



**U.S. ARMY TRIAL JUDICIARY  
STANDING OPERATING  
PROCEDURES**

**25 February 2021**

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Section I  
**Personnel and Administration**

Chapter 1  
**Processing of Judges at New Stations**

1. Judges are assigned to U.S. Army Trial Judiciary (USATJ), U.S. Army Legal Services Agency (USALSA). USALSA provides military personnel records processing and other personnel support for Judges. Finance and housing support is provided by the Judge's local duty installation.
2. Upon arrival at a new duty installation, the Judge will:
  - a. Contact the Office of the Chief Trial Judge (OCTJ) Paralegal NCO, by telephone or email, on the day of reporting or as soon as practicable thereafter.
  - b. Comply with all in-processing requirements of USALSA and OCTJ through coordination with the OCTJ Paralegal NCO.
  - c. In-process through the local finance office at their duty installation.
3. Judges will maintain a Top Secret clearance throughout their assignment to the Trial Judiciary. Judges are personally responsible for applying for such a clearance and initiating reinvestigation when necessary.
4. Judges will not be attached to any other unit or organization without the concurrence of the Chief Trial Judge (CTJ).

Chapter 2  
**Addresses and Rosters**

1. Addresses.

a. The official duty station address should follow the format below:

**DEPARTMENT OF THE ARMY**  
Office of the (Chief) Circuit Judge  
1st Judicial Circuit  
141 Lewis Avenue  
Fort Drum, New York 13602-5100

b. To prevent erroneous mail delivery, Judges should ensure that their current and prior locators and correspondents are informed of their local duty station and address.

2. Rosters. Subject to requirements of the Privacy Act, the OCTJ will prepare and distribute a roster of each Judge's office address, office phone number, DSN prefix, fax number, e-mail address, cell phone number and home phone number.

## Chapter 3 Military Standards

1. General. Judges will maintain the standards required of all Army personnel.
2. Uniform.
  - a. The uniform standard for Army courts-martial is contained in the Rules of Practice Before Army Courts-Martial.
  - b. When presiding over another service's trial, Judges will wear the Army equivalent of the uniform prescribed by that service.
  - c. When on duty, but not presiding at trial, Judges may wear any authorized Army uniform.
  - d. Judges may wear civilian clothing while traveling to and from a TDY location.
3. Military Training. Judges will comply with applicable Army training requirements to include physical training testing, arms qualification, and other readiness matters. Judges should coordinate these requirements with the host SJA office or other appropriate official to ensure that they receive timely notification of scheduled military training required of all officers by Army Regulations. As Soldiers, Judges should strive to maintain proficiency in basic Soldier skills (such as weapons qualification), even if not specifically required by Army Regulations.
  - a. Physical Fitness and Appearance. All members of the Trial Judiciary must meet the Army standards for physical fitness and appearance (FM 7-22; AR 600-9; AR 40-501).
  - b. Personnel with physical limitations must consult a physician and participate in a fitness program compatible with those limitations.
  - c. All Judges will take the APFT twice yearly (as modified to meet a particular Judge's physical profile), once between 1 April and 31 May and again between 1 September and 31 October of each year. After completion, a copy of the completed APFT Card will be forwarded to OCTJ.
  - d. Chief Circuit Judges (CCJs) must immediately report to the CTJ the names of Judges who either do not take or fail the Army Physical Fitness Test (APFT), or fail to meet weight or body fat standards. Include in the report, as appropriate, any medical profile and a description of any remedial program. This information may be forwarded by the CTJ to the Executive Officer, USALSA.
  - e. Results of the latest semiannual APFT will be included in Officer Evaluation Reports as required. The APFT must be supervised and graded by someone other than the person taking the test.
  - f. Results of semiannual weight surveys will be conducted and reported to OCTJ at the same time that the semi-annual APFT results are reported. A Judge who exceeds body fat standards IAW AR 600-9 will provide a weekly report to his or her CCJ or the CTJ, as appropriate.

#### 4. Professional Responsibility.

a. Judges must maintain the independence of the Trial Judiciary. For example, Judges must avoid social situations that might compromise, or might appear to compromise, that independence. However, Judges are highly visible representatives of the Army and of the military legal profession. Accordingly, Judges should participate in community and installation activities, consistent with our required actual and apparent independence. Additionally, Judges should comply with host installation administrative and personnel policies, including, but not limited to, prohibited activities and local duty hours.

b. Ethical lapses or violations of the rules of professional conduct are sometimes intentionally committed by military lawyers, but most often such problems are the result of ignorance or negligence. Judges, because of their daily association with trial attorneys and impartial view of office operations, are in an excellent position to detect and prevent ethical violations. Judges must also assume the task of promoting ethical awareness among those with whom they are associated and so must:

(1) Be familiar with the standards, policies and procedures related to ethics and professional responsibility issues contained in AR 27-26, The Army Rules of Professional Conduct for Lawyers; Chapter 7, AR 27-1, Legal Services; The Code of Judicial Conduct for Army Trial and Appellate Judges (2008); the American Bar Association Standards for Criminal Justice, and the opinions of the OTJAG Professional Responsibility Committee;

(2) Adhere personally to both the letter and spirit of all ethical mandates;

(3) Ensure that all military and civilian lawyers with whom they have professional contact are aware of and held to the above standards;

(4) Report violations of these standards to the appropriate authority (e.g., Staff Judge Advocate, Regional Defense Counsel or Chief, USATDS) and through judiciary channels to the CTJ, so that appropriate action can be taken.

## Chapter 4 Reports

1. Members of the Trial Judiciary are responsible for the following reports:

a. Court-Martial Case Report (CMCR). A CMCR must be filed in every case in which an arraignment has been conducted. At the conclusion of such cases, the last Judge on the record will send an electronic CMCR, no later than COB the next duty day after conclusion of the trial or COB the next duty day following the Judge's return to his/her duty station. Judges do that by accessing ACMIS (Army Courts-Martial Information System), a secure, web-based management tool on the JAGCNET developed to give the Clerk of Court and trial judges the ability to monitor, track, and document every step required to maintain official CMCRs—from case initiation through case review to final outcome. After the Judge captures the required CMCR information, the Judge will submit the CMCR for approval to the Clerk of Court, where personnel will approve or reject it (notifying the submitting Judge by e-mail of their action on the submitted CMCR). If the Clerk of Court rejects the CMCR, the Judge must edit the rejected CMCR and resubmit that CMCR for subsequent approval. ACMIS also lets the Judge create a charge and a specification, as well as view the change log and edit an approved or rejected CMCR. ACMIS can be accessed under the applications portal on the JAGCNET using the CAC.

The CMCR is of vital importance to our military justice system. The CMCR is the document that triggers the Army's tracking system for post-trial processing; Judges must be diligent in meeting the deadlines above. Additionally, the information contained in the CMCR (such as number of hours spent in Article 39(a) sessions and number of hours in trial) are important statistical indicators of workload. Accordingly, accuracy and completeness are critical to the CMCR.

If a Judge cannot file a CMCR through ACMIS (or the ACMIS is unavailable) by the above deadline, that Judge should contact the OCTJ for the Microsoft Word format for the CMCR. The Judge can then complete the CMCR in Microsoft Word and forward it to the OCTJ for filing with ACCA.

Because of the importance of the CMCR, completing the CMCR is the personal responsibility of each Judge and cannot be delegated.

b. Circuit Judge Report (CJR). All Judges will submit to the Court Administrator, OCTJ by e-mail (copy to the CCJ), NLT the 5th working day of each month, a CJR covering trial activities for the preceding calendar month [see page 11 below]. Exceptions are approved only by the CTJ. Negative reports are required. If a Judge tries a case in another Circuit, the Judge must provide a copy of the CJR to both the Judge's own CCJ and the CCJ of that other Circuit. As with the CMCR, the data on the CJR also are statistical indicators of workload; accuracy and completeness are equally critical here. Completing the CJR is the personal responsibility of each Judge and cannot be delegated.

c. Reporting of Significant Incidents. All Judges will immediately notify the CTJ and the appropriate CCJ by telephone or e-mail of the following pending incidents:



- (1) Appeals by the United States under Article 62, UCMJ, and writs filed by Defense or Special Victim Counsel (SVC);
- (2) Cases referred as capital;
- (3) Capital sentence;
- (4) Referred espionage cases;
- (5) Referred war crime cases;
- (6) Referred cases involving SGMs, LTCs, COLs, and general officers;
- (7) Referred cases involving any JA officer;
- (8) Any other high-profile case, one which could reasonably generate media interest, or is otherwise significant;
- (9) Formal allegations or criticisms involving trial judges, magistrates, judiciary personnel or judicial operations; or
- (10) Any personal problems (e.g., extended illness, serious illness or injury, or death of an immediate family member), including those which have or are likely to generate unusual publicity.

d. Report of APFT score and height/weight. See Chapter 3 for guidance.

e. Dockets. With certain limited exceptions, courts-martial are open to the public. As such, it is important the public be able to easily determine what cases are pending. The USATJ uses the eDocket (located on the USATJ website <http://www.jagcnet.army.mil/usatj>) to publish trial dockets. Each Judge (or the senior Judge at installations with more than one) is responsible for updating the eDocket immediately upon changes in case status. Docket entries will contain the information requested by eDocket and will be publicly available (subject to security requirements).

The POC phone number listed (normally the Public Affairs Office for each GCMCA represented on that docket) must be to a person who can directly answer substantive questions about the case posed by callers, without referring the caller to another person. The POC phone numbers must be confirmed by the Judge posting the eDocket entry at least semi-annually, or on deployment / redeployment of that POC.

For help with the eDocket, see the Quick-Start User's Guide available on the eDocket website.

