

The Manual for Military Commissions

Executive Summary

January 18, 2007

Today, the Secretary of Defense is submitting to Congress a comprehensive Manual for the full and fair prosecution of alien unlawful enemy combatants by military commissions, in accordance with the Military Commissions Act of 2006. The Manual is made up of four separate sections: The Preamble, The Rules for Military Commissions, the Military Commission Rules of Evidence, and the Crimes and Elements. The Rules for Military Commissions set forth the procedural rules for Military Commissions. The Military Commission Rules of Evidence provide evidentiary rules to govern the admissibility of evidence at trial. The Crimes and Elements section lays out the crimes punishable by Military Commission and the elements of those crimes.

This Manual is the product of a tremendous interagency effort. Principally military judge advocates and attorneys from the Departments of Defense and Justice, using the Manual for Courts-Martial as a guide, undertook the initial drafting. Drafts were then coordinated with other relevant agencies to ensure that specific rules and procedures reflect careful consideration of our nation's intelligence activities, as called for in the MCA. The overriding considerations reflected in the Manual for Military Commissions are fairness and fidelity to the Military Commissions Act of 2006. It is intended to ensure that alien unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people. This Manual will have an historic impact for our military and our country.

FOREWORD

This Manual for Military Commissions (M.M.C.) is published in implementation of the Military Commissions Act of 2006 (M.C.A.), 10 U.S.C. §§ 948a, *et seq.*, and consists of four parts: I, Preamble; II, Rules for Military Commissions (R.M.C.); III, Military Commission Rules of Evidence (Mil. Comm. R. Evid.); and IV, Crimes and Elements.

The M.M.C. is adapted from the Manual for Courts-Martial (2005) to comport with the M.C.A. As required by the M.C.A., I have consulted with the Attorney General. The M.M.C. applies the principles of law and rules of evidence in trial by general courts-martial so far as I have considered practicable or consistent with military or intelligence activities, and is neither contrary to nor inconsistent with the M.C.A.

Robert M. Gates
Secretary of Defense

PART I
PREAMBLE

1. Structural provisions of the M.C.A.

The M.C.A. amends both Articles 21 and 36, Uniform Code of Military Justice (U.C.M.J.) (10 U.S.C. §§ 821 and 836) to permit greater flexibility in constructing procedural and evidentiary rules for trials of alien unlawful enemy combatants by military commission. Several key provisions of the M.C.A. demonstrate this accommodation of military operational and national security considerations:

(a) While the M.C.A. is consistent with the U.C.M.J. in many respects, neither the U.C.M.J. itself nor “[t]he judicial construction and application of that chapter” is binding on trials by military commission (10 U.S.C. § 948b(c)).

(b) 10 U.S.C. §§ 810, 831(a), (b), & (d), and 832 do not apply to these military commissions (10 U.S.C. § 948b(d)(1)).

(c) Other provisions of the U.C.M.J. apply only as specified in the M.C.A. (10 U.S.C. § 948b(d)(2)).

(d) The M.C.A. provides that the Secretary of Defense, in consultation with the Attorney General, may prescribe rules of evidence and procedure, as well as elements and modes of proof, for offenses tried by these military commissions (10 U.S.C. § 949a(a)), and that if the Secretary promulgates regulations, he shall submit them to the Committees on Armed Services of the Senate and the House of Representatives (M.C.A. § 3(b)).

(e) Such rules “shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence” for trials by general court-martial, so long as the Secretary’s rules and procedures are not contrary to or inconsistent with the M.C.A. (10 U.S.C. § 949a(a)).

(f) Implementing rules must be consistent with the M.C.A. and provide for the accused’s rights to:

(1) be present at trial, examine and respond to evidence admitted against him, cross-examine witnesses who testify against him, obtain and present evidence, and not be required to testify against himself at a military commission proceeding (10 U.S.C. §§ 948r(a), 949a(b)(1)(A) & (B), and 949j(a)); and

(2) assistance by counsel or self-representation (10 U.S.C. § 949a(b)(1)(C) & (D)).

(g) Statements obtained by torture are not admissible (10 U.S.C. § 948r(b)), but statements “in which the degree of coercion is disputed” may be admitted if reliable, probative, and the admission would best serve the interests of justice (10 U.S.C.

§ 948r(c)). In addition, for such statements obtained after December 30, 2005, the methods used to obtain those statements must comply with the Detainee Treatment Act of 2005, enacted on that date (10 U.S.C. § 948r(d)(3)).

(h) In addition, rules may provide for:

(1) admission of evidence if determined to have “probative value to a reasonable person” (10 U.S.C. § 949a(b)(2)(A));

(2) admission of evidence notwithstanding the absence of a search warrant or other authorization (10 U.S.C. § 949a(b)(2)(B));

(3) admission of an accused’s allegedly coerced statements if they comport with § 948r (10 U.S.C. § 949a(b)(2)(C));

(4) authentication of evidence similar to Military Rule of Evidence (Mil. R. Evid.) 901 (10 U.S.C. § 949a(b)(2)(D));

(5) admission of hearsay evidence not meeting an exclusion or exception under the Mil. R. Evid. if the proponent gives notice and the opposing party does not demonstrate that the evidence lacks probative value or reliability (10 U.S.C. § 949a(b)(2)(E)); and

(6) exclusion of any evidence failing to meet the requirements of Mil. R. Evid. 403 (10 U.S.C. § 949a(b)(2)(F)).

2. Determinations of practicability and consistency with military and intelligence activities

The rules of evidence and procedure promulgated herein reflect the Secretary’s determinations of practicability and consistency with military and intelligence activities. Just as importantly, they provide procedural and evidentiary rules that not only comport with the M.C.A. and ensure protection of classified information, but extend to the accused all the “necessary judicial guarantees” as required by Common Article 3. In this regard, these rules represent a delicate balance similar in concept, but different in detail from those provided in the Manual for Courts-Martial.

PART II. RULES FOR MILITARY COMMISSIONS

CHAPTER I. GENERAL PROVISIONS

Rule 101. Scope, title

(a) *In general.* These rules govern the procedures and punishments in all trials by military commissions of alien unlawful enemy combatants engaged in hostilities against the United States as defined in 10 U.S.C. § 948a(1) and (3) for violations of the law of war and other offenses triable by military commissions and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities.

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

Rule 102. Purpose and construction

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

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

Rule 103. Definitions and rules of construction

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

(1) “Alien” means a person who is not a citizen of the United States.

(2) “Article” refers to articles of the Uniform Code of Military Justice (Title 10 U.S.C., Chapter 47) unless the context indicates otherwise.

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

(4) “Capital offense” means an offense for which death is an authorized punishment under the M.C.A. or the law of war.

(5) “Citizen of the United States.” A person may become a citizen of the United States only by birth within the territory of the United States, by birth to parents who are United States citizens, or by naturalization. *See* 8 U.S.C. §§ 1401, 1427.

(6) “Classified information” means the following:

(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security; or

(B) Any restricted data, as that term is defined in section 11y. of the Atomic Energy Act of 1954 (42 U.S.C. § 2014(y)).

(7) “Code” refers to the Uniform Code of Military Justice, unless the context indicates otherwise.

(8) “Convening authority” means the Secretary of Defense or any officer or official of the United States designated by the Secretary of Defense for that purpose.

Discussion

See R.M.C. 504(b) concerning who may convene military commissions.

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

(10) “Military commission” includes, depending on the context:

(A) The military judge and members of a military commission; or

(B) The military judge when a session of a military commission is conducted without members under R.M.C. 803.

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

(12) “Detail” means to order a person to perform a specific temporary duty, unless the context indicates otherwise.

(13) “Geneva Conventions” means the international conventions signed at Geneva on August 12, 1949.

(14) “Lawful enemy combatant” means a person who is:

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command,

wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

(15) “Legal advisor” is an official appointed by authority of the Secretary of Defense who fulfills the responsibilities of that position, as delineated in this Manual, and otherwise provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the Code. A legal advisor may be military or civilian and may include a staff judge advocate, if so appointed.

(16) “M.C.A.” means the Military Commissions Act of 2006, which provides the authority to establish military commissions under 10 U.S.C. Chapter 47A.

(17) “M.C.M.” means the Manual for Courts-Martial.

(18) “Members.” Any active duty commissioned officer is eligible to serve on a military commission. The members of a military commission are voting members detailed by the convening authority who, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

(19) “Military judge” means the presiding officer of a military commission detailed in accordance with 10 U.S.C. § 826 (Article 26). No person is eligible to act as military judge in a case of a military commission under the M.C.A. if he is the accuser or a witness or has acted as investigator or a counsel in the same case. A military judge detailed to a military commission under the M.C.A. may not consult with the members of the commission except in the presence of the accused (except as otherwise provided for in 10 U.S.C. § 949d), trial counsel, and defense counsel, nor may he vote with the members of the commission.

(20) “Party” in the context of parties to a military commission, means:

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

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

(21) “Sexual contact” means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

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

(23) “*sua sponte*” means that the person involved acts on that person’s initiative, without the need for a request, motion, or application.

(24) “Unlawful Enemy Combatant” means:

(A) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(B) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

(C) “Co-belligerent” means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

(25) “Victim” means a person who has suffered direct physical, emotional or pecuniary harm or loss as a result of the commission of an offense as defined in the M.C.A. or the law of war.

