investigate to either substantiate or discount the likelihood of perjury.

The ethical requirements regarding the presentation of perjured testimony are not triggered unless the client makes inculpatory admissions to the lawyer and later indicates that he or she will testify differently at trial.[397] The lawyer then has the preliminary duty to conduct an investigation to see if there is sufficient corroboration of the original admissions such that they are established as true.[398] Once this threshold consideration is satisfied and the client insists on committing perjury, the lawyer's ethical responsibilities are set forth in Army Rule 3.3(a)(2) and (4):

> (a) A lawyer shall not knowingly:
> …
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; [or]
> …

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[391] DA Pam 27–9, para. 3–170 lists the "inducement and procurement" of perjury as an element of subornation. This is further defined to mean"influence, persuade, or cause."
[392] Army Rule 1.2(d). Note that the prohibition only involves conduct known to be illegal or fraudulent.
[393] This represents the classic "Anatomy of a Murder" scenario. *See* R. Traver, Anatomy of a Murder (1958).
[394] Standards for Criminal Justice 4–3.2(b) (1986).
[395] Standards for Criminal Justice 4–3.2((a) (1986).
[396] Standards for Criminal Justice 4–3.8 (1986).
[397] Army Rule 3.3, comment; Standards for Criminal Justice 4–7.7 (1986).
[398] *Id.*

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures…'[399]

These rules make it clear that once a client commits perjury, the lawyer must take appropriate remedial action, including the disclosure of the perjury to the tribunal if "necessary to avoid assisting a criminal or fraudulent act by the client."[400] The comment to Army Rule 3.3 suggests an overall approach to best address this problem. First, the lawyer, upon learning that the client has testified falsely, should consult with the client confidentially.[401] During this consultation, the lawyer should urge the client to immediately correct the matter on the record.[402] If the client refuses to correct the matter and, if necessary, to rectify the situation, the lawyer must disclose the client's perjury to the tribunal or to the other party.[403]

A more difficult question is what the lawyer should do when the client has not yet committed the perjury but has manifested a firm intention to do so. The comment to Rule 3.3 provides some guidance. It states that the lawyer must advise the client against taking the witness stand to testify falsely.[404] If the client insists on testifying falsely, the lawyer must seek to withdraw from representation.[405] If withdrawal is not permitted, the lawyer must refrain from lending aid to the perjury or using the perjured testimony.[406] The comment does not otherwise state specifically what the lawyer should do when withdrawal is denied.

Realizing the void in guidance to lawyers faced with this situation, the American Bar Association published Formal Opinion 87-353[407] to help fill the void. This opinion relates that in the situation, the lawyer should act in a manner consistent, as much as possible, with the confidentiality protection provided in Rule 1.6,[408] and yet not violate Rule 3.3.[409] The opinion states that one way to accomplish this is as follows:

(1) Refraining from calling the client as a witness when the lawyer knows that the only testimony the client would offer is false; or

(2) Examining the client only on those matters about which the client will testify truthfully,[410] and refraining from examining the client on the subject matter which would produce the false testimony.[411]

Of course, this does not resolve the lawyer's problem when the client informs the tribunal of his or her desire to testify and that the lawyer is preventing the client from testifying.[412] Under the circumstances, the opinion notes that the lawyer may have no choice but to disclose to the tribunal the client's intention to testify falsely.[413]

While the overall guidance to lawyers on handling client perjury is less specific than desirable, it is clear that lawyer involvement in client perjury will not be tolerated. Accordingly, lawyers must handle problems of mendacious clients within the profession's admittedly broad ethical standards while at the same time attempting to preserve the client's confidentiality. When client confidentiality and the lawyer's duty of candor to the tribunal are in conflict, the duty of candor prevails.[414]

d. The duties of the defense counsel when the perjury is discovered after the conclusion of the proceeding. The obligations of lawyers under Army Rule 3.3 terminate at the conclusion of the proceeding.[415] Accordingly, if client perjury is not discovered until after the proceeding is concluded, the lawyer is not obligated to rectify it. The issue, however, for the military attorney at a court-martial is when does the proceeding conclude. Does a court- martial conclude at sentence, action, or when appellate review is complete? No clear answer is provided in the rules.

e. Refusing to offer evidence believed to be false. Army Rule 3.3(c) provides that "[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false."[416] This rule is permissive, so the lawyer has discretion to offer