## 2. Military Magistrates.

a. Magistrate Activity Report. Each military magistrate will file with the appropriate Supervising Judge and/or CCJ all required reports. Every six months, by 1 February and by 1 August, each CCJ will forward to OCTJ a memorandum identifying the current military magistrates within the Circuit, the date training was conducted for each and a consolidated semi-annual military magistrate's report for the Circuit covering the periods January - June and July - December.

b. The CTJ is responsible for supervision of the Army's Military Magistrate Program. Supervising Judges will conduct appropriate training for newly appointed military magistrates on search and seizure and pretrial confinement review law and procedures and inform their CCJs of the dates when training was conducted and the name(s) of those trained. Each military magistrate will be provided a copy of the Administrative SOP for Military Magistrates, posted on the USATJ website ([www.jagcnet.army.mil/usatj](http://www.jagcnet.army.mil/usatj)).

## LIST OF REPORTS

1. Court-Martial Case Report (CMCR) [computer generated, by data base]

FROM: Individual Military Judge  
TO: Clerk of the Court, ACCA (via ACMIS)  
WHEN: No later than COB the next duty day after conclusion of the trial or COB the next duty day following the judge's return to his/her duty station.  
HOW: By accessing ACMIS on the JAGCNET under the JAGC Applications Portal by using your CAC.

2. Circuit Judge Report (CJR) [by e-mail]

FROM: Individual Military Judge  
TO: Court Administrator and Paralegal NCO, US Army Trial Judiciary, with copy to Chief Circuit Judge and to any CCJ in whose jurisdiction the Judge tried cases  
WHEN: Submitted by the 5th working day of each month, with subject line reflecting that month, i.e., "HargisJune11".

3. Significant Incident Report [by telephone or e-mail]

FROM: Individual Military Judge  
TO: Chief Trial Judge, info to Chief Circuit Judge  
WHEN: As soon as case or issue comes to the attention of the judge.

4. Magistrate Activity Report [by e-mail]

FROM: Each military magistrate  
TO: Supervising Circuit or Chief Circuit Judge  
WHEN: Submitted by each magistrate as directed by the appropriate supervising Circuit or Chief Circuit Judge.

5. Semi-annual Report of Current Military Magistrates and Dates of Training and Consolidated Magistrate Activity [memorandum by e-mail].

FROM: Each Chief Circuit Judge  
TO: Court Administrator, US Army Trial Judiciary  
WHEN: Submitted by 1 February and 1 August.

6. Report of APFT Score and Weight [See Chapter 3]

FROM: Individual Military Judge  
THRU: Chief Circuit Judge  
TO: Court Administrator and Paralegal NCO, US Army Trial Judiciary  
WHEN: Submitted semi-annually.

7. Docket [See Chapter 4]

FROM: Each Judge (or senior Judge when more than one per installation).  
TO: eDocket (located at <http://www.jagcnet.army.mil/usatj>).  
WHEN: Immediately upon change in case status.

Circuit Judge Report 2013

[NAME OF JUDGE]														
CMCR#s:														
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL	
<u>1ST CIRCUIT</u>														
ABERDEEN PG														0
CUBA														0
FORT BELVOIR														0
FORT CAMPBELL														0
FORT DETRICK														0
FORT DIX														0
FORT DRUM														0
FORT EUSTIS														0
FORT KNOX														0
FORT LEE														0
FORT MEADE														0
FORT MONMOUTH														0
MIL DIST W ASH														0
WEST POINT														0
TOTAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
# days in Trial-1st Circuit														0
<u>2ND CIRCUIT</u>														
FORT BENNING														0
FORT BRAGG														0
FORT GORDON														0
FORT JACKSON														0
FORT RUCKER														0
MacDILL AFB														0
FORT STEWART														0
REDSTONE ARSL														0
EGLIN AFB														0
SHAW AFB														0
TOTAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
# days in Trial-2nd Circuit														0
<u>3RD CIRCUIT</u>														
FORT HOOD														0
FORT POLK														0
FORT RILEY														0
FORT SILL														0
FT LEAVENWORTH														0
FT LEONARD WD														0
FT SAM HOUSTON														0
TOTAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
# days in Trial-3rd Circuit														0

<u>4TH CIRCUIT</u>	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
ALASKA													0
FORT BLISS													0
FORT CARSON													0
FORT HUACHUCA													0
FORT IRW IN													0
FORT LEW IS													0
MONTEREY													0
HAWAII													0
JAPAN													0
KOREA													0
WSMR													0
TOTAL	0	0	0	0	0	0	0	0	0	0	0	0	0
# days in Trial-4th Circuit													0
<u>5TH CIRCUIT (EUR)</u>													
AFGHANISTAN													0
AFRICA													0
ENGLAND													0
GERMANY													0
ITALY													0
KOSOVO													0
KUWAIT													0
NETHERLANDS													0
TOTAL	0	0	0	0	0	0	0	0	0	0	0	0	0
# days in Trial-5th Circuit													0
TOTAL ALL CIRC	0	0	0	0	0	0	0	0	0	0	0	0	0
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
# days in Trial-All Circuits	0	0	0	0	0	0	0	0	0	0	0	0	0
# days TDY													0
# acquittals													0
# days Military Comm													0

## Army Trial Judiciary Monthly Circuit Judge Report

Each active and USAR Judge will track cases tried by location using an Excel spreadsheet provided by the Court Administrator, OCTJ. The document is sent to the OCTJ NLT the 5th working day of the following month. Exceptions approved only by the CCJ or CTJ. A courtesy copy must be sent to each CCJ for each Circuit in which a case was tried. Each Judge must submit a report each month as there is an automatic addition feature imbedded in the spreadsheet. A negative report is required. A "case" includes not only a court-martial which proceeds thru findings and/or sentence, but also any case in which an arraignment occurs and the case concludes prior to findings. For example, a post-arraignment administrative discharge, a mistrial, withdrawal or dismissal of charges after arraignment, *Dubay* or other rehearing and Article 62 appeals. A good rule of thumb: the number of cases on the report for the month should equal the number of CMCRs a Judge filed with the Clerk of Court, US Army Court of Criminal Appeals, during that month. As a double check, just under your name on the second line of the CJR, include the CMCR numbers for the cases you list on your CJR.

At the bottom of the spreadsheet, include the following information:

# days in trial: any part of a day on the record, be it a 39(a) session, trial, *Dubay* or other rehearing, is counted as 1 day.

# days TDY: this includes travel to preside over courts-martial (pre and post-trial sessions), CLE conference attendance, judge and counsel training at locations other than home station, promotion or selection boards, Article 32 preliminary hearings, AR 15-6 investigations, or participation in an event as guest speaker. In other words, anything that takes you away from your home station on orders, for any length of time (for example, a four-hour round trip between DC and Fort Lee for motions would be one day of TDY).

# acquittals: include only those cases where the accused is acquitted of all charges and specifications. No partial acquittals or dismissal of charges on statute of limitations, jurisdiction, speedy trial, or other grounds.

# days MilCom TDY: number of days TDY related to Military Commissions requirements.

Chapter 5  
**Evaluation Reports**

1. OER.

a. Reference: AR 623-3 and DA Pam 623-3.

b. Judges will be rated by their designated supervisors. In addition to other methods of evaluation, raters will personally observe trials of rated Judges. The rating scheme will be established and published by OCTJ annually, or more frequently as needed.

c. OCTJ will manage OER processing for AC Judges. OCTJ will also manage OER processing for USAR Judges assigned to the 150th Legal Operations Detachment (LOD) when those Judges are senior rated by an AC General Officer. The 150th LOD will manage OER processing for USAR Judges assigned to the unit when those Judges are senior rated by a USAR General Officer.

d. Processing. The following processing requirements apply:

(1) The rated Judge will ensure that an OER Support Form and an OER "shell" are created in the Evaluations Entry System (EES) no later than 15 days prior to the Judge's OER THRU date. The rated Judge will provide the rater (1) APFT data (to include height/weight), (2) three suggested future assignments for the senior rater portion of the OER, (3) the rated Judge's Multi-Source Assessment and Feedback (MSAF) date (see AR 350-1), and (4) a copy of the rated Judge's ORB.

(2) For AC Judges, the Court Administrator, OCTJ, will review the OER "shell" no later than the Judge's OER THRU date. For USAR Judges, the S-1, 150th LOD will review the OER "shell" no later than the Judge's OER THRU date.

(3) Raters will complete their portions of the rated Judge's OER and OER Support Form in the EES NLT 15 days after the rated Judge's OER THRU date. Raters will list three suggested future assignments in the senior rater portion of the OER. Raters will also provide draft senior rater comments in the OER.

e. Standard duty descriptions. The following standard duty descriptions may be modified as necessary to reflect the judge's actual duties:

(1) AC Judge -- Performs duties comparable to those of a United States Federal District Court judge. Presides over trials in General and Special courts-martial in the (specify Circuit), and elsewhere, as required. Ensures trials are conducted fairly, efficiently, and in accordance with the law. Instructs court members on the law. In trials without members, determines guilt or innocence, and, when necessary, adjudges a sentence. Supervises all military magistrates within his/her jurisdiction. Reviews records of trial and provides statistical records of court activity. Conducts investigations as required. Provides training for trial and defense counsel.

(2) AC CCJ – Ensures the orderly and efficient trial of all cases in the \_\_\_\_ Judicial Circuit. Supervises the Military Magistrate Program within the Circuit. Performs duties comparable to those of a United States Federal District Court judge. Presides over trials in General and Special courts-martial throughout the \_\_\_\_ Judicial Circuit. Supervises and trains Active and USAR judges within the Circuit. Ensures trials are conducted fairly and in accordance with the law. Instructs court members on the law. In trials without members, determines guilt or innocence, and, when necessary, adjudges a sentence. Reviews records of trial and provides statistical records of court activity. Conducts investigations as required. Provides training for trial and defense counsel.

(3) USAR Judge -- Performs duties similar to those of a United States Federal

District Court judge by presiding over General and Special courts-martial and conducting hearings on evidentiary matters. Ensures trials are conducted fairly, efficiently, and in accordance with the law. Instructs court members on the law. In trials without members, determines guilt or innocence, and when necessary, adjudges a sentence. Acts as a military magistrate and reviews cases of pre-trial confinement for legal sufficiency and appropriateness. Assists in the training and professional development of counsel. Promptly authenticates records of trial. Prepares all required reports.

2. NCOER.

Reference: AR 623-3 and DA Pam 623-3. Noncommissioned officer(s) assigned or detailed to Army Trial Judiciary will be rated by a designated supervisor.



Chapter 6  
**Leave and Pass**

1. General. See paragraph 7-7e, AR 27-10.

2. Leave and Pass Procedure.

a. Pass. Circuit Judges will submit pass requests to CCJs. CCJs are authorized to approve/disapprove pass requests from Circuit Judges without notification to the OCTJ. CCJs will submit their own pass requests to the CTJ for approval/disapproval. DA Form 31 will be used for all pass requests. A pass is required for travel of more than 250 miles from a Judge's home station.

b. Leave.

(1) Circuit Judges. Circuit Judges will submit leave requests to CCJs. After recommending approval/disapproval, CCJs will forward the leave request to the Court Administrator and Paralegal NCO, OCTJ, for approval/disapproval.

(2) CCJs. CCJs will submit leave requests to the CTJ for approval/disapproval.

(3) Leave requests should be submitted at least 14 calendar days before the leave start date. Once approved, leave forms will be forwarded to USALSA Administrative Office for a control number. A copy of the completed leave form will be provided to the Judge.

(4) Judges are not required to sign in/out in person or by telephone. It will be assumed that the Judge takes leave/pass as stated on the leave/pass form. It is the Judge's responsibility to inform the Court Administrator, OCTJ, of any leave not actually taken following the approval of a leave form.

Chapter 7  
**Awards and Trial Judiciary Coins**

1. Award Approval Authority. Awards pertaining to AC Trial Judiciary personnel and USAR Judges are routed through OCTJ for approval by the Commander, USALSA (AAM/ARCOM/MSM); TJAG (LOM); or higher authority (ARCENT for BSM for Judges in support of OEF), per AR 600-8-22. For AC Judges and USAR Judges aligned with AC Circuits, the awardee's CCJ will draft the appropriate award and forward it to OCTJ consistent with the time requirements below.

2. Time Requirements for Processing Awards. Nominations must be digitally signed and transmitted electronically and include the nominee's height and weight in the e-mail message to which the electronic DA Form 638 is attached. To ensure sufficient time for processing, approval, and presentation before departure, recommendation for awards will arrive at the OCTJ in sufficient time to allow the OCTJ to forward the award recommendation to the Executive Officer, USALSA on or before the following dates:

- a. AAM/ARCOM/MSM, 60 days before desired date of presentation,
- b. LOM/BSM, 90 days before desired date of presentation.

3. Trial Judiciary Coins. Trial Judiciary coins are available for optional purchase by Judges for presentation to recognize services to the Judiciary. Judges desiring to purchase coins may do so through the Circuit Judge assigned to the Republic of Korea. Judges should follow the guidance in Chapter 10, AR 600-8-22 in determining whether to present a coin. The following is additional guidance on presentation of coins:

a. Coins may not be presented to anyone where such presentation may foreseeably:

- (1) compromise the Judge's impartial role;
- (2) violate the Code of Judicial Conduct;
- (3) cause the Judge's recusal; or
- (4) indicate favoritism to either side in a criminal case or an administrative hearing.

b. Typically appropriate situations for a coin presentation would be exceptional performance by persons in the following categories:

- (1) to a bailiff;
- (2) to a military or civilian court reporter upon the departure of the Judge or the reporter;
- (3) to a clerk of court upon the departure of the Judge or the clerk;
- (4) to a guest speaker at a local CLE;
- (5) to a DA civilian employee or a soldier who has been particularly helpful to a Judge, such as an automation clerk, driver, or warrant officer.

Questions whether a planned presentation is appropriate should be directed to the CCJ or CTJ.

Chapter 8  
**Continuing Legal Education**

1. Satisfying mandatory state continuing legal education (CLE) requirements is an individual responsibility. Judges must also comply with The Judge Advocate General's annual requirement for three hours of professional responsibility training.
  
2. Judges may attend annual conferences and CLE sessions at government expense, subject to the availability of spaces and funds, when approved by the CTJ. All funding requests for CLE courses are approved by the Commander, USALSA. Priority will normally be given to those Judges whose state bar organizations impose mandatory CLE requirements.
  
3. All Judges will attend the Joint Military Judges' Annual Training. Normally, only the CTJ, the Commander, 150th LOD, and CCJs will attend the Annual CLE Workshop at The Judge Advocate General's Legal Center and School.

Chapter 9  
**US Army Reserve (USAR) Trial Judges**

1. General.

a. To meet the need for qualified, readily available Military Judges in the event of mobilization, U.S. Army Reserve (USAR) Legal Command has established the 150th Legal Operations Detachment (LOD) to which all USAR Judges are assigned (unless mobilized).

b. The eligibility criteria and application process for USAR officers are outlined in the Appendix to JAG Pub 1-1, available electronically under the Personnel tab at <https://www.jagcnet.army.mil/> (log in is required).

c. USAR Judges are selected for specific positions on the 150th LOD MTOE, but they will generally be detailed to the four CONUS based judicial Circuits by the CTJ, and further detailed to specific cases by the CCJs.

d. Judges will be employed as directed by the CTJ and CCJ. When not mobilized, Judges are assigned to the 150th LOD. To the extent consistent with TJ policy, Judges will comply with all administrative, training, and assignment policies of the 150th LOD. The CTJ has been delegated authority by TJAG to promulgate further administrative, training and utilization policies. Inactive Training (IDT) for Judges is coordinated with the 150th LOD and the CTJ. Annual Training (AT) dates, location and mission are determined by the CTJ, in coordination with the Commander, 150th LOD.

2. Training.

a. Premobilization training includes completion of the Military Judge Course; on-the-job training; reading of *The Army Lawyer*, *Military Law Review*, Military Justice Reporters, and TJ Memoranda; writing scholarly articles for publication; conducting bridge the gap and similar advocacy instruction; and other appropriate training. Annual Training (AT) is the primary means for Judges to acquire and maintain proficiency as Military Judges.

b. Prospective Judges must attend the Military Judge Course at TJAGLCS in either an AC training for school (ADTS) or AC special work (ADSW) status. A grade of 77 points or higher is a prerequisite to continued assignment to the 150th LOD.

c. Subsequent AT consists of fragmented periods to maximize the Judge's availability to preside over courts-martial. This will be in coordination with the supervising AC CCJ, subject to resource allocation by the Commander, 150th LOD. Judges may preside at courts-martial during periods of IDT. DA Form 1380s should be signed by the CCJ upon completion of IDT. AT Orders should be certified by the CCJ.

3. Duty Designation and Annual Training (AT).

a. Annual training not only enables Judges to maintain proficiency, but also assists the CTJ in accomplishment of the Judiciary's mission. Judges are authorized up to 14 days AT. An additional 15 days may be requested.

b. Coordination of AT. The Commander, 150th LOD will prepare a recommended stationing plan by Circuit and location for coordination with CTJ. The CTJ then designates which Circuit each USAR Judge will support. The CCJ for that Circuit is designated as the supervising Military Judge, unless further delegated by the CCJ to a specific Judge within that Circuit. Thereafter, the USAR Judge coordinates with the CCJ (or supervising Judge) for detailing to cases. Although the USAR Judge should consult the on-line docket for his or her Circuit for available cases, USAR Judges can request to be detailed to cases in a

Circuit other than the one to which he or she is aligned. However, the CCJ will give preference to the USAR Judges aligned with that CCJ's Circuit and any cross-Circuit detailing of USAR Judges requires the concurrence of both CCJs. Once detailed to a case, the USAR Judge will request AT orders through the 150th LOD.

c. The CCJ will determine the training program for the USAR Judges assigned to his or her Circuit. The CCJ, or another experienced AC Judge within the Circuit, should be present in the courtroom when the USAR Judge is starting his or her military judicial career. When the CCJ determines that the USAR Judge has sufficient experience in military practice and procedure to preside unsupervised over courts-martial, the CCJ may authorize USAR Judges to try cases without AC supervision. Such authorization will be in writing. Generally, a new Judge should observe several courts-martial before presiding over cases.

#### 4. Evaluation.

a. The Commander, 150th LOD recommends to the CTJ the rating chain for Judges assigned to the 150th LOD. The CTJ will publish the rating chain for Judges assigned to the 150th LOD. The CTJ exercises technical supervision over USAR Judges.

b. During both mobilization and non-mobilization, USAR Judges will be rated strictly within judiciary channels. They will not be placed under dual supervision. USAR Judges will normally be rated by the CCJ or the CTJ and senior rated by the Chief Judge/Commander, USALSA, or the Chief Judge (IMA), USALSA. The Commander, 150th LOD will be rated by the CTJ and senior rated by the Chief Judge/Commander, USALSA or the Chief Judge (IMA). Rating schemes will be updated at least annually, or upon a change of rater, whichever comes first.

5. Certification. Judges must be certified by TJAG in accordance with Article 26(b), UCMJ, before presiding over any courts-martial. Successful completion of the Military Judge Course with at least a 77 grade average and the favorable recommendation of the CTJ are prerequisites to certification. USAR Judges who do not successfully complete the Military Judge Course, or who complete the course but are not certified by TJAG, will be reassigned.

6. Reports. USAR Judges are responsible for submitting all applicable reports required in Chapter 4.

7. Records of Trial. A USAR Judge is responsible for authenticating the record of trial for each case at which he or she presides. Because this is an important task for which little formal training is provided, the supervising CCJ or Judge should provide appropriate instructions and advice. The Rules of Practice Before Army Courts-Martial and Chapter 17 of this SOP provide guidance. The supervising CCJ or Judge should also insure that the Staff Judge Advocate has the correct forwarding address for the USAR Judge. When sending the record of trial for authentication, the Staff Judge Advocate should include a postage prepaid return envelope for returning the record. Consistent with their workload, Judges are strongly encouraged to complete authentication within 7 days of receipt of the record of trial. Judges must inform the CTJ, the appropriate CCJ and the Commander, 150th LOD of any case in which authentication has not been completed within 21 days after the record is submitted to the Judge and must detail the extraordinary circumstances warranting the delay.

8. Additional Duty Restrictions. USAR Judges must not be assigned other duties which depart from their judicial and independent function or which cast doubt upon their ability to remain impartial. Any question a USAR Judge has about propriety of a particular duty should be submitted to the Commander, 150th LOD, their respective CCJ or the CTJ.

Section II  
**Duties and Responsibilities / Policy Matters**

Chapter 10  
**Public Affairs**

1. Contact with Media. Judges will not discuss cases with the news media without permission of the CTJ. A media inquiry on a specific case should be directed to the Public Affairs Officer at the installation on which the case is pending or was tried.
2. Cases with Potential Media Interest. Unusual charges referred for trial or unusual and noteworthy occurrences during or after trial should, within the Judge's discretion, be reported to the CTJ. (Note reporting requirements for significant incidents in Chapter 4.)
3. Pretrial Publicity. Judges must be sensitive to pretrial publicity issues. A Judge may, in the Judge's discretion, issue appropriate orders regarding pretrial publicity (see R.C.M. 806(d)). Although one military court has determined that Judges inherently have the authority to issue "gag" orders (see *United States v. Garwood*, 16 M.J. 863, 868 (N.M.C.M.R. 1983)), such orders pose significant constitutional issues and should be approached cautiously.

## Chapter 11 Counsel Training

### 1. General.

a. Judges are encouraged to assist in the development of advocacy skills for counsel who practice before them. Judges should provide orientation, guidance, and instruction to counsel concerning court-martial practices and procedure through structured training programs.

b. Counsel training programs will include an initial mandatory “Gateway to Practice” program. Other counsel training programs may include: “Bridging the Gap” post-trial critiques; annual refresher training; classes on targeted areas of practice (either sua sponte or at the request of either the government or the defense); and the scholarly publication of articles and notes on military justice. The goals of counsel training programs are to improve trial advocacy and to promote the most effective and efficient use of scarce judicial resources.

### 2. Specific Objectives. Counsel training should accomplish five specific objectives:

- a. Provide information and guidance concerning local practices and procedures;
- b. Review trial and defense counsel duties with each counsel;
- c. Identify special problem areas to avoid;
- d. Provide practical advice in areas of practice and procedure in which counsel are traditionally weak; and
- e. Spotlight other specific problems of practice or procedure when they arise.

### 3. Initial “Gateway to Practice” Training.

a. Gateway training is mandatory for all newly assigned counsel and ideally should be conducted before any counsel makes an appearance representing either the government or an accused. The training session should provide initial information and guidance on local practice and procedures, review trial and defense counsel duties, and address areas in which counsel are traditionally weak. It is intended to be done in a group setting and is primarily directed to newly assigned trial and defense counsel, with special attention to those with limited trial experience. However, Gateway training can benefit experienced counsel, paralegals and court reporters alike.

b. Gateway training is also appropriate when a Judge arrives at his or her new duty station. While inexperienced counsel should receive special emphasis, the training should apply to all military counsel. Even relatively experienced counsel need information about local practices and procedures unique to that Judge. Individual judges should add other subjects based on their perception of local problem areas.

### 4. Bridging the Gap Sessions.

a. At the conclusion of each trial, the Judge may call both trial and defense counsel into chambers to discuss their performance. The Judge may discuss the performance of one counsel only, should the other refuse to participate.

b. The Bridging the Gap sessions should focus on special problem areas to avoid and spotlight specific problems of technical aspects of counsel performance, rather than on tactical decisions. For example, appropriate topics for a Bridging the Gap session might include:

- (1) counsel's failure to adequately lay the foundation for a business record, past recollection recorded or present memory refreshed;
- (2) errors in laying the foundation for an expert opinion;
- (3) charging defects;
- (4) problems in motions practice, such as a failure to tailor a "canned brief" to the facts of a particular case;
- (5) missing court deadlines;
- (6) problems in preparing a client for a providence inquiry;
- (7) trial advocacy issues; and
- (8) misunderstandings of substantive or procedural law.

c. The Judge should not discuss:

- (1) personal impressions of the evidence or arguments presented;
- (2) the Judge's thought process in ruling on a motion or in arriving at a particular finding or sentence;
- (3) tactical decisions made by counsel in the course of the trial;
- (4) witness credibility;
- (5) factors considered in arriving at findings or the sentence;
- (6) the weight, if any, given to testimony, documents, argument, or case citations; or
- (7) other information that would disclose the Judge's deliberative process (see *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009)).

While special findings might properly encompass some of the prohibitions listed above, special findings are ordinarily issued in writing and upon reflection, rather than in an informal session where recollections of what was and was not said may differ. *United States v. McNutt*, 62 M.J. 16 (C.A.A.F. 2005) demonstrates the legal and practical problems that may ensue when a Judge discusses matters other than trial performance in an informal setting where there is no formal record of what was said. Although not specifically prohibited, Bridging the Gap sessions in contested judge alone cases require particular vigilance by the Judge to avoid the above problem areas.

d. A Judge should not conduct a Bridging the Gap session when there is a pending companion case or when an Article 62 appeal is filed with the Army Court of Criminal Appeals. See generally *United States v. Copening*, 34 M.J. 28 (C.M.A. 1992).

e. While civilian counsel are not expressly excluded from Bridging the Gap sessions, Judges should recognize that civilian counsel can have varied levels of experience with military practice and should tailor their comments toward civilian counsel's performance at trial, if any, accordingly.



## 5. Annual Training Sessions.

a. The lack of experienced counsel and military justice supervisors at many installations means that Judges now play a more active role in training counsel. While the primary responsibility for training counsel rests with staff judge advocates, chiefs of military justice, regional and senior defense counsel, the military justice system suffers the consequences when counsel are poorly trained and inadequately supervised. When counsel are well-trained, prepared, and understand their responsibilities in the military justice system, trials proceed more efficiently and fewer delays ensue. Thus, Judges have a vested interest in improving a counsel's courtroom performance.

b. Accordingly, Judges should conduct additional training sessions in their jurisdictions. Conducted at least annually and primarily in a classroom or group session, these training sessions should focus on recurring problems or issues. They may be conducted in conjunction with local and regional counsel training programs, such as TDS and TCAP conferences, or may be "stand alone" sessions with counsel from both the government and the defense attending. While Judges must remain vigilant and avoid disclosing matters protected by the deliberative process privilege in these sessions, the presence of a large group of counsel should reduce the possibility that one or two attendees may take a Judge's comments about trial tactics, effective (or ineffective) direct or cross examination, argument, or motions practice out of context.

c. Judges may require all counsel to attend these sessions, but the primary focus of the training should be on counsel with limited trial experience. The training sessions should not repeat the initial Gateway training. Instead, the sessions should focus on specific problem areas.

d. There is no specified length or format for these training sessions, but Judges should keep travel time for counsel in mind when scheduling.

6. Sua Sponte or Requested Training Sessions. Trials will highlight certain specific shortcomings in counsel performance or preparation. In addition to the training outlined above, Judges can sua sponte conduct training sessions targeted to these specific shortcomings. Occasionally, military justice supervisors (such as SJAs or RDCs) may also identify counsel shortcomings and request targeted training from the Judge. Judges should be receptive to such requests; well-trained, prepared, and knowledgeable counsel result in trials that proceed more efficiently and with fewer delays. Thus, as with the annual training, Judges have a vested interest in improving a counsel's courtroom performance.

7. "A View From The Bench" article. Each Judicial Circuit will submit at least one article annually to the OCTJ for submission to The Judge Advocate General's Legal Center and School for publication in *The Army Lawyer*. Possible subjects include improving advocacy skills, the impact of a recent appellate case on courts-martial practice, and how to lay an evidentiary foundation. The intended audience is the trial practitioner. The CTJ will designate a staggered Circuit schedule and the respective CCJs will designate the author(s).

## 8. Responsibilities.

a. CCJs will supervise, monitor, and coordinate counsel training programs within their respective Circuits.

b. Individual Judges:

(1) will meet with each newly assigned trial or defense counsel within 30 days of his or her assignment (ideally prior to the counsel's first court appearance) to conduct initial Gateway training, if not done as part of group training. Judges will conduct counsel training at

those installations that they support. At installations with no resident Judge, the responsible Judge will conduct initial Gateway training when traveling to preside over a previously scheduled court-martial during a TDY visit for trials or encourage counsel to attend a program at a nearby installation. If necessary, and funding is available, the Judge may make a special TDY trip to conduct initial Gateway training. At installations with two or more resident Judges, the senior resident Judge will assign training responsibilities, subject to the approval of the CCJ.

(2) may conduct annual training sessions.

(3) may hold Bridging the Gap sessions at the conclusion of courts-martial.

(4) as designated by the CCJ, will author "A View from the Bench" articles for publication in *The Army Lawyer*.

c. There are no required reports for counsel training. However, the CTJ will monitor the program's operation and will review progress with CCJs. Each Judge should keep a personal log of Gateway sessions which records names and dates.

9. Other Instruction. Judges should also consider using regular docket sessions and scheduled CLE sessions to provide orientation for new counsel and to address recurring problems. Any such references at regular docket sessions should be brief and to the point. When appropriate, Judges may also participate in local or regional conferences hosted by TDS and TCAP. Judges are encouraged to participate in installation SJA, TCAP, and TDS training sessions.

## Chapter 12 Jurisdiction and Detailing of Judges

1. Organization. The U.S. Army Trial Judiciary is organized by Circuits, as designated in Permanent Orders 1-1, HQDA, OTJAG, and as discussed in paragraph 7-3, AR 27-10.

2. Detailing of Military Judges. See paragraph 7-6, AR 27-10.

All AC and USAR Judges are certified and designated by TJAG, upon graduation from the Military Judge Course, as both GCM and SPCM judges. However, detailing to courts-martial differs between AC and USAR Judges.

a. AC Judges. AC Judges, and USAR Judges who have been mobilized and assigned to the US Army Trial Judiciary, have the authority to detail themselves or any other Judge (AC or USAR) under their supervision or made available to try cases for jurisdictions in the area of responsibility of the detailing Judge to SPCMs or GCMs. CCJs will assign areas of responsibility for AC Judges within their Circuit and will direct travel of Judges within the Circuit in order to provide for the timely and efficient trial of cases. In directing travel by a Judge, CCJs are responsible for optimizing the use of Judge time and minimizing the cost of travel. In situations where it may be less expensive for a Judge from outside a Circuit to replace an unavailable Judge, the CCJ should contact the other CCJs to arrange for the availability of a Judge from another Circuit. No travel outside a Circuit is permitted without the consent of both CCJs.

b. USAR Judges. USAR Judges assigned to the 150th LOD have the authority to detail themselves to SPCMs, but must first coordinate with the AC CCJ of the Circuit with which they are aligned. The authority to detail such USAR Judges to GCMs is withheld to the CTJ, US Army Trial Judiciary and to CCJs, US Army Trial Judiciary. The CTJ or a CCJ may detail such Judges to GCMs in their discretion, or may delegate individual GCM detailing authority to an individual USAR Judge, also in the discretion of the CTJ or a CCJ.

c. Detailing may be oral (in person or by telephone) or in writing (including e-mail).

d. Military Judges from other services may preside over Army cases. Before an individual may be cross-service detailed for Army courts-martial, he or she must first be made available by their respective service CTJ. The detail will then be by a separate written order from the Army CTJ.

e. Army Judges may be detailed to courts-martial of other services by respective CCJ's; however, concurrence of the CTJ is required. See paragraph 7-6f, AR 27-10.

f. All Judges may be detailed to summary courts-martial with approval of the CCJ.

g. Notwithstanding the above and unless conflicted, only the CTJ (after consultation with the appropriate CCJ) details Judges to cases referred capital.

3. Travel to Try Cases. All Judges who are required to travel to try cases to which they have been detailed will make every effort to minimize travel expenses by avoiding unnecessary delays and by using government facilities whenever feasible. Judges should avoid, if possible, billeting arrangements that may put them in close contact with witnesses, court members, or TDY counsel. Notwithstanding the need to minimize travel costs, traveling Judges may routinely plan arrival dates a day in advance of scheduled trial dates and may schedule departures for the day following the anticipated end date of a trial. USAR Judges will receive additional travel guidance from the 150th LOD.

Chapter 13  
**Rules of Court**

1. Reference: See paragraph 7-8, AR 27-10.
2. The Rules of Practice Before Army Courts-Martial are published under separate cover.

Chapter 14  
**RCM 802 Conferences**

1. General. See R.C.M. 802.

2. Rules for Conferences.

a. There is no requirement to conduct an R.C.M. 802 conference; limiting communications with counsel to on-the-record sessions ensures there is no misunderstanding as to the matters discussed. Judges should also note that, while “traditional” R.C.M. 802 conferences are conducted in person or telephonically, e-mail communication may also constitute an R.C.M. 802 conference.

b. Nothing prohibits a Judge from having the court reporter record a conference. Unlike the record of an Article 39(a) session, this record need not be transcribed unless some dispute arises over the discussion at the conference.

c. In light of the history of appellate litigation over unrecorded matters that substantially affect the trial, judges should ensure that the substance of any conference is summarized on the record and should also ensure that counsel concur, on the record, with the summary, or state the basis of their disagreement.

3. Subjects for Conferences. Appropriate subjects for R.C.M. 802 conferences include:

a. Docketing and scheduling.

b. Discussions of discovery matters.

c. Preliminary discussions of possible motions.

d. Witness production questions.

e. Trial arrangements such as: location, uniform, and *voir dire* procedures.

4. Prohibition of Plea Negotiations. A military judge may not participate in negotiations relating to pleas. See R.C.M. 802(a) Discussion.

Chapter 15  
**Arraignments and Unusual Trial Issues**

1. Arraignment. Judges should arraign an accused as soon as possible, taking into account the accused's rights under Article 35, UCMJ. Travel costs should not be the decisive factor in whether to arraign an accused. However, to avoid unnecessarily creating a ROT, Judges may delay arraignment, at the request of both parties, when the parties anticipate alternate disposition.

2. Trials in absentia. Generally, an accused has the right to be present at every stage of his trial; however, if certain conditions are met, an accused shall be considered to have waived his right to be present and may be tried in his absence. RCM 804(c). A guide to conducting trials in absentia is available on the USATJ website ([www.jagcnet.army.mil/usatj](http://www.jagcnet.army.mil/usatj)) under the "References" tab.

3. Pretrial Restraint Issues.

a. Administrative restraint. Military Judges have no authority to intervene in administrative restraint under R.C.M. 304(h) and 306(c)(2). They may, however, determine whether such restraint constitutes restriction tantamount to confinement or unlawful pretrial punishment when such issues are raised after referral.

b. Review of Pretrial Confinement Decisions

(1) Authority prior to referral.

(a) All Judges are also military magistrates. Acting as a military magistrate, a Judge may reconsider a decision to approve pretrial confinement. Decisions of a military magistrate ordering release from pretrial confinement are not subject to appeal by trial counsel to a Judge.

(b) Upon request, magistrates may reconsider the decision to confine based on any significant information not previously considered. The failure of the command to comply with Article 10 by promptly preferring charges is one factor the magistrate may consider.

(2) After referral. The Judge should promptly schedule an Article 39(a) session when an accused challenges the propriety of his or her continued confinement or the conditions under which he or she is being held.

4. Written Instructions to Members. In addition to oral instructions to the members in the presence of the parties, on both findings and sentencing, Judges shall provide a written copy of those instructions to the members for their use during deliberations.

5. Supervising Judge. When a supervising judge is observing trial, the detailed judge should disclose that on the record, using the following suggested language. The consent of both parties is not required for a supervising judge to be present. While legally permissible for the supervising judge to enter chambers during deliberations in a judge alone case, such practice is discouraged to avoid the appearance of improper influence.

**MJ:** I note for the record that (state the supervising judge's name and duty position) is in the spectator's gallery today. He / She is my supervising military judge and is observing these proceedings in that capacity. I may consult with him / her during the trial, including in chambers. However, none of this will improperly influence me in hearing and deciding all matters in this case. Any decisions, rulings, deliberations or findings I may make in this case are solely my personal responsibility and will be mine alone.

## 6. Accused's Death During Trial.

a. When an accused dies during trial, the proceedings will be abated *ab initio* and the charges will be dismissed. See *US v Robinson*, 60 M.J. 923 (A.C.C.A. 2005). Upon confirmation of the accused's death, the military judge could abate the proceedings and dismiss the charges. However, during trial immediate action is necessary and such confirmation normally is not immediate. Thus, the prudent course of action for the judge is to grant a continuance, leaving the issue of abatement and dismissal to the convening authority.

b. If death occurs before members have participated in any portion of the trial, the military judge should grant a continuance for the convening authority to act as above. If the members have participated in trial before death occurs, the military judge should grant a continuance for the convening authority to act as above and should advise the members accordingly:

**[If the accused dies before deliberations begin:] MJ:** Members of the Court, I have granted a continuance in this case. As a result, your services are no longer required. Thank you for your attendance and service. You are excused.

**[If the accused dies after deliberations begin:] MJ:** Members of the Court, I have granted a continuance in this case. As a result, your services are no longer required. Before I excuse you, let me advise you of one additional matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused.

## 7. Judges as Character Witnesses.

a. No Judge may volunteer to testify as a character witness in a judicial, administrative or other adjudicative proceedings, and may not so testify unless subpoenaed or ordered to do so by an appropriate authority. See Rule 3.3, Code of Judicial Conduct for Army Trial and Appellate Judges (Code of Conduct), dated 16 May 2008. Such testimony, should it occur, would likely also implicate Rule 1.3 of the Code of Conduct.

b. If asked to testify as a character witness, the Judge immediately must:

(1) In writing, discourage the party requesting the Judge as a witness from requiring such testimony from the Judge; and

(2) Consult with the Judge's CCJ (who will in turn consult with the CTJ).

c. Once subpoenaed or otherwise ordered to do so by appropriate authority, the Judge should also be sensitive to improper use of the Judge's title, when called upon to testify as a character witness in a judicial, administrative or other adjudicative proceeding. See Rule 1.3 of the Code of Conduct. When so testifying, the Judge should avoid referring to the Judge's title (unless ordered to do so by appropriate authority), but instead should answer generically when asked about his or her duty status: "I am a Judge Advocate" or "I am assigned to the United States Army Legal Services Agency."

## 8. Government Appeals / Petitions for Extraordinary Relief.

a. Under Article 62 (as implemented by RCM 908), the government may appeal certain rulings and orders. Typically, these are rulings either dismissing specifications / charges or excluding government evidence. When the trial counsel notifies the judge that the government is considering appealing a ruling and requests a delay to do so, the judge must give the government a reasonable length of time to do so, up to 72 hours. While the trial can continue as to “matters unaffected by the ruling” while the government is considering an appeal, a delay in the entire court-martial may be prudent unless the circumstances clearly dictate otherwise. The government is then required to provide the judge with written notice of intent to appeal not later than 72 hours. Note that Chapter 17, paragraph 13 of this document requires the judge to “provide essential findings of fact and conclusions of law orally or in writing before requiring counsel to notify of intent to appeal.” This requirement prevents the appearance that the judge’s findings and conclusions are nothing more than after the fact rationalizations for the challenged ruling.

b. While any party can file a petition for extraordinary relief, typically such actions are filed by the defense. There is no requirement to delay the court-martial upon the filing of a petition for extraordinary relief, absent a stay from the appellate court.

9. Contempt. Judges have contempt power, consistent with Article 48, UCMJ and R.C.M. 809. Because of the far-ranging impact not only to the pending case but also to the Judiciary as a whole, Judges should, to the extent practicable given the circumstances of the case in which the issue arises, consult with their CCJ and the CTJ before exercising such power.



Chapter 16  
**Judge Recusal and Court Composition**

1. Denial of Judge Alone Request. As a matter of policy within the Trial Judiciary, in cases in which trial by Judge alone has been requested, and the detailed Judge determines he or she should not hear the case as trier of fact, the detailed Judge will obtain another Judge. In such cases, the Judge will contact the CCJ or CTJ and request that another Judge be detailed.

2. Recusal or Disqualification of Military Judge.

a. R.C.M. 902 addresses judicial disqualification, through specific situations in R.C.M. 902(b) and generally in R.C.M. 902(a).

b. Liberal standard. Military Judges should apply a liberal standard in deciding whether recusal is appropriate. Some guidelines that can be drawn from military case law follow:

(1) Recusal is not automatically or necessarily required:

(a) When the Judge has acted as Judge alone in a companion case.

(b) When a guilty plea has been declared improvident prior to findings in a Judge alone case. The Judge should, however, state for the record before calling on the accused to make a forum election that anything disclosed in the providence inquiry will not be considered on guilt or innocence.

(c) When a Judge has performed pretrial magisterial acts (e.g., issuance of a search warrant) in a case and is not required to provide supplementary factual information. (See (2)(d), below.) See *United States v. Sanchez*, 37 M.J. 426 (C.M.A. 1993).

(d) When in a Judge alone case, the Judge has been advised in advance of a trial of an anticipated plea of guilty, but a plea of not guilty is entered at trial.

(e) After ruling on suppression motions.

(f) When the Judge has seen the sentence limitation in a pretrial agreement. See *United States v. Key*, 55 M.J. 537 (A.F.Ct.Crim.App. 2001); *United States v. Phillipson*, 30 M.J. 1019 (A.F.C.M.R. 1990); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976); *United States v. Villa*, 42 C.M.R. 166 (C.M.A. 1970).

(2) Recusal is required:

(a) When any of the automatic disqualifications of R.C.M. 902(b) exist.

(b) When the Judge has formed or expressed an opinion as to guilt other than in his or her role as a Judge alone in a previous trial of the same or closely related case.

(c) When the Judge has any doubt as to his or her ability to preside impartially in the case or when he or she believes his or her impartiality can reasonably be questioned.

(d) When a Judge has performed pretrial magisterial acts and is required to provide supplementary factual information concerning such acts, whether in the form of sworn testimony or other statements, on the record (e.g., response to voir dire.)

(e) When the Judge becomes a witness in the case. The mere introduction into evidence of a document executed by the Judge in connection with pretrial magisterial acts does not, of itself, necessarily make the Judge a witness.

(f) When any other facts indicate the Judge should not sit in the interest of having the trial free from substantial doubt as to legality, fairness, and impartiality.

c. Procedures.

(1) When a Judge recuses or grants a challenge against himself or herself, he or she is responsible for immediately arranging the assignment of the case to another Judge.

(2) If there are clear grounds for recusal known before trial, the Judge should make known his or her recusal to the parties and arrange for the case to be assigned to another Judge before trial commences.

(3) Recusal arising during the course of a trial must be reflected in the record of trial.

(4) Whenever a possible ground for recusal or challenge is known or made known to a Judge, the Judge is obligated to disclose the matter on the record if he or she does not recuse himself or herself before trial commences. When a possible ground appears, the Judge is subject to *voir dire* thereon by the parties, which will normally reveal whether grounds for recusal exist. If the parties do not question the Judge upon his or her disclosure of possible grounds for challenge or recusal, and the Judge subjectively feels that he or she is not biased, can impartially try the case, and should not recuse himself or herself, the Judge should place on the record a statement of why he or she is not recusing or granting a challenge. (For example: "I am familiar with the facts of this case only from having presided as Judge in the companion case of \_\_\_\_\_, on \_\_\_\_\_. I have formed no opinions for or against either party in the case, will not consider any information I previously received in the trial of this case, and will judge this case only on competent evidence presented during the course of this trial.")

Chapter 17  
**Records of Trial and Authentication**

1. References: R.C.M. 1103, 1104; Chapter 5, AR 27-10; Rules of Practice Before Army Courts-Martial, Rule 28.

2. Because defects in a record of trial produce needless appellate litigation, prompt and careful review and authentication of records of trial is second in priority only to the trial of the case itself. If the record of trial is deficient, the Judge should assist the trial counsel and the court reporter to produce records that are adequate. Judges should not authenticate deficient records of trial unless all options to correct the deficiencies have been exhausted. If all efforts to produce a complete /verbatim record of trial have failed, the Judge may authenticate the record and note the deficiencies; labeling the record as incomplete or non-verbatim is appropriately left to the appellate courts.

3. A record of trial is the accurate written transcript of proceedings, complete with all exhibits that were marked at trial. Whether verbatim or summarized, it must be a written transcript. Judges should recognize that preparation of the record of trial begins at trial. Judges should assist counsel in making sure that the record accurately reflects what is said and done.

4. Counsel Review.

a. Trial Counsel. Before the record is submitted to the Judge for authentication, the trial counsel must examine the record. The trial counsel who completes the errata must be a trial counsel on the record at trial. The trial counsel should make whatever changes are necessary to ensure the record accurately reflects what actually happened. Trial counsel should correct spelling and grammar, while ensuring that any "corrections" do not change what the parties and witnesses actually said and did. The trial counsel's errata sheet should be included with the record before it is submitted to the Judge for authentication.

b. Defense Counsel. Before submission to the Judge, the defense counsel should have a reasonable opportunity to examine the record. The defense counsel who completes the errata must be a defense counsel on the record at trial. The defense counsel's errata sheet should either be included with the record when the ROT is forwarded to the Judge for authentication or provided separately to the Judge before authentication. If defense counsel is given a reasonable opportunity to examine the record and does not provide errata, the Judge should ensure the ROT contains a notation or memorandum to that effect.

c. Timing. The Rules of Practice Before Army Courts-Martial set a 150 page per day requirement on counsel to review records, absent unusual circumstances. After this time period has elapsed, the Judge may authenticate without the defense counsel's review.

5. Military Judge. The Judge is responsible for the accuracy of the record. The preferred method to authenticate the record is for the Judge to make pen and ink corrections directly to the original transcript and then initial on the right side of the page. The Judge must then also reflect on a separate errata sheet the numbers of the pages on which changes were made so the court reporter can substitute that page in the other copies of the record of trial. See page 42 for an errata sheet using this method. If time and distance warrant, the Judge may consider authenticating an electronic version of the transcript by e-mail, provided the Judge is satisfied by means other than personal observation that all exhibits marked and referred to during the trial are with the record.

6. Authentication of the Record of Trial. See R.C.M. 1104.

a. When and How Authenticated. Authentication is the act of verifying the accuracy of the record of trial. The Judge authenticates the record of trial unless unable to do so by reason of death, disability, or "absence." If more than one Judge presided over the court-martial, each Judge can

only authenticate the record of the proceedings over which that Judge presided.

b. **Expediting Authentication.** The Judge must examine each record promptly. Consistent with their workload and absent extraordinary circumstances, Judges should complete authentication within 7 days of receipt of the record of trial. Judges must inform the CTJ and the appropriate CCJ of any case in which authentication has not been completed within 21 days after the record is submitted to the Judge and must detail the extraordinary circumstances warranting the delay.

c. **Tracking Records.** Judges will keep copies of their errata and authentication pages for all records of trial. Judges should also keep a log reflecting the date the record was received, the date authenticated, and the means/location to which the record was sent. Records of trial will only be sent as authorized by paragraph 5-48, AR 27-10. If it is necessary to return substandard records to the court reporter for retyping, insertion of missing exhibits, or other documents, the Judge should include a memorandum for record or make written comments on the errata sheet to reflect the delays occasioned thereby.

#### 7. Certificate of Correction.

a. If the Judge is careful in examining the record prior to authentication, Certificates of Correction should be unnecessary. However, in the event a Certificate of Correction is necessary, the format appears at Appendix 14, M.C.M and samples are included on the USATJ website.

b. **Procedure.** Whenever it is necessary for the Judge to make a substantive change in the record by means of Certificate of Correction, the Judge must give notice to all parties. All parties must be given an opportunity to be heard, and to contest the proposed correction with affidavits or other evidence. The proposed certificate should be served on the parties for their examination. This does not preclude coordination on the subject of the proposed correction in a telephone conference call, an e-mail or a more formal conference (perhaps including the Judge, the trial counsel, the defense counsel, and the court reporter). The accused has no right to be present during any conference regarding the preparation of a Certificate of Correction.

#### 8. Verbatim Records of Trial. (See R.C.M. 1103 and Appendix 14, M.C.M.; and Chapter 5, AR 27- 10)

a. **When required.** The determination of whether a verbatim record is necessary is based on the adjudged sentence, not the sentence ultimately approved by the convening authority (even if the convening authority, prior to preparing the record, agrees to approve a sentence that would not trigger a verbatim record). To preclude delays occasioned by the need to retype a record in verbatim format, the Judge may consider reminding the trial counsel of this requirement during any Bridge the Gap session. The Judge should also double check, prior to authenticating a summarized record, that the adjudged sentence does not require a verbatim record.

b. **Optional preparation of a verbatim transcript.** Nothing prohibits preparation of a verbatim record, even if the sentence adjudged does not require one. A Judge should not decline to authenticate such a verbatim record, as long as it reflects the true proceedings.

9. **Sidebar Conferences.** Because of the difficulties inherent in recording these conferences while simultaneously ensuring that court members do not overhear what is said, they will not be used. Excusing the court members and conducting an Article 39(a) session can be done quickly, and avoids the need for curative instructions, should the members overhear inappropriate matters in a sidebar conference.

10. Reconstruction of portions of the ROT. Failures of recording equipment or other problems may necessitate reconstruction of a portion of the record of trial. Substantial reconstructions may result in a non-verbatim record. Judges should solicit the assistance of both counsel in reconstructing testimony or argument.

11. Summarized Records of Trial. See Chapter 5, AR 27-10; R.C.M. 1103; and Appendix 13, M.C.M.

a. In many respects, preparation of a summarized record of trial is more difficult than preparation of a verbatim record. While court reporters and trial counsel generally do an adequate job of ensuring that the testimony is appropriately summarized, they often fail to include sufficient details about *voir dire* and challenges, forum election, the factual basis for rulings (particularly important if written findings of fact and conclusions of law are not made by the Judge and appended to the record of trial), the substance of evidentiary objections, and the content of R.C.M. 802 sessions. Military Judges reviewing summarized records prior to authentication should ensure that the record contains sufficient details to permit a reviewing agency to determine what happened and why. Although the sentence may not necessitate a verbatim record, the accused Soldier retains certain appellate rights, with review by the Criminal Law Division, OTJAG, or the Army Court of Criminal Appeals.

b. Preparation and content.

(1) Acquittal or termination prior to findings. In these cases, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), the forum, the results of trial, and sufficient information to establish jurisdiction over the accused and the offenses. The convening or higher authority may prescribe additional requirements.

(2) Record of a conviction. If the trial resulted in a conviction for any offense, the record should comport with Appendix 13, M.C.M.

12. Exhibits.

a. Sufficiency of the Record. Whether verbatim or summarized, the record of trial must be complete, including every exhibit marked for identification, regardless of whether it was subsequently received in evidence or whether it was considered by the fact finder.

b. Appellate Exhibits. Appellate exhibits include the Findings Worksheet; the Sentence Worksheet; the flyer of charges and specifications distributed to the court members; court members' written questions; exhibits used solely for motion practice and other interlocutory matters, including proposed instructions; briefs and memoranda of law; statutes and regulations judicially noticed; and any other exhibits which do not go to the merits or toward sentence.

c. Sealed Exhibits.

(1) Judges have explicit authority to order certain exhibits sealed (such as M.R.E. 412, classified evidence, matters reviewed *in camera*, R.C.M. 701(g)(2) or federal law on child pornography). Beyond that explicit authority, there is support for broad authority by Judges to seal exhibits. See generally *U.S. v. Humphreys*, 57 M.J. 83 (C.A.A.F. 2002). However, when a Judge orders an exhibit sealed without explicit authority to do so, one court has equated that with limiting public access to a court-martial. See *U.S. v. Scott*, 48 M.J. 663 (A.C.C.A. 1998). There, the Army Court chastised a Judge for sealing an entire stipulation of fact without sufficient findings in the record to justify that action. Based on *Scott*, Judges should address the four-part test for closing a court-martial before sealing an exhibit, thus facilitating appellate review:

(a) Did the party seeking the sealing of the exhibit advance an overriding interest that is likely to be prejudiced if the exhibit is not sealed?

- (b) Was the sealing narrowly tailored to protect that interest?
- (c) Did the Judge consider reasonable alternatives to sealing the exhibit?

(2) Did the Judge make adequate findings of fact and conclusions of law in the record to support a decision to seal the exhibit, in aid of review?

(3) The Judge could address each of these factors on the record at an Article 39(a) session prior to concluding the trial or the Judge could address each of these factors in the sealing order (see below), marked as an appellate exhibit and attached to the manila envelope in which the evidence is sealed.

(4) When the Judge orders any portion of the record sealed, the Judge must prepare a written order detailing the limitations on access to the sealed exhibits. See R.C.M. 1103A. Records should be sealed in a manner that permits appellate review without dismantling the ROT. One suggestion is to place the pages of the record or exhibit ordered sealed in a large envelope, then two-hole punch the bottom of the envelope, for placement in the appropriate place in the original record of trial, with the opening of the envelope at the bottom of the record of trial. A copy of the Judge's order sealing the pages will be attached to the outside of the envelope. See page 43.

(5) To ensure the Judge's order sealing exhibits is not inadvertently overlooked, prudence dictates the Judge produce a sealing order immediately after trial and then actually seal the exhibits with the court reporter following the trial.

d. Substitution in the Record for Exhibits.

(1) Pursuant to R.C.M. 1103, the Judge may authorize substitution of copies, photographs, or descriptions of exhibits. The Judge should consider the following in determining whether to authorize substitutions and what type of substitute is permitted:

(a) Is the exhibit too cumbersome to be included in the record of trial?

(b) Is the exhibit a document that must, or should, be returned to the record from which it was obtained? Regardless of law enforcement agency preference, the original of the accused's confession or rights warning should normally be included in the record of trial.

(c) Is the exhibit otherwise inappropriate for inclusion in the record? For example, is the exhibit contraband or a bio-chemical hazard?

(d) Does the substitute accurately depict the original? In the case of photographs of charts and graphs used by witnesses, do color originals necessitate color photographic copies?

(e) Does the substitute facilitate supervisory review not only by the convening authority, but also by the Criminal Law Division or appellate courts?

e. Law and Regulations Judicially Noticed. When the Judge takes judicial notice of law or regulation, a copy of the applicable law or regulation, or other source used in determining the law or regulation, should ordinarily be appended to the record as an appellate exhibit, unless it can reasonably be anticipated to be readily available to any possible reviewing authority. This is especially important in Article 92 and Assimilative Crimes Act (18 U.S.C. Section 13) cases. Local regulations and state statutes may not be readily available to the appellate courts.

f. Audio or video recordings. If a transcript was previously prepared, it should be marked

separately as an exhibit and included in the record. This obviates the need for a separate transcription of the recording in the ROT. The audio recording must nonetheless be included as a separate exhibit. When a video recording is played, it must also be marked and included as an exhibit. When assembling a record of trial containing audio or video recordings, the court reporter should ensure that the recordings are securely attached, while still affording access to reviewing agencies without the need to disassemble the record of trial. See *United States v. Craig*, 60 M.J.156 (C.A.A.F. 2004) for the proper procedures to follow before admitting a written transcript of the audio portion of a recorded conversation.

13. Special and Essential Findings. When presiding as Judge alone, the Judge makes general findings of guilty and not guilty. On proper request, the Judge must also make special findings. A Judge may also have to make essential findings of fact. When such findings are placed on the record, the appellate courts grant substantial deference to the Judge. When the Judge fails to make essential findings, the appellate courts do not grant the same measure of deference to the Judge's decision. In addition, when ruling on defense challenges for cause, the Judge must state on the record, "I have considered the liberal grant mandate in ruling on a challenge for implied bias," or words to that effect. See *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008). If the findings are made orally at trial, and the record of trial is summarized, the special or essential findings should be set forth verbatim or nearly verbatim, or appended to the record of trial prior to authentication in a memorandum of decision. If special or essential findings are made in a memorandum format, the memorandum must be appended to the record of trial as an appellate exhibit before authentication. Guidance in making special findings and preserving them for the record is set forth at Appendix G, *Military Judges' Benchbook*. If a ruling is subject to a government appeal under Article 62, UCMJ, or extraordinary writ, the Judge must provide essential findings of fact and conclusions of law orally or in writing before requiring counsel to notify of intent to appeal.

14. Proceedings in Revision.

a. Contents. When a record is amended in revision proceedings, the record should show specifically, ordinarily by page and line, the part of the original record that is changed and the changes made. No physical change is made in the original record.

b. Authentication. The record of Proceedings in Revision is authenticated in the manner prescribed for the original record.

\*\*\*\*\* MILITARY JUDGE'S ERRATA SHEET \*\*\*\*\*

UNITED STATES v.

MILITARY JUDGE:

PAGE NUMBER	JUDGE'S INITIALS	PAGE NUMBER	JUDGE'S INITIALS	PAGE NUMBER	JUDGE'S INITIALS	PAGE NUMBER	JUDGE'S INITIALS

NOTICE: The above page(s) (has) (have) correction(s). A copy of each corrected page must be inserted into all copies of the record of trial.

Signature of Military Judge\_\_\_\_\_Date:\_\_\_\_\_



**UNITED STATES**

**v.**

**KIRK, James T., PFC,  
U.S. Army,  
59<sup>th</sup> Ordnance Brigade,  
Eglin AFB, FL 32542**

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**Seal Order**

**20 March 2013**

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The following exhibits \_\_\_\_\_ contain [child pornography / erotica]  
[MRE 412 matters] [MRE 513 matters] [\_\_\_\_\_].

**[NOTE: When there is no explicit authority to seal the exhibit, add this:** Sealing is necessary to prevent prejudice to an overriding interest [specify the interest]. The sealing is no broader than is necessary in scope and duration to protect that overriding interest. Reasonable alternatives to sealing, such as [specify the alternative considered], have been considered and found inadequate because [explain why the alternatives considered are inadequate].]

Accordingly the above referenced matters are hereby sealed and shall remain sealed consistent with RCM 1103A. Notwithstanding that provision, the following conditions apply to the sealed enclosures:

- a. No copies shall be made for any purpose without a court order.
- b. The original documents, sealed, will remain in the original record of trial.
- c. A copy of this order will be placed on the envelope containing the sealed enclosure.
- d. A copy of this order will be placed in all copies of the record of trial. **[NOTE:**

**Use this when the sealed records contain this matter.]e.**

Under no circumstances will any sealed exhibits containing child pornography / erotica be provided to or disclosed to the accused, for any reason.]

[e/f.] For purposes of post-trial submissions and post-trial actions, the sealed documents can be opened and viewed by [the accused,] the accused's defense counsel, the Staff Judge Advocate and the Convening Authority.

2. Questions regarding this order should be directed to the undersigned at \_\_\_\_\_.

I. B. DEJUDGE  
COL, JA  
Military Judge

Chapter 18  
**Operational Deployments**

1. The Trial Judiciary will provide Military Judge support for operational deployments. The CTJ will designate one or more Judges, as required, to deploy in support of a given operation.
2. The CTJ will:
  - a. Coordinate requirements for Military Judge support with USALSA, OTJAG, and the supported commands.
  - b. Designate the deploying Judge, determine length of deployment, and establish judicial rotation policies.
  - c. Coordinate with the supported SJA and deploying Judge concerning provision of military magistrate services for the deploying unit. The senior deployed Judge will normally be delegated authority to appoint military magistrates in the area of deployment. In the absence of any deployed Judges, the CCJ responsible for the region will appoint military magistrates as required.
  - d. Designate the CCJ responsible for judicial support for deployed units until a Military Judge is deployed to the theater of operations.
3. CCJs will:
  - a. In accordance with operational security requirements, advise CTJ of impending deployments from their Circuits that might require Military Judge support.
  - b. Ensure that Judges are prepared to deploy.
4. Judges will:
  - a. In accordance with operational security requirements, advise the CCJ of impending deployments from their supported units that might require Military Judge support.
  - b. Coordinate with supported units concerning the manner and timing by which the commander and staff judge advocate want Military Judge support provided.
  - c. Coordinate with supported units for transportation to theater of operations.
  - d. Determine and satisfy military and personal requirements for deployment, including medical, legal, financial, APFT, weapons qualification, information technology and other administrative issues. A suggested list of military and personal requirements is available on the USATJ website, but must be tailored to the specific circumstances of each deployment.
  - e. Advise CCJ of docketed and projected cases that will be affected by the Judge's deployment.
  - f. Coordinate with SJA and CTJ on provision of military magistrate services and designation of military magistrates.
5. Trial Judiciary personnel who participate in the planning, coordination, or deployment process will insure that CTJ is fully informed of all requests for judicial support. Deploying personnel will provide written reports, as directed by CTJ, while deployed. CTJ will be responsible for the preparation of the after-action report. A suggested deployment checklist is available on the USATJ website ([www.jagcnet.army.mil/usati](http://www.jagcnet.army.mil/usati)) under the "References" tab.

Section III  
**Additional Duties and Responsibilities**

Chapter 19  
**Debarment and Suspension Proceedings**

1. References:

a. Federal Acquisition Regulation (FAR) Subpart 9.4 - Debarment, Suspension, and Ineligibility.

b. Defense Federal Acquisition Regulation (DFAR) Subpart 209.4 - Debarment, Suspension, and Ineligibility and DFAR Department of Defense Agency Supplementary Regulation, Appendix H - Debarment and Suspension Procedures (48 CFR, Chapter 2, Subchapter I, Appendix H).

c. Army Federal Acquisition Regulation (AFAR), Subpart 9.4 – Debarment, Suspension, and Ineligibility.

d. Army Regulation 27-10, *Military Justice*, paragraph 7-4a(4)(g) (11 May 2016).

2. Army debarring officials may request OCTJ to detail a Military Judge to perform fact-finding duties in cases involving the suspension or debarment of a contractor pursuant to Reference 1.a.

3. Debarment and Suspension Procedures. Military Judges detailed as fact-finders will perform their duties professionally and in conformance with the uniform Department of Defense suspension and debarment procedures in DFAR Appendix H (Reference 1.b).

## **DEBARMENT AND SUSPENSION PROCEDURES**

### **H-100 Scope.**

This appendix provides uniform debarment and suspension procedures to be followed by all debarring and suspending officials.

### **H-101 Notification.**

Contractors will be notified of the proposed debarment or suspension in accordance with FAR 9.406-3 or 9.407-3. A copy of the record which formed the basis for the decision by the debarring and suspending official will be made available to the contractor. If there is a reason to withhold from the contractor any portion of the record, the contractor will be informed of what is withheld and the reasons for such withholding.

### **H-102 Nature of proceeding.**

There are two distinct proceedings which may be involved in the suspension or debarment process. The first is the presentation of matters in opposition to the suspension or proposed debarment by the contractor. The second is fact-finding which occurs only in cases in which the contractor's presentation of matters in opposition raises a genuine dispute over one or more material facts. In a suspension action based upon an indictment or in a proposed debarment action based upon a conviction or civil judgment, there will be no fact-finding proceeding concerning the matters alleged in the indictment, or the facts underlying the convictions or civil judgment. However, to the extent that the proposed action stems from the contractor's affiliation with an individual or firm indicted or convicted, or the subject of a civil judgment, fact-finding is permitted if a genuine dispute of fact is raised as to the question of affiliation as defined in FAR 9.403.

### **H-103 Presentation of matters in opposition.**

(a) In accordance with FAR 9.406-3(c) and 9.407-3(c), matters in opposition may be presented in person, in writing, or through a representative. Matters in opposition may be presented through any combination of the foregoing methods, but if a contractor desires to present matters in person or through a representative, any written material should be delivered at least 5 working days in advance of the presentation. Usually, all matters in opposition are presented in a single proceeding. A contractor who becomes aware of a pending indictment or allegations of wrongdoing that the contractor believes may lead to suspension or debarment action may contact the debarring and suspending official or designee to provide information as to the contractor's present responsibility.

(b) An in-person presentation is an informal meeting, nonadversarial in nature. The debarring and suspending official and/or other agency representatives may ask questions of the contractor or its representative making the presentation. The contractor may select the individuals who will attend the meeting on the contractor's behalf; individual respondents or principals of a business firm respondent may attend and speak for themselves.

(c) In accordance with FAR 9.406-3(c) and 9.407-3(c), the contractor may submit matters in opposition within 30 days from receipt of the notice of suspension or proposed debarment.

(d) The opportunity to present matters in opposition to debarment includes the opportunity to present matters concerning the duration of the debarment.

#### **H-104 Fact-finding.**

(a) The debarring and suspending official will determine whether the contractor's presentation has raised a genuine dispute of material fact(s). If the debarring and suspending official has decided against debarment or continued suspension, or the provisions of FAR 9.4 preclude fact-finding, no fact-finding will be conducted. If the debarring and suspending official has determined a genuine dispute of material fact(s) exists, a designated fact-finder will conduct the fact-finding proceeding. The proceeding before the fact-finder will be limited to a finding of the facts in dispute as determined by the debarring and suspending official.

(b) The designated fact-finder will establish the date for a fact-finding proceeding, normally to be held within 45 working days of the contractor's presentation of matters in opposition. An official record will be made of the fact-finding proceeding.

(c) The Government's representative and the contractor will have an opportunity to present evidence relevant to the facts at issue. The contractor may appear in person or through a representative in the fact-finding proceeding.

(d) Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure govern fact-finding. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(e) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceeding and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination.

#### **H-105 Timing requirements.**

All timing requirements set forth in these procedures may be extended by the debarring and suspending official for good cause.

#### **H-106 Subsequent to fact-finding.**

(a) Written findings of fact will be prepared by the fact-finder as mandated by FAR 9.406-3(d)(2)(i) and 9.407-3(d)(2)(i).

(b) The fact-finder will determine the disputed fact(s) by a preponderance of the evidence. A copy of the findings of fact will be provided to the debarring and suspending official, the Government's representative, and the contractor.

(c) The debarring and suspending official will determine whether to continue the suspension or to debar the contractor based upon the entire administrative record, including the findings of fact.

(d) Prompt written notice of the debarring and suspending official's decision will be sent to the contractor and any affiliates involved, in compliance with FAR 9.406-3(e) and 9.407-3(d)(4).

Chapter 20  
**Inmate Transfer Hearings**

1. The military services do not have adequate facilities to provide long-term, inpatient psychiatric treatment for sentenced military prisoners. Historically, prisoners requiring such treatment have been transferred to the custody of the Federal Bureau of Prisons (BOP) under the provisions of Article 58(a), UCMJ. The Supreme Court has held that inmates are entitled to certain procedural safeguards, including notice, counsel, and a hearing before an independent decision-maker before they may be involuntarily transferred from a prison to a psychiatric treatment facility. *Vitek v. Jones*, 445 U.S. 480 (1980).

2. The procedures in paragraph 3-4, AR 190-47 govern hearings to determine whether a military prisoner in a military correctional facility (typically the USDB) should be transferred to the BOP for inpatient psychiatric care or treatment not available at the military corrections facility. Armeregulation 27-10, *Military Justice*, paragraph 7-4a(4)(d) provides that Military Judges may conduct these hearings. In addition to those procedures, the Military Judge will review and authenticate the transcript of the hearing, prior to it being forwarded to the installation commander.

3. The resident Military Judge servicing Fort Leavenworth is detailed to preside over these hearings. When this is not feasible, then another Judge will be detailed. This substitute detail must be done in writing by the Chief Trial Judge.