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

Discussion

1 U.S.C. §§ 1 through 5, 10 U.S.C. § 101, and 10 U.S.C. § 801 (Article 1) are set forth below.

1 U.S.C. § 1. Words denoting number, gender, and so forth.

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words “insane” and “insane person” and “lunatic” shall include every idiot, lunatic, insane person, and person non compos mentis; the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

“officer” includes any person authorized by law to perform the duties of the office;

“signature” or “subscription” includes a mark when the person making the same intended it as such;

“oath” includes affirmation, and “sworn” includes affirmed;

“writing” includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

§ 2. “County” as including “parish,” and so forth.

The word “county” includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

§ 3. “Vessel” as including all means of water transportation.

The word “vessel” includes every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water.

§ 4. “Vehicle” as including all means of land transportation.

The word “vehicle” includes every description of carriage or other artificial contrivance used or capable of being used, as a means of transportation on land.

§ 5. “Company” or “association” as including successors and assigns.

The word “company” or “association”, when used in reference to a corporation, shall be deemed to embrace the words “successors and assigns of such company or association”, in like manner as if these last-named words, or words of similar import, were expressed.

10 U.S.C. § 101. Definitions

In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

- (1) “United States”, in a geographic sense, means the States and the District of Columbia.
- (2) Except as provided in section 101(1) of title 32 for laws relating to the militia, the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States, “Territory” means any Territory organized after this title is enacted, so long as it remains a Territory.
- (3) “Possessions” includes the Virgin Islands, the Canal Zone, Guam, American Samoa, and the Guano islands, so long as they remain possessions, but does not include any Territory or Commonwealth.
- (4) “Armed forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard.
- (5) “Department”, when used with respect to a military department, means the executive part of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, it means the executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments.
- (6) “Executive part of the department” means the executive part of the Department of the Army, Department of the Navy, or Department of the Air Force, as the case may be, at the seat of government.
- (7) “Military departments” means the Department of the Army, the Department of the Navy, and the Department of the Air Force.
- (8) “Secretary concerned” means—
 - (A) the Secretary of the Army, with respect to matters concerning the Army;
 - (B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy;
 - (C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and
 - (D) the Secretary of Transportation, with respect to matters concerning the Coast Guard when it is not operating as a service in the Navy.
 - (E) the Secretary of Defense is the head of the Department of Defense and is the principal assistant to the President in all matters relating to the Department of Defense.
- (9) “National Guard” means the Army National Guard and the Air National Guard.
- (10) “Army National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, and the Canal Zone, and the District of Columbia, active and inactive, that—
 - (A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article 1, of the Constitution; wholly or partly at Federal expense; and

(C) is federally recognized.

(11) “Army National Guard of the United States” means the reserve component of the Army all of whose members are members of the Army National Guard.

(12) “Air National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article 1, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(13) “Air National Guard of the United States” means the reserve component of the Air Force all of whose members are members of the Air National Guard.

(14) “Officer” means commissioned or warrant officer.

(15) “Commissioned officer” includes a commissioned warrant officer.

(16) “Warrant officer” means a person who holds a commission or warrant in a warrant officer grade.

(17) “Enlisted member” means a person in an enlisted grade.

(18) “Grade” means a step or degree, in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

(19) “Rank” means the order of precedence among members of the armed forces. [Definitions established in clauses (18) and (19) post-date the enactment of the code and, as a result, differ from usage of the same terms in the code and current and prior provisions in the Manual for Courts-Martial (M.C.M.). *See* Articles 1(5) and 25(d)(1); Rules for Courts-Martial 1003(c)(2); paragraphs 13c(1), 83c(2), and 84c, Part IV, M.C.M., 1984. M.C.M. 1951 referred to officer personnel by “rank” and enlisted personnel by “grade.” *See* paragraphs 4c, 16b, 126d, 126i, and 168, M.C.M., 1951. “Rank” as defined in 10 U.S.C. § 101, clause (19) above, refers to the M.C.M., 1951 provision regarding “lineal precedence, numbers, and seniority.” Paragraph 126i, M.C.M., 1951; *see also* paragraph 126i, M.C.M., 1969 (Rev). Except where lineal position or seniority is clearly intended, rank, as commonly and traditionally used, and grade refer to the current definition of “grade.”]

(20) “Rating” means the name (such as “boatswain’s mate”) prescribed for members of an armed force in an occupational field. “Rate” means the name (such as “chief boatswain’s mate”) prescribed for members in the same rating or other category who are in the same grade (such as chief petty officer or seaman apprentice). [Note: The definitions in clauses (3), (15), (18)-(21), (23)-(30), and (31)-(33) reflect the adoption of terminology that, though undefined in the source statutes restated in this title, represents the closest practicable approximation of the ways in which the terms defined have been most commonly used. A choice has been made where established uses conflict.]

(21) “Authorized strength” means the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces.

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

(23) “Active duty for a period of more than 30 days” means active duty under a call or order that does not specify a period of 30 days or less.

(24) “Active service” means service on active duty.

(25) “Active status” means the status of a reserve commissioned officer, other than a commissioned warrant officer, who is not in the inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

(26) “Supplies” includes material, equipment, and stores of all kinds.

(27) “Pay” includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(28) “Shall” is used in an imperative sense.

(29) “May” is used in a permissive sense. The words “no person may . . .” mean that no person is required, authorized, or permitted to do the act prescribed.

(30) “Includes” means “includes but is not limited to.”

(31) “Inactive-duty training” means—

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. It includes those duties when performed by Reserves in their status as members of the National Guard.

(32) “Spouse” means husband or wife, as the case may be.

(33) “Regular”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(34) “Reserve”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of an armed force.

(35) “Original”, with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to his most recent appointment in the component that is neither a promotion nor a demotion.

(36) Repealed.

(37) “Active-duty list” means a single list for the Army, Navy, Air Force or Marine Corps (required to be maintained under section 620 of this title), which contains the names of all officers of that armed force, other than officers described in section 641 of this title, who are serving on active duty.

(38) “Medical officer” means an officer of the Medical Corps of the Army, an officer of the Medical Corps of the Navy, or an officer in the Air Force designated as a medical officer.

(39) “Dental officer” means an officer of the Dental Corps of the Army, an officer of the Dental Corps of the Navy, or an officer of the Air Force designated as a dental officer.

(40) “General officer” means an officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

(41) “Flag officer” means an officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or commodore.

(d) 10 U.S.C. § 801. Article 1. Definitions. In this chapter:

(1) “Judge Advocate General” means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

(2) The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.

(3) “Commanding officer” includes only commissioned officers.

(4) “Officer in charge” means a member of the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(5) “Superior commissioned officer” means a commissioned officer superior in rank or command.

(6) “Cadet” means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.

(7) “Midshipman” means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service.

(8) “Military” refers to any or all of the armed forces.

(9) “Accuser” means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(10) “Military judge” means a commissioned officer of the armed forces detailed to preside over the military commission in accordance with section 826 of this title (article 26). [*See also* Rules for Courts-Martial 103(15).]

(11) “Legal officer” means any commissioned officer of the Navy, Marine Corps or Coast Guard designated to perform legal duties for a command.

(12) “Judge Advocate” means—

(A) an officer of the Judge Advocate General’s Corps of the Army or Navy; or

(B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate.

(13) “National security” means the national defense and foreign relations of the United States.

Rule 104. Unlawfully Influencing Action of Military Commissions

(a) General prohibitions.

(1) *Convening authorities.* No authority convening a military commission under the M.C.A. may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions or in the conduct of the proceedings.

(2) *All persons.* No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts or the exercise of professional judgment by trial counsel or defense counsel.

(3) Exceptions.

(A) *Instructions.* Subsections (a)(1) and (2) of this rule do not apply with respect to general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions.

(B) *Court instructions.* Subsections (a)(1) and (2) of this rule do not apply with respect to statements and instructions given in open proceedings by a military judge or counsel.

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

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

(b) Prohibitions concerning evaluations.

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

(A) Consider or evaluate the performance of duty of any such person as a member of a military commission; or

(B) Give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel represented any accused before a military commission.

(2) *Evaluation of military judge.* The convening authority of a military commission under this chapter shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to the military commission, which relates to his performance of duty as a military judge on the military commission.

Rule 105. Direct communications: convening authorities and Legal Advisors; among Legal Advisors

(a) *Convening authorities and legal advisors.* Convening authorities shall at all times communicate directly with their legal advisors in matters relating to the administration of military commissions.

(b) *Among legal advisors.* Legal advisors may communicate directly with colleagues and superiors.

(c) *Among members of the Judge Advocate General's Corps.* Nothing in this Manual is intended to preclude Judge Advocates from seeking and receiving advice, as appropriate, from their respective service Judge Advocate Generals.

Rule 106. Delivery of unlawful enemy combatants to civilian authorities

Under such regulations as the Secretary of Defense may prescribe, unlawful enemy combatants may be delivered upon request to civilian authorities, foreign or domestic, for trial.

Rule 108. Rules of court

The Chief Judge for Military Commissions may make rules of court not inconsistent with these rules for the conduct of the military commission's proceedings. Such rules shall be disseminated in accordance with procedures prescribed by the Chief Judge or a person to whom this authority has been delegated. Noncompliance with such procedures shall not affect the validity of any rule of court with respect to a party who has received actual and timely notice of the rule or who has not been prejudiced under 10 U.S.C. § 859 (Article 59) by the absence of such notice. Copies of all rules of court issued under this rule shall be forwarded to the Convening Authority concerned.

Rule 109. Professional responsibility rules for military judges and counsel

(a) *In general.* Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the M.C.A. and this Manual.

(b) *Application of professional responsibility rules to attorneys.* (1) In addition to complying with State and service-specific Rules of Professional Conduct, all attorneys practicing before

military commissions shall adhere to any rules of professional responsibility prescribed by the Secretary of Defense and shall, in the course of practice before military commissions, apply state, service-specific and commission-specific rules of practice and professional responsibility consistent with the provisions of this Rule.

(2) Failure to adhere to the rules applicable to trials by military commission may be subject to appropriate action by the military judge, the convening authority, the Judge Advocate General of the appropriate armed force, or the General Counsel of the Department of Defense. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to the M.C.A. and this Manual, punitive measures imposed under R.M.C. 809, and any other lawful sanction.

(3) Recognizing the specialized nature of military commissions and military commissions practice the following principles and procedures shall apply to trials by military commission under the M.C.A. and this Manual:

(A) In effecting a choice of law between the professional responsibility rules of a counsel's licensing jurisdiction and the rules, regulations, and instructions applicable to trials by military commission, the latter shall be considered paramount, unless such consideration is expressly forbidden by the rules of a counsel's licensing jurisdiction.

(i) Any military counsel who believes such an express prohibition exists shall immediately bring the matter to the attention of the chief prosecutor or chief defense counsel, the convening authority, and the military judge, if one has been detailed. If the conflict cannot be resolved, the military judge or the chief prosecutor or chief defense counsel, as appropriate, shall remove the affected counsel from the case and may effect detail of another military counsel.

(ii) Any civilian defense counsel who raises such a prohibition may elect to remain on the case, but may not thereafter raise the conflict as an impediment to complying with any statute, rule, regulation, or instruction applicable to trials by military commissions and waives any issue arising from any alleged prohibition or conflict on appeal, either interlocutory or due course.

(B) Military commissions shall be deemed a "court," "forum," or "tribunal" for the purposes of construing any choice of law provision in the professional responsibility rules of a counsel's licensing jurisdiction that defers to the rules of a court, tribunal, or other forum.

(C) If an express conflict exists between the rules applicable to trials by military commission and the branch specific armed forces Rules of Professional Conduct, the convening authority or military judge shall apply the rules applicable to trials by military commission only after the legal advisor to the convening authority has coordinated with The Judge Advocate General of the appropriate armed force to resolve the conflict. If the conflict cannot be resolved, the chief prosecutor or chief defense counsel, as appropriate, or the military judge shall remove the affected counsel from the case and may effect detail of another military counsel.

(D) Prior to approving assignment of a military defense counsel to the Office of Chief Defense Counsel, the chief defense counsel will verify that licensing bar association rules of each such counsel cannot reasonably be foreseen as an impediment to that counsel's adherence to the rules of professional responsibility expressly applicable to trials by military commission.

(c) *Application of professional responsibility rules to judges.* If the conduct of a military judge, in the course of military commissions practice appears to be in violation of applicable service-specific Rules of Professional Conduct or rules of other jurisdictions that regulate the professional conduct of attorneys, and the military judge's conduct was not undertaken to comply with an express requirement of the M.C.A., this Manual, or other statute or regulation applicable to trials by military commission, the convening authority may forward information concerning such instances to the Judge Advocate General of the appropriate armed force.

CHAPTER II. JURISDICTION

Rule 201. Jurisdiction in general

(a) *Nature of jurisdiction of military commissions.*

- (1) The jurisdiction of a military commission is entirely penal or disciplinary.

Discussion

“Jurisdiction” means the power to hear a case and to render a legally competent decision. A military commission has no power to adjudge civil remedies. For example, a military commission may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property.

- (2) The M.C.A. applies in all places.

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

(b) *Requisites of military commission jurisdiction.*

- (1) *Jurisdiction of military commissions generally.* A military commission shall have jurisdiction to try any offense made punishable by the M.C.A. or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

- (2) *Lawful enemy combatants.* Military commissions under the M.C.A. shall not have jurisdiction over lawful enemy combatants.

- (3) *Specific requisites for military commission jurisdiction.* A military commission always has jurisdiction to determine whether it has jurisdiction. Otherwise for a military commission to have jurisdiction:

- (A) The military commission must be convened by an official empowered to convene it;

- (B) The military commission must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here “personnel” includes only the military judge and the members;

- (C) Each charge before the military commission must be referred to it by a competent authority;

- (D) The accused must be a person subject to military commission jurisdiction; and

(E) The offense must be subject to military commission jurisdiction.

Discussion

See R.M.C. 203. The judgment of a military commission without jurisdiction is void and is entitled to no legal effect.

(c) *Contempt.* A military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

Discussion

See R.M.C. 809 for procedures and standards for contempt proceedings.

(d) *Types of military commissions.* Except as otherwise expressly provided, the military commissions may try any person subject to the M.C.A. for any offense made punishable under the M.C.A. or the law of war. Upon a finding of guilty of an offense made punishable by the M.C.A. or the law of war, a military commission may, within limits prescribed by this Manual, adjudge any punishment authorized under R.M.C. 1003.

(1) *Non-capital commissions.* All cases not referred capital by the convening authority are non-capital cases, even if they contemplate trial of one or more capital offenses.

(2) *Capital commission.* Any commission in which:

(A) The case has been referred with a special instruction that the case be tried as capital; and

(B) A sentence of death is specifically authorized under the M.C.A. or the law of war for one or more offenses referred to trial.

Rule 202. Persons subject to the jurisdiction of the military commissions

(a) *In general.* The military commissions may try any person when authorized to do so under the M.C.A.

(b) *Determination of unlawful enemy combatant status by Combatant Status Review Tribunal or other competent tribunal dispositive.* A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A. The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals.

Discussion

Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal (“C.S.R.T.”) process to determine an individual’s combatant status. The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission. The M.C.A. provides that an individual is deemed an unlawful enemy combatant for purposes of the personal jurisdiction of a military commission if the individual has been determined to be an unlawful enemy combatant by a C.S.R.T. or other competent tribunal. Where combatant status of the accused may otherwise be relevant, the parties may establish the accused’s status by evidence adduced in accordance with the commission rules. The determination of an individual’s combatant status for purposes of establishing a commission’s jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government’s obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.

Combatant Status Review Tribunal. The M.C.A. provides that an alien determined to be an unlawful enemy combatant by a C.S.R.T. shall be subject to military commission jurisdiction, whether the C.S.R.T. determination was made “before, on, or after the date of the enactment” of the M.C.A. *See* 10 U.S.C. § 948a(1)(ii). At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an “enemy combatant” if he “was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners.” The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.

Other Competent Tribunal. The M.C.A. also provides that an individual shall be deemed an “unlawful enemy combatant” if he has been so determined by a competent tribunal established consistent with the law of war. *See* 10 U.S.C. § 948a(1)(ii).

The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.

(c) *Procedure.* The jurisdiction of a military commission over an individual attaches upon the swearing of charges.

Rule 203. Jurisdiction over the offense

Military commissions may try any offense under the M.C.A. or the law of war.

CHAPTER III. INITIATION OF CHARGES; APPREHENSION; PRETRIAL RESTRAINT; RELATED MATTERS

Rule 301. Report of offense

Any person may report an offense subject to trial by military commission.

Rule 307. Swearing of charges

(a) *Who may swear charges.* Any person subject to the Code may swear charges.

Discussion

No person may be ordered to swear charges to which that person is unable to make truthfully the required oath. *See* Article 30(a) of the Code and section (b) of this rule. A person who has been the accuser or nominal accuser (*see* Article 1(9) of the Code) may not also serve as the convening authority of a military commission to which the charges are later referred.

(b) *How charges are sworn; oath.* A person who swears charges must:

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

(2) State that the signer has personal knowledge of or has reason to believe, the matters set forth therein; and that they are true in fact to the best of that person's knowledge and belief.

Discussion

See 10 U.S.C. § 948q(a). The following form may be used to administer the oath:

“You (swear) (affirm) that you are a person subject to the Uniform Code of Military Justice, that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s), and that the same are true in fact to the best of your knowledge and belief. (So help you God.)”

The accuser's belief may be based upon reports of others in whole or in part.

(c) *How to allege offenses.*

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

(2) *Charge.* A charge states the punitive article of the Act, law of war, or offense as defined in this Manual that the accused is alleged to have violated.

(3) *Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Except for aggravating

circumstances under R.M.C. 1001(b)(2), facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

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

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

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

Rule 308. Notification to accused of charges

Upon the swearing of the charges and specifications, the accused shall be informed of the charges against him as soon as practicable. Such charges shall be in English and, if appropriate, in another language that the accused understands.

CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general

(a) *Who may dispose of charges.* Only the Secretary of Defense or an officer or official of the United States designated by the Secretary for the purpose to convene military commissions may dispose of charges.

(b) *How charges may be disposed of.* The authority may dispose of the charges by dismissing any or all of them or referring any or all of them to a military commission in a prompt manner.

Discussion

A proper authority may dispose of charges individually or collectively. If charges are referred to a military commission, ordinarily all known charges should be referred to a single military commission. Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed. When all charges and specifications are dismissed, the accuser and the accused ordinarily should be informed. A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by military commission is not appropriate. Charges may be dismissed because trial would be detrimental to the prosecution of a war or harmful to national security, *see* R.M.C. 407(b).

Rule 406. Pretrial advice

(a) *In general.* Before any charge may be referred for trial by a military commission, it shall be referred to the legal advisor of the convening authority for consideration and advice.

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

(1) Conclusion with respect to whether each specification alleges an offense under the M.C.A.;

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

(3) Conclusion with respect to whether a military commission would have jurisdiction over the accused and the offense;

(4) Conclusion, after consultation with the Office of the Director of National Intelligence and appropriate intelligence agencies, with respect to whether trial of the charges would be harmful to national security; and

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

Discussion

The legal advisor is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the legal advisor is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charging document is forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; and discussion of significant aggravating, extenuating, or mitigating factors.

Whatever matters are included in the advice, whether or not they are required, should be accurate. Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective.

The standard of proof to be applied in R.M.C. 406(b)(2) is probable cause. *See* R.M.C. 601(d). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion.

(c) *Distribution.* A copy of the advice of the legal advisor shall be provided to the defense if charges are referred to trial by military commission.

Rule 407. Action by convening authority

(a) *Disposition.* When in receipt of charges, the convening authority may:

- (1) Dismiss any charges;
- (2) Dismiss any specification;
- (3) Subject to R.M.C. 601(d), refer any or all charges to a military commission.

(b) *National security matters.* When in receipt of charges the trial of which the convening authority finds would probably be inimical to the prosecution of a war or harmful to national security, that convening authority, unless otherwise prescribed by regulations of the Secretary of Defense, and after appropriate consultation with the Office of the Director of National Intelligence, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to a trial. As the convening authority finds appropriate, he may dismiss the charges, or authorize trial of them.

CHAPTER V. MILITARY COMMISSION COMPOSITION AND PERSONNEL; CONVENING MILITARY COMMISSION

Rule 501. Composition and personnel of military commission

(a) *Composition of a military commission.*

(1) A non-capital military commission shall consist of a military judge and at least five members.

(2) Subject to the provisions of (3), below, a capital military commission shall consist of a military judge and at least twelve members.

(3) In any case in which twelve members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission but not fewer than nine members. In such a case, the convening authority shall make a detailed statement, to be appended to the record, stating why a greater number of members were not reasonably available.

(b) *Counsel in a military commission.* Military trial and defense counsel shall be detailed to military commissions by the Chief Prosecutor and Chief Defense Counsel, respectively. Assistant trial and associate or assistant defense counsel may also be detailed. Civilian trial counsel may be detailed by the Chief Prosecutor, with the approval of the convening authority and, if such counsel are employed by another government agency, with the approval of the head of that agency. Should an accused, pursuant to his request, be deemed competent to represent himself, detailed defense counsel shall serve as standby counsel.

(c) *Court reporters.* The convening authority of the military commission shall detail to or employ for the commission qualified court reporters to make a verbatim recording of the proceedings of and testimony taken before the commission.

(d) *Interpreters.* The convening authority may detail or employ for the military commission interpreters who shall interpret for the commission and as necessary, for the trial counsel, defense counsel, and the accused.

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

Rule 502. Qualifications and duties of personnel of military commissions

(a) *Members.*

(1) *Qualifications.* The members detailed to a military commission shall be those active duty commissioned officers, who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial

temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

Discussion

Retired officers of any Regular component and members of Reserve components of the armed forces, who are otherwise qualified, may serve as members provided that they are on active duty.

(2) *Duties.* The members of a military commission shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a military commission may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material.

Discussion

Members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Except as provided in these rules, members should not discuss any part of a case with anyone until the matter is submitted to them for determination. Members should not on their own visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. Members should not form an opinion on any matter in connection with a case until that matter has been submitted to them for determination.

(b) *President.*

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

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

(A) Preside over closed sessions of the members of the military commission during their deliberations;

(B) Speak for the members of the commission when announcing the decision of the members or requesting instructions from the military judge;

(c) *Qualifications of military judge.* A military judge shall be a commissioned officer of the armed forces, serving on active duty who is a member of the bar of a Federal court or a member of the bar of the highest court of a State or the District of Columbia and who is certified to be qualified for duty under 10 U.S.C. § 826 (Article 26 of the Code) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

(1) *Ineligibility of certain individuals.* No person is eligible to act as military judge in a case of a military commission if he is the accuser or a witness or has acted as investigator or a counsel in the same case.

(2) *Consultation with members; ineligibility to vote.* A military judge detailed to a military commission may not consult with the members of the commission except in the presence of: the accused provided the accused hasn't been excluded from certain proceedings under the rules, trial counsel, and defense counsel, nor may he vote with the members of the commission.

(3) *Other duties.* A commissioned officer who is certified to be qualified for duty as a military judge of a military commission may perform such other duties as are assigned to him by or with the approval of the Judge Advocate General of the armed force of which such officer is a member or the designee of such Judge Advocate General.

(4) *Prohibition on evaluation of fitness by convening authority.* The convening authority of a military commission shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to the military commission which relates to his performance of duty as a military judge on the military commission.

(d) *Counsel.*

(1) *Certified counsel not required.* Ordinarily, only persons certified under 10 U.S.C. § 827(b) (Article 27(b) of the Code) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as a trial counsel or defense counsel or assistant or associate defense counsel in military commission. A civilian who is a member of the bar of a Federal court or the highest court of a State or the District of Columbia and is otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense may be detailed as a trial counsel for a military commission.

Discussion

To be certified by the Judge Advocate General concerned under Article 27(b) of the Code, a person must be a member of the bar of a Federal court or the highest court of a State or the District of Columbia. The Judge Advocate General concerned may establish additional requirements for certification.

(2) *Role of detailed defense counsel when civilian counsel has been hired.* When the accused has civilian defense counsel, the detailed counsel is "associate counsel" unless excused from the case (*see* R.M.C. 506(b)).

(3) *Qualifications of civilian defense counsel.* Civilian defense counsel who represent an accused in a military commission shall:

(A) Be a member of the bar of a Federal court or of the bar of the highest court of a State, the District of Columbia, or U.S. possession; and

(B) Be a United States citizen; and

(C) Not have been the subject of disqualifying action by a bar or other competent authority; and

(D) Have obtained or be eligible to obtain a security clearance at the level of Secret or higher, as required; and

(E) Have signed the agreement prescribed by the Secretary pursuant to 10 U.S.C. § 949c(b)(3)(E).

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

(A) The accuser;

(B) An investigating officer;

(C) A military judge; or

(D) A member.

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

Discussion

In the absence of evidence to the contrary, it is presumed that a person who, between referral and trial of a case, has been detailed as counsel for any party to the military commission to which the case has been referred, has acted in that capacity.

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

Discussion

(A) *General duties before trial.* Upon receipt of referred charges, trial counsel should cause a copy of the charges to be served upon accused (*see* R.M.C. 602). Trial counsel should: examine the charging document and allied papers for completeness and correctness; correct (and initial) minor errors or obvious mistakes in the charges but may not without authority make any substantial changes (*see* R.M.C. 603); and assure that the information about the accused on the charge sheet and any evidence of previous convictions are accurate.

(B) *Relationship with convening authority.* Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers; report an actual or anticipated reduction of the number of members below quorum to the convening authority; bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons.

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

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

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

(F) *Post-trial duties.* Trial counsel must promptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, and the officer in charge of the confinement facility, and supervise the preparation, authentication, and distribution of copies of the record as required by these rules (*see* R.M.C. 1103; 1104).

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

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

Discussion

(A) *Initial advice by military defense counsel.* Defense counsel should promptly explain to the accused the general duties of the defense counsel and inform the accused of the right to retain civilian counsel. Unless the accused directs otherwise, military counsel will begin preparation of the defense immediately after being detailed without waiting for approval of a request for retention of civilian counsel (*see* R.M.C. 506).

(B) *General duties of defense counsel.* Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (*see also* Mil. Comm. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused's understanding and choice may be made a matter of record.

Defense counsel must explain to the accused: the type of the military commission, capital or non-capital, the right to plead guilty or not guilty and the meaning and effect of a plea of guilty; the applicable rights to introduce evidence, to testify or remain silent, and to assert available defenses; and the rights to present evidence during

sentencing and the rights of the accused to testify under oath, make an unsworn statement, and have counsel make a statement on behalf of the accused. These explanations must be made regardless of the intentions of the accused as to testifying and pleading. Defense counsel should try to obtain complete knowledge of the facts of the case before advising the accused, and should give the accused a candid opinion of the merits of the case.

(C) *Preparation for trial.* Defense counsel may have the assistance of trial counsel in obtaining the presence of witnesses and evidence for the defense (*see* R.M.C. 703). Defense counsel should consider the elements of proof of the offenses alleged and the pertinent military commission rules of evidence to ensure that evidence that the defense plans to introduce is admissible and to be prepared to object to inadmissible evidence offered by the prosecution. Defense counsel should: prepare to make an opening statement of the defense case (*see* R.M.C. 913(b)); and prepare to examine and cross-examine witnesses, and to make final argument on the findings and, if necessary, on sentencing (*see* R.M.C. 919; 1001(g)).

(D) *Trial.* Defense counsel should represent and protect the interests of the accused at trial. When a trial proceeds in the absence of the accused, defense counsel must continue to represent the accused.

(E) *Post-trial duties.*

(i) *Deferment of confinement.* If the accused is sentenced to confinement, the defense counsel must explain to the accused the right to request the convening authority, or general or flag officer in command should their subordinate organization exercise control over the accused, or if no longer under the jurisdiction or control of either a convening authority or military command to any official so empowered by the Secretary of Defense or his designee to defer service of the sentence to confinement and assist the accused in making such a request if the accused chooses to make one (*see* R.M.C. 1101(c)).

(ii) *Examination of the record; appellate brief.* The defense counsel should in any case examine the record for accuracy and note any errors in it. This notice may be forwarded for attachment to the record (*see* R.M.C. 1103(d) and (e)).

(iii) *Submission of matters.* If the accused is convicted, the defense counsel may submit to the convening authority matters for the latter's consideration in deciding whether to approve the sentence or to disapprove any findings (*see* R.M.C. 1105). Defense counsel should discuss with the accused the right to submit matters to the convening authority and the powers of the convening authority in taking action on the case. Defense counsel may also submit a brief of any matters counsel believes should be considered on further review.

(iv) *Appellate rights.* Defense counsel must explain to the accused the rights to appellate review that apply in the case, and advise the accused concerning the exercise of those rights. Defense counsel should explain the powers of the Court of Military Commission Review and advise the accused of the right to be represented by counsel before it (*see* R.M.C. 1202). Defense counsel should also explain the right to review by the United States Court of Appeals for the District of Columbia Circuit and the possibility of further review by the Supreme Court (*see* R.M.C. 1205). Defense counsel must explain the consequences of waiver of appellate review, when applicable, and, if the accused elects to waive appellate review, defense counsel will assist in preparing the waiver (*see* R.M.C. 1110(b)(2)).

(v) *Examination of post-trial recommendation.* When the post-trial recommendation is served on defense counsel, defense counsel should examine it and reply promptly in writing, noting any errors or omissions. Failure to note defects in the recommendation waives them (*see* R.M.C. 1106(e)).

(F) *Associate or assistant defense counsel.* Associate or assistant counsel may act in that capacity only under the supervision and by the general direction of the defense counsel. A detailed defense counsel becomes associate defense counsel when the accused has other military or civilian counsel and detailed counsel is not excused. Although associate counsel acts under the general supervision of the defense counsel, associate defense counsel may act without such supervision when circumstances require and only if such counsel has the qualifications to act as defense counsel. Responsibility for trial of a case may not devolve upon an assistant who is not qualified to serve as defense counsel. An assistant defense counsel may not act in the absence of the defense counsel at trial unless the assistant has the qualifications required of a defense counsel. Unless the contrary appears, all acts of an assistant or associate defense counsel are presumed to have been done under the supervision of the defense counsel.

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

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

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

(A) The accuser;

(B) A witness;

(C) Counsel for any party; or

(D) A member of the military commission or of any earlier commission of which the trial is a rehearing or new or other trial.

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

(A) *Interpreters.* Interpreters shall interpret for the commission and as necessary, for the trial counsel and defense counsel and for the accused.

Discussion

The accused also may retain an otherwise qualified unofficial interpreter without expense to the United States.

(B) *Reporters.* Reporters shall make a verbatim recording of the proceedings of and testimony taken before the military commission and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

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

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

Discussion

See R.M.C. 807 regarding oaths for reporters, interpreters, and escorts.

(f) *Action upon discovery of disqualification or lack of qualifications.* Any person who discovers that a person detailed to a military commission is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made to the convening authority, if prior to the military commission's first session, or to the military judge, if during or after trial.

Rule 503. Detailing members, military judges, and counsel

(a) *Members.* The convening authority shall detail active duty commissioned officers as members and alternate members for trials by military commission. Each of the military departments shall nominate officers in the number and grades requested by the convening authority, who meet the qualifications of 10 U.S.C. § 825 (Article 25 of the Code). The convening authority shall select from the lists of available officers those who are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

Discussion

See R.M.C. 501.

(b) *Military judge.*

(1) *Military judges.* The military judge of each military commission shall be detailed by the Chief Trial Judge from a pool of certified military judges nominated for that purpose by The Judge Advocates General of each of the military departments. Each military judge in the pool shall have at least two years' experience as a military judge while certified to be qualified for duty as a military judge in a general court-martial. Any officer so selected who is not currently serving on active duty, but consents to the selection, shall be ordered to active duty for this purpose, in accordance with applicable service regulations.

Discussion

See R.M.C. 502(c) discussion.

(2) *Chief judge for military commissions.* The Convening Authority shall select a military judge from the pool described in subsection (1) to serve as the Chief Judge of the Military Commissions Trial Judiciary. The Chief Trial Judge shall have extensive experience as a military judge certified to be qualified for duty as a military judge in general courts-martial and shall be currently appointed in the grade of colonel or captain. If the officer selected is not currently serving on active duty, but consents to the selection, he or she shall be ordered to active duty for this purpose, in accordance with applicable service regulations, for a period not to exceed three years.

(3) *Military Commissions Trial Judiciary.* The Military Commissions Trial Judiciary shall consist of the Chief Trial Judge and such military judges as have been nominated under (b)(1) to comprise the pool from which military judges will be detailed to military commissions.

(c) *Counsel.* Counsel shall be detailed in accordance with regulations of the Secretary of Defense, or by the Chief Prosecutor or the Chief Defense Counsel. If authority to detail counsel has been delegated to a person, that person may detail himself or herself as counsel. The Chief Prosecutor and Chief Defense Counsel, who shall have such qualifications as are prescribed in the M.C.A. and in regulations that may be promulgated by the Secretary of Defense, shall be selected and assigned by the Secretary of Defense or his designee.

(d) *Record of detail.* The orders detailing counsel shall indicate who made the detail and shall be included in the record of trial. The military judge shall announce his or her detail information on the record at the military commission.

Rule 504. Convening military commissions

(a) *In general.* A military commission is created by a convening order of the convening authority.

(b) *Who may convene military commissions.* A military commission may be convened by the Secretary of Defense or persons occupying positions designated as a convening authority by the Secretary of Defense. The power to convene military commissions may not be delegated.

(c) *Disqualification.*

(1) *Accuser.* An accuser may not convene a military commission for the trial of the person accused.

(2) *Action when disqualified.* When a convening authority who would otherwise convene a military commission is disqualified in a case, the charges shall be forwarded to the Secretary of Defense for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority.

(d) *Convening orders.* A convening order for a military commission shall detail the members and may designate where the military commission will meet. If the convening authority has been designated by the Secretary of Defense, the convening order shall so state. Additional matters to be included in convening orders may be prescribed by the Secretary of Defense.

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

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

(a) *In general.* Subject to this rule, the members, military judge, and counsel may be changed by an authority competent to detail such persons. Members also may be excused as provided elsewhere in this rule.

Discussion

Changes of the members of the military commission should be kept to a minimum. If extensive changes are necessary and no session of the military commission has begun, it may be appropriate to withdraw the charges from one commission and refer them to another (*see* R.M.C. 604).

(b) *Procedure.* When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge, such persons shall be detailed in accordance with R.M.C. 503. An order changing the members of the commission, except one

which excuses members without replacement, shall be reduced to writing before authentication of the record of trial. Excusal of any member, including an alternate member, shall be reflected in the record.

Discussion

When members or counsel have been excused and the excusal is not reduced to writing, the excusal should be announced on the record. A member who has been temporarily excused need not be formally reappointed to the military commission.

(c) Changes of members.

(1) *Before assembly.* Before the military commission is assembled, the convening authority may change the members of the military commission without showing cause.

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

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

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

(C) As a result of challenge.

(3) *New members.* New members may be detailed after assembly only when, as a result of excusals under subsection (c)(2) of this rule, the number of members of the commission is reduced below a quorum.

(d) Changes of detailed counsel.

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

(2) *Defense counsel.*

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

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

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

(ii) For other good cause shown on the record.

(e) *Change of military judge.*

(1) *Before assembly.* Before the military commission is assembled, the military judge may be changed by the Chief Trial Judge, without cause shown on the record.

(2) *After assembly.* After the military commission is assembled, the military judge may be changed by the Chief Trial Judge only when, as a result of disqualification under R.M.C. 902 or for good cause shown, the previously detailed military judge is unable to proceed.

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

Rule 506. Accused’s rights to counsel

(a) *In general.* The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by the detailed defense counsel. The accused is not entitled to be represented by more than one military counsel.

Discussion

See R.M.C. 502(d)(3) for determining qualifications for civilian defense counsel. *See* R.M.C. 502(d)(6) and 505(d)(2) concerning the duties and substitution of defense counsel. These rules and this Manual do not prohibit participation on the defense team by consultants not expressly covered by section (d) of this rule, as provided in such regulations as the Secretary of Defense may prescribe, subject to the requirements of Mil. Comm. R. Evid. 505.

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

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

(d) *Other persons present.* Subject to the discretion of the military judge, 10 U.S.C. § 949d(f), and such regulations as the Secretary of Defense may prescribe, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under R.M.C. 502.

Discussion

See also Mil. Comm. R. Evid. 615 if the person is a potential witness in the case.

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

Rule 601. Referral

(a) *In general.* Referral is the order of a convening authority that charges against an accused will be tried by a specified military commission.

Discussion

Referral of charges requires three elements: a convening authority who is authorized to convene the military commission and is not disqualified (*see* R.M.C. 601(b) and (c)); sworn charges that have been received by the convening authority for disposition (*see* R.M.C. 307); and a military commission convened by that convening authority or a predecessor. If trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, *see* R.M.C. 407(b).

(b) *Who may refer.* The Secretary of Defense or a designated convening authority may refer charges to a military commission.

(c) *Disqualification.* An accuser may not refer charges to a military commission.

Discussion

Convening authorities are not disqualified from referring charges by prior participation in the same case except when they have acted as accuser.

(d) *When charges may be referred.* If the convening authority finds, or is advised by a legal advisor that there are reasonable grounds to believe that an offense triable by a military commission has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or legal advisor may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a military commission except in compliance with R.M.C. 406. The convening authority or legal advisor shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(e) *How charges shall be referred.*

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

Discussion

Referral is ordinarily evidenced by an indorsement to the charging document. The signature may be that of a person acting by the order or direction of the convening authority. In such a case, the signature element must reflect the signer's authority.

The convening authority may instruct that the charges against the accused be tried with certain other charges against the accused. (*See* subsection (2) below.)

The convening authority may instruct that charges against one accused be referred for joint or common trial with another accused. (*See* subsection (3) below.)

Capital offenses may be referred as non-capital.

Any special instructions must be stated in the referral indorsement.

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

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

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

Discussion

A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. A joint offense is one committed by two or more persons acting together with a common intent. Offenders are properly joined only if there is a common unlawful design or purpose. Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.

(f) *The Secretary of Defense.* The Secretary of Defense may cause charges, whether or not referred, to be transmitted to him for further consideration, including, if appropriate, referral.

Rule 602. Service of charges

The trial counsel assigned to a case before a military commission shall cause to be served upon the accused and military defense counsel a copy of the charges upon which trial is to be had. Such charges shall be served in English and, if appropriate, in another language that the accused understands. Such service shall be made sufficiently in advance of trial to prepare a defense.

Discussion

Trial counsel should comply with this rule upon receipt of the charges. Whenever after service the charges are amended or changed the trial counsel must give notice of the changes to the defense counsel. Whenever such amendments or changes add a new party, a new offense, or substantially new allegations, the charge sheet so amended or changed must be served anew (*see also* R.M.C. 603). Service may be made only upon the accused; substitute service upon defense counsel is insufficient. The trial counsel should promptly inform the defense counsel

when charges have been served. If the accused has questions when served with charges, the accused should be told to discuss the matter with defense counsel.

Rule 603. Changes to charges and specifications

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

Discussion

Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors. Minor changes also include those which reduce the seriousness of an offense, as when the value of an allegedly stolen item in a larceny specification is reduced, or when a desertion specification is amended to allege only unauthorized absence.

(b) *Minor changes before arraignment.* Any person forwarding, acting upon, or prosecuting charges on behalf of the United States may make minor changes to charges or specifications before arraignment.

Discussion

Charges forwarded or referred for trial should be free from defects of form and substance. Minor errors may be corrected and the charge may be redrafted without being sworn anew by the accuser. Other changes should be signed and sworn to by an accuser. All changes in the charges should be initialed by the person who makes them. A trial counsel acting under this provision ordinarily should consult with the convening authority before making any changes which, even though minor, change the nature or seriousness of the offense.

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

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

Discussion

If there has been a major change or amendment over the accused's objection to a charge already referred, a new referral is necessary. When charges are re-referred, they must be served anew under R.M.C. 602.

Rule 604. Withdrawal of charges

(a) *Withdrawal.* The convening authority may for any reason cause any charges or specifications to be withdrawn from a military commission at any time before findings are announced.

Discussion

Charges which are withdrawn from a military commission should be dismissed (*see* R.M.C. 401(b)), unless it is intended to refer them anew promptly or to forward them to another authority for disposition.

Charges should not be withdrawn from a military commission arbitrarily or unfairly to an accused. (*See also* section (b) of this rule.)

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

Charges which have been properly referred to a military commission may be withdrawn only by the direction of the convening authority or a superior competent authority in the exercise of that officer's independent judgment. When directed to do so by convening authority or a superior competent authority, trial counsel may withdraw charges or specifications by lining out the affected charges or specifications, renumbering remaining charges or specifications as necessary, and initialing the changes. Charges and specifications withdrawn before commencement of trial will not be brought to the attention of the members. When charges or specifications are withdrawn after they have come to the attention of the members, the military judge must instruct them that the withdrawn charges or specifications may not be considered for any reason.

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

Discussion

See also R.M.C. 915 (Mistrial). When charges which have been withdrawn from a military commission are referred to another military commission, the reasons for the withdrawal and later referral should be included in the record of the later military commission, if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding.

Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of any rights to which he may be entitled, or with the impartiality of a military commission. A withdrawal is improper if it was not directed personally and independently by the convening authority or by a superior competent authority.

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

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

(a) *Generally.*

(1) In interviewing and obtaining statements, oral and written, from witnesses, both trial and defense counsel may use audio-visual and/or telecommunications technology when practicable, and shall have equal access to such technology in preparation for and during trial.

(2) The right to examine, under this rule, includes the right to copy, subject to 10 U.S.C. § 949j(c). The defense's right to examine classified evidence under this rule is subject to section (f) and Mil. Comm. R. Evid. 505.

(3) The military judge may specify the time, place and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice, the protection of national security, and the safety of witnesses.

(4) In the event that the accused has elected to represent himself and the military judge has approved that election, standby defense counsel shall examine the evidence and be prepared to provide advice to the accused.

(5) The duty to provide discovery is continuing, meaning that if at any time prior to or during a military commission, a party discovers additional material subject to discovery under the rule, that party shall promptly notify the other party or military judge as to the existence of the material.

(b) *Disclosure by the trial counsel.* Except as directed by the military judge pursuant to section (a), the trial counsel shall provide the following information or matters to the defense:

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

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

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

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

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

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

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

Discussion

Such notice should be in writing except when impracticable.

(3) *Prior convictions of accused offered on the merits.* Before trial on the merits, the trial counsel shall notify the defense of any records of prior criminal convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to examine such records when they are in the trial counsel's possession.

(c) *Examination of documents, tangible objects, reports.* After service of charges, upon a request of the defense, the Government shall permit the defense counsel to examine the following materials:

(1) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

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

(3) The contents of all relevant statements—oral, written or recorded—made or adopted by the accused, that are within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion

For the definition of “material to the preparation of the defense” in subsections (1), (2), and (3), see *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). Evidence introduced by the Government at trial must be disclosed to the accused. See 10 U.S.C. § 949a(b)(A).

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

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

(2) Notify the defense of the names of the witnesses that trial counsel intends to call at the presentencing proceedings.

(e) *Exculpatory evidence*. Subject to section (f), the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

- (1) Negate the guilt of the accused of an offense charged;
- (2) Reduce the degree of guilt of the accused of an offense charged; or
- (3) Reduce the punishment.

In this section, the term “evidence known to trial counsel,” as it relates to exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title.

(f) *National security privilege*. Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. This rule applies to all stages of proceedings in military commissions, including the discovery phase. Pursuant to 10 U.S.C. §§ 949d(f) and 949j(c), the military judge may issue a protective order to limit the distribution or disclosure to the defense of classified evidence, including the sources, methods or activities by which the United States acquired the evidence.

(1) To withhold disclosure of information otherwise subject to discovery under this rule, the military judge must find that the privilege is properly claimed under Mil. Comm. R. Evid. 505.

(2) Once such a finding is made, the military judge shall authorize, to the extent practicable:

(A) the deletion of specified items of classified information from documents made available to the defense;

(B) the substitution of a portion or summary of the information for such classified documents;

(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

(3) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this rule, to protect from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that the sources, methods, or activities by which the United States acquired the evidence are classified. The military judge may require trial counsel to provide, to the extent practicable, an unclassified summary of the sources, methods, or activities by which the United

States acquired such evidence.

(4) In making the determinations under subsections (2) and (3) as to whether alternatives to classified information are practicable, the military judge may consider any relevant factor, including the burden that producing the alternatives would impose on the Government, the time it would take to produce the alternative, the degree to which a summary could be provided consistent with national security, whether the evidence is cumulative of or distinct from other evidence available to the defense, the relevance and materiality of the evidence to the preparation of the defense, and the significance of the evidence in comparison with other evidence to which the defense has access.

(5) Where exculpatory evidence is classified, the defense shall be provided with an adequate substitute in accordance with the procedure under paragraphs (A), (B), or (C) of this section.

(6) In the event that trial counsel plans to introduce classified information as evidence at trial, trial counsel shall permit the defense to examine that information in advance of trial in the form authorized by 10 U.S.C. § 949d(f) and Mil. Comm. R. Evid. 505.

(7) In the event the military judge determines that (i) the classified information itself is evidence that the Government seeks to use at trial, exculpatory, or necessary to enable the defense to prepare for trial, and (ii) the Government's proposed alternative is not adequate or that no alternative to classified information is practicable, the military judge may issue any order permitted under Mil. Comm. R. Evid. 505(e)(4).

(8) Nothing in this rule prevents the military judge from issuing additional protective orders, unrelated to classified matters, as may be required in the interests of justice.

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

(1) *Names of witnesses and statements.*

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

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

(i) Provide the trial counsel with the names of any witnesses whom the defense intends to call at the presentencing proceedings; and

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

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

Discussion

Such notice shall be in writing unless impracticable. See R.M.C. 916(k) concerning the defense of lack of mental responsibility. See R.M.C. 706 concerning inquiries into the mental responsibility of the accused. See Mil. Comm. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars (see R.M.C. 906(b)(5)).

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

(4) *Reports of examination and tests.* If the defense requests disclosure under section (b) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall permit the trial counsel to examine any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the defense that the defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

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

Discussion

Nothing in this rule precludes defense counsel from its obligation to disclose evidence as required by other rules in this manual and the military commission rules of evidence.

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

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

(j) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.

Discussion

Convening authorities, commanders and members of their immediate staffs should make no statement, oral or written, and take no action which could reasonably be understood to discourage or prevent witnesses from testifying before a military commission, or as a threat of retribution for such testimony.

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

(l) *Regulation of discovery.*

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

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

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

(A) Order the party to permit discovery;

(B) Grant a continuance;

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

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

Discussion

Factors to be considered whether to grant an exception to exclusion under (3)(C) include: the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events mitigated the disadvantage caused by failure to disclose; and any other relevant factors.

The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply with this rule was willful and motivated by a desire to obtain tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Government. Before imposing this sanction, the military judge must weigh the defendant's rights under the M.C.A. against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in a fair and efficient administration of justice; and (3) the potential prejudice to the truth-determining function of the trial process.

Rule 702. Depositions

(a) *In general.* A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.

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

(c) *Request to take deposition.*

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

Discussion

A copy of the request and any accompanying papers ordinarily should be served on the other parties when the request is made.

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

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

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

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

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

(3) *Action on request.*

(A) *In general.* A request for a deposition may be denied for good cause, e.g., to protect classified information, sources, methods and means of acquiring intelligence, subject to review by the military judge.

Discussion

Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary. The fact that a witness will be available for trial is good cause for the denial in the absence of unusual circumstances, such as when the Government has improperly impeded defense access to a witness.

(B) *Written deposition.* A request for a written deposition may not be approved without the consent of the opposing party and the authority ordering the deposition determines that the interests of the parties and the military commission can be adequately served by a written deposition.

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

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

(d) *Action when request is approved.*

(1) *Detail of deposition officer.* When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer. A deposition officer under this rule, shall be an officer in the grade of major or lieutenant commander or higher or one with legal training.

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

Discussion

Such instruction may include the time and place for the deposition.

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

(f) *Duties of the deposition officer.* In accordance with this rule, and subject to any instructions under subsection (d)(2) of this rule, the deposition officer shall:

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

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance

with the procedures for production of witnesses and evidence under R.M.C. 703(e) and (f).

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

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

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

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

Discussion

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

The authority who ordered the deposition should forward copies to the parties.

(g) *Procedure.*

(1) *Oral depositions.*

(A) *Rights of accused.* At an oral deposition, the accused shall have the right to be represented by counsel who will examine, cross-examine and make objections on behalf of the accused.

Discussion

An accused does not have the right to be present at an oral deposition, except as provided by the military judge. The military judge also may order the provision of direct communication, including video where practicable, between an accused and counsel for oral depositions.

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

Discussion

A sample oath for deposition follows: "You (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

(2) *Written depositions.*

(A) *Rights of accused.* The accused shall have the right to be represented by counsel as provided in R.M.C. 506 for the purpose of taking a written deposition.

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

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

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

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

Discussion

A deposition read in evidence or one that is played during a military commission is recorded and transcribed by the reporter in the same way as any other testimony. The deposition need not be included in the record of trial.

(h) *Objections.*

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

(2) *Oral depositions.* Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made

during the deposition, the objection is waived if not made at the deposition.

Discussion

A party may show that an objection was made during the deposition but not recorded, but, in the absence of such evidence the transcript of the deposition governs.

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

(i) *Deposition by agreement not precluded.*

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

(2) *Use of deposition.* Subject to protection of classified information, nothing in this rule shall preclude the use of a deposition at the military commission by agreement of the parties unless the military judge forbids its use for good cause.

Rule 703. Production of witnesses and evidence

(a) *In general.* The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.

(b) *Right to witnesses.*

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

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

(3) *Unavailable witness.* (A) *In general.* A party is not entitled to the presence of a witness who is deemed “unavailable” in the discretion of the military judge.

Discussion

In determining whether a witness is “unavailable,” the military judge shall consider the factors in Mil. R. Evid. 804(a).

(B) *Exceptions.* Notwithstanding paragraph (A), if the testimony of a witness determined to be unavailable is of central importance to the resolution of an issue essential to a fair trial, and there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness’ presence, or shall abate the

proceedings, if the military judge finds that the reason for the witness' unavailability is within the control of the United States.

Discussion

This rule departs from the R.C.M. 703(b)(3), which would permit the abatement of the proceedings even when the absence of the witness is not the fault of the United States. That rule provides a broader standard than that existing in the federal civilian courts, and it is particularly impracticable for military commissions. The M.C.A. recognizes that witnesses located in foreign countries may be unavailable for many reasons outside the control of the United States, and Congress provided for the broad admissibility of hearsay precisely to allow for the introduction of evidence where the witnesses are not subject to the jurisdiction of the military commission or are otherwise unavailable.

(c) Determining which witnesses will be produced.

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

(2) Witnesses for the defense.

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

(B) Contents of request.

(i) *Witnesses on merits or interlocutory questions.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

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

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

(D) *Determination.* The trial counsel shall arrange for the presence of witnesses listed by the defense unless the trial counsel contends that the witness' production is not required under this rule, classified under 10 U.S.C. § 949j(c), or government information under rule 701(k) and (l). If the trial counsel contends that the witness' production is not required or protected, the matter may be submitted to the military judge, or if prior to referral, the convening

authority. If, after consideration of the matter and an *in camera* review of any trial counsel submissions asserting that the material is subject to such provisions, the trial judge grants a motion for a witness, the trial counsel shall produce the witness, or the military judge shall issue such order as the interests of justice may require.

Discussion

When significant or unusual costs would be involved in producing witnesses, the trial counsel should inform the convening authority, as the convening authority may elect to dispose of the matter by means other than military commission (*see* R.M.C. 906(b)(6); R.M.C. 905(j)).

(3) Upon request of either party the military judge may permit a witness to testify from a remote location by two-way video teleconference, or similar technology. If the opposing party objects to such a request, the military judge shall resolve the matter by balancing all probative factors, including, but not limited to, the need of either party for personal appearance of the witness, the remote and unique situation of the forum, and the logistical difficulties in obtaining the presence of the witness.

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

(e) *Procedures for production of witnesses.* The process to compel such witnesses to appear and testify and to compel the production of other such evidence shall be by subpoena.

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

(2) *Civilian witnesses.*

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

(B) *Contents.* A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers,

documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

(C) *Who may issue.* A subpoena may be issued by the military judge or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.

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

(E) *Place of service.*

(i) *In general.* A subpoena requiring the attendance of a witness at a deposition or military commission, may be served at any place.

(ii) *Foreign territory.* A subpoena requiring the attendance of a witness in a foreign territory may be obtained in accordance with 28 U.S.C. § 1783 and this rule.

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

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

(G) *Neglect or refusal to appear.*

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

Discussion

A warrant of attachment may be used when necessary to compel a witness to appear or produce evidence under this rule. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

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

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

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

Discussion

In executing a warrant of attachment, no more force than necessary to bring the witness to the military commission or deposition may be used.

(f) *Right to evidence.*

(1) *In general.* Subject to § 949j(c) and R.M.C. 701, each party is entitled to the production of evidence which is relevant, necessary and noncumulative.

Discussion

Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact. As to the discovery of classified information or other government information, *see* Mil. Comm. R. Evid. 505 and 506.

(2) *Unavailable evidence.*

(A) Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence that is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge may grant a continuance or other relief in order to attempt to produce the evidence.

(B) If a continuance under paragraph (A) cannot or does not result in the production of the evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, but only upon a finding that the United States was in possession of the evidence and the evidence was lost in bad faith or destroyed in bad faith.

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

(4) *Procedures for production of evidence.*

(A) *Evidence under the control of the Government.* Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence, subject to the provisions of Mil. Comm. R. Evid. 505.

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

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

Rule 704. Immunity

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

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

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

Discussion

“Testimonial” immunity is also called “use” immunity.

Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.

In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person’s statements, testimony, or information derived from them. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person’s testimony or statements. Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.

(b) *Scope.* Nothing in this rule bars:

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

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

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

Discussion

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

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

(1) *Persons subject to the M.C.A.* The military commission convening authority may grant immunity to any person subject to the M.C.A. However, the convening authority may grant immunity to a person subject to the M.C.A. extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

(2) *Persons subject to the code.* The military commission convening authority may grant immunity to any person subject to the code from prosecution before a general court-martial when specifically authorized to do so by a general court-martial convening authority. The military commission convening authority may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

(3) *Persons not subject to the code or the M.C.A.* A military commission convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

See the discussion under section (c) of this rule concerning forwarding a request for authorization to grant immunity to the Attorney General.

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

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

Discussion

A person who has received a valid grant of immunity from a proper authority may be ordered to testify. A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the code may be charged as provided in the M.C.M. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privileges against disclosure of information. An immunity order or grant must not specify the contents of the testimony it is expected the witness will give. When immunity is granted to a prosecution witness, the accused must be notified.

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

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

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

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

Rule 705. Pretrial agreements

(a) *In general.* Subject to such limitations as the Secretary may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule. All of the terms of the agreement must be contained in the agreement and must be in writing.

Discussion

The authority of convening authorities to refer cases to trial and approve pretrial agreements extends only to trials by military commission. To ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the United States district courts, convening authorities shall ensure that appropriate consultation under the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction" (*see* Manual for Courts-Martial app. 3) has taken place prior to trial by military commission or approval of a pretrial agreement in cases where such consultation is required.

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

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

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

(A) Refer the charges to a certain type of military commission;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the commission;

Discussion

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

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

(E) Take specified action on the sentence adjudged by the commission; and

(F) Fulfill such additional terms or conditions requested by the accused, within the power of the convening authority, and not otherwise prohibited under this Manual or the M.C.A.

Discussion

For example, the convening authority may agree to approve no sentence in excess of a specified maximum or outside a specified and agreed upon range to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.

(c) *Terms and conditions.*

(1) *Prohibited terms or conditions.*

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

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of the right to counsel or to other indispensable judicial guarantees.

Discussion

A pretrial agreement provision which prohibits the accused from making certain pretrial motions (*see* R.M.C. 905-907) may be improper.

(2) *Permissible terms or conditions.* Subject to paragraph (c)(1)(A) of this rule, paragraph (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

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

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

Discussion

See R.M.C. 704(a)(2) concerning testimonial immunity.

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions; and

(E) A promise to waive procedural requirements such as the opportunity to obtain the personal appearance of witnesses at sentencing proceedings, or a promise to waive appellate review.

(d) *Procedure.*

(1) *Negotiation.* Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the legal advisor, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

Discussion

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

(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the legal advisor, who has been authorized by the convening authority to sign.

Discussion

The convening authority should consult with the legal advisor before acting on an offer to enter into a pretrial agreement.

(4) *Withdrawal.*

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

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

(e) *Nondisclosure of existence of agreement.* No member of a military commission shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. Comm. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

Discussion

See also R.M.C. 910(f) (plea agreement inquiry).

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

(a) *Initial action.* If it appears to any convening authority who considers the disposition of charges, or to any trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to

stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the authority authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Discussion

See R.M.C. 909 concerning the capacity of the accused to stand trial and R.M.C. 916(k) concerning mental responsibility of the accused.

(b) *Ordering an inquiry.*

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

(2) *After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the military commission (including any R.M.C. 803 session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

(c) *Inquiry.*

(1) *By whom conducted.* When a mental examination is ordered under section (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

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

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? Other appropriate questions may also be included.

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

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

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

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

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

Rule 707. Timing of pretrial matters

(a) In general

(1) Within 30 days of the service of charges, the accused shall be brought to trial. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.M.C. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.M.C. 803.

(2) Within 120 days of the service of charges, the military judge shall announce the assembly of the military commission, in accordance with R.M.C. 911.

(3) As soon as practicable after the service of charges, the military judge shall set an appropriate schedule for discovery.

(b) Accountability

(1) *In general.* The date of the service of charges against the accused shall not count for purpose of computing time under section (a) of this rule. The date on which the accused is

brought to trial or the military judge announces the assembly of the military commission, as the case may be, shall count.

(2) *Multiple charges.* When charges are served at different times, accountability for each charge shall be determined from the appropriate date under section (a) of this rule for that charge.

(3) *Pretrial orders.* By appropriate judicial order, the military judge shall direct all parties to abide by the time limits set forth in section (a) of this rule, and shall grant departures from such time limits only as provided by subsection (b)(4) of this rule.

(4) *Events which affect time periods*

(A) *Dismissal or mistrial.* If charges are dismissed, or if a mistrial is granted, new time periods under this rule shall begin on the date of dismissal or mistrial.

(B) *Government appeals.* If notice of appeal under R.M.C. 908 is filed, new time periods under section (a) of this rule shall begin, for all charges neither proceeded on nor severed under R.M.C. 908(b)(8), on the date of notice to the parties under R.M.C. 908(b)(12) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Military Commission Review under R.M.C. 908, if there is a further appeal to the United States Court of Appeals for the District of Columbia Circuit or, subsequently, to the Supreme Court, new time periods under section (a) of this rule shall begin on the date the parties are notified of the final decision of the United States Court of Appeals for the District of Columbia Circuit or, if appropriate, the Supreme Court.

(C) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, new time periods under section (a) of this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.

(D) *Commitment of the incompetent accused.* If the accused is hospitalized or treated as provided in R.M.C. 909(f), all periods of such commitment shall be excluded when determining whether the time periods in section (a) of this rule have run. If, at the end of the period of commitment, the accused is returned to the custody of the convening authority, new time periods under section (a) of this rule shall begin on the date of such return to custody.

(E) *Continuances granted only in the interests of justice*

(i) The military judge shall grant a continuance or other departure from the requirements of this rule only upon finding that the interests of justice served by taking such action outweigh the best interests of both the public and the accused in a prompt trial of the accused.

(ii) No such period of delay resulting from a continuance granted by the military judge in accordance with paragraph (b)(4)(E)(i) shall be excludable unless the military

judge sets forth, in the record of the case, either orally or in writing: (A) the military judge's reasons for finding that the interests of justice served by the granting of such continuance outweigh the best interests of both the public and the accused in a prompt trial of the accused, and (B) the identity of the party or parties responsible for the delay.

(F) *Appeal of certain matters not grounds for departure.* Delay occasioned by the accused's appeal of a finding by a Combatant Status Review Tribunal, or another competent tribunal established under the authority of the President or the Secretary of Defense, that the accused is an unlawful enemy combatant shall not constitute a basis for departing from any time limit set forth in section (a) of this rule.

(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized or treated as provided in R.M.C. 909(f), shall be excluded when determining whether new time periods under section (a) of this rule have run. All other pretrial delays approved by the military judge in accordance with subsection (b)(4) of this rule, or by the convening authority, shall be excluded when determining whether any time period in section (a) of this rule has run.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary of Defense, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

(2) *Motions.* Upon a party's timely motion to a military judge under R.M.C. 905 for relief under this rule, the proponent of the motion should provide the court with a chronology detailing the processing of the case from the date of the swearing of charges. This chronology should be made a part of the appellate record.

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* Dismissal will be with or without prejudice to the government's right to reinstitute military commission proceedings against the accused for the same offense at a later date. In determining whether to dismiss charges with or without prejudice, the military judge shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a prompt trial under this rule.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for a speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

(e) *Waiver*. Except as provided in R.M.C. 910(a)(2), a plea of guilty which results in a finding of guilty waives any application of the instant rule as to that offense.

Discussion

Application of this rule may also be waived by a failure to raise the issue at trial. *See* R.M.C. 905(e) and 907(b)(2).

CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a military commission.

Discussion

The military judge is responsible for ensuring that military commission proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources.

The military judge shall:

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

Discussion

The military judge should consult with counsel concerning the scheduling of sessions and the uniform to be worn. The military judge recesses or adjourns the military commission as appropriate. Subject to R.M.C. 504(d), the military judge may also determine the place of trial.

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

Discussion

See also R.M.C. 804 and 806. Military commissions should be conducted in an atmosphere that is conducive to calm and detached deliberation and determination of the issues presented and that reflects the seriousness of the proceedings.

- (3) Subject to the M.C.A. and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual;

Discussion

See R.M.C. 102. The military judge may, within the framework established by the M.C.A and this Manual, prescribe the manner and order in which the proceedings may take place. Thus, the military judge may determine: when, and in what order, motions will be litigated (*see* R.M.C. 905); the manner in which *voir dire* will be conducted and challenges made (*see* R.M.C. 902(d) and 912); the order in which witnesses may testify (*see* R.M.C. 913; Mil. Comm. R. Evid. 611); the order in which the parties may argue on a motion or objection; and the time limits for argument (*see* R.M.C. 905; 919; 1001(g)).

The military judge should prevent the unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties' presentations or the appearance of partiality. The parties are entitled to a reasonable opportunity to properly present and support their contentions on any relevant matter.

- (4) Rule on all interlocutory questions and all questions of law raised during the military commissions; and

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

Discussion

The military judge instructs the members concerning findings (*see* R.M.C. 920) and sentence (*see* R.M.C. 1005), and when otherwise appropriate. For example, preliminary instructions to the members concerning their duties and the duties of other trial participants and other matters are normally appropriate (*see* R.M.C. 913). Other instructions (for example, instructions on the limited purpose for which evidence has been introduced (*see* Mil. Comm. R. Evid. 105), may be given whenever the need arises.

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

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

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

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

Discussion

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to make an inquiry along certain lines to discover and produce additional evidence (*see also* Mil. Comm. R. Evid. 614). In taking such action, the military commission must not depart from an impartial role.

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

Discussion

A report of the matter may be made to the convening authority after trial. If charges are preferred for an offense indicated by the evidence referred to in this section, no member of the commission who participated in the first trial should sit in any later trial. Such a member would ordinarily be subject to a challenge for cause (*see* R.M.C. 912