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[399] Army Rule 3.3(a)(2) and (4).
[400] Army Rule 3.3(a)(2).
[401] Army Rule 3.3, comment.
[402] *Id.*
[403] *Id.*
[404] *Id.*
[405] *Id.*
[406] *Id.*
[407] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87–353 (1987). Army Rule 3.3 is based on Model Rule 3.3, and the language is essentially the same. Consequently, ABA opinions should constitute persuasive authority.
[408] The confidentiality requirements of Army Rule 1.6 do not apply when disclosure is required by Army Rule 3.3. *See* Army Rule 3.3(b).
[409] Formal Op. 87–353 (1987).
[410] "Truthfully" in this context means testifying about matters other than those which would produce the false testimony.
[411] Formal Op. 87–353 (1987).
[412] The military judge may well ask whether the client has been advised of his or her right to testify.
[413] Formal Op. 87–353 (1987).
[414] Army Rule 3.3(b) and comment.
[415] *Id.*
[416] Army Rule 3.3(c).

the evidence or to refuse to do so.[417] This rule is a logical extension of Army Rule 1.2, which notes that the lawyer is responsible for technical and legal tactical issues, and Army Rule 3.3, Candor Toward the Tribunal.[418] It permits the lawyer to decide what evidence will best accomplish the objectives established by the client, while at the same time acknowledging the obligation to be candid toward the tribunal.[419] The only limitation on the lawyer's exercise of judgment or discretion is that the lawyer's belief that the evidence is false must be "reasonable."[420] Predictably, any challenge to a lawyer's decision on this basis not to offer evidence will be on the grounds that the lawyer had no reasonable basis to believe that the evidence was false.

38–13. Relations with the news media

a. General. Publicity about a case, particularly within a relatively small, homogeneous and insulated community such as exists at some military installations, may prejudice the right of either side to a fair hearing before an impartial court. Because of this, counsel should avoid making any public statements about a case without the express approval of superior authorities.[421] Normally information should be released only through the public affairs officer of the local command.[422]

b. Information which ethically may be released. Even if a judge advocate receives official permission to make a statement to the press, the statement must conform with applicable ethics guidelines.[423]

In addition to the ethical guidelines specifically imposed by the Army Rules, Army lawyers are also governed in this area by such statutes as the Freedom of Information Act and the Privacy Act, in addition to regulations of the Department of Defense, the Department of the Army, and The Judge Advocate General, all of which may further restrict the release of information by the lawyer.[424] Under these guidelines, a lawyer involved in the investigation or litigation of a matter may state without elaboration--

(1) the general nature of the claim or defense;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case:

(i) the identity, duty state, occupation, and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time, and place of apprehension; and
(iv) the identity of investigating and apprehending officers or agencies and the length of the investigation.[425]

c. Information which ethically may not be released. The guidelines are equally explicit in enumerating what a lawyer may not do:

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.
(b) A statement referred to in paragraph a ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, discharge from the

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[417] *See* Army Rules, scope ("[Some of these rules,] cast in the term 'may' are permissive and define areas… in which the lawyer has professional discretion.").
[418] Army Rule 1.2, comment.
[419] *See* Rule 1.2(a) (the client is responsible for deciding the objectives of representation and the lawyer must abide by the client's decisions on this issue, but the lawyer is responsible for deciding the means by which the client's objectives are to be pursued).
[420] Army Rule 3.3(c). Of course, if the lawyer *knows* that the evidence is false he has no discretion. Army Rule 3.3(a)(4).
[421] *See generally* Standards for Criminal Justice 8–1.1 (1986) (fair trial and free press); AR 340–17, Office Management-Release of Information and Records from Army Files, para. 5–101 (1 Oct. 1982); AR 360–5, Army Public Affairs-Public Information (24 Dec. 1986); DAJA–CL 1980/4971, 1986 (Relations With News Media).
[422] *Id.*
[423] *See generally* Army Rule 3.6; Standards for Criminal Justice 3–1.3, 4–1.3 (1986).
[424] Army Rule 3.6(d). *See also* Gentile v. Nevada State Bar, 111 S. Ct. 2720 (1991) (Rule 36 strikes a proper balance between the First Amendment rights of lawyers with the government's interests in detaining fair trials, but a portion of the rule is unconstitutionally vague).
[425] Army Rule 3.6(c).

Army or other adverse personnel action and that statement relates to:
(1) the character, credibility, reputation, or criminal record of a party, of a suspect in a criminal investigation, or of a witness, or the identity of a witness, or the expected testimony of a party or witness;
(2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal to make a statement;
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of an accused or suspect in a criminal case or proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action;
(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;
(6) the fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation that the accused is presumed innocent until and unless provide guilty; or
(7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense.[426]

d. Press coverage of the trial. Video and audio recording and the taking of photographs in the courtroom during the proceedings, and radio or television broadcasting of proceedings from the courtroom, are all prohibited.[427]

[426] Army Rule 3.6(b).
[427] R.C.M. 806(c).

Chapter 39
(Chapter not used.)

39–1. (Title not used.)
(Paragraph not used.)

39–2. (Title not used.)
(Paragraph not used.)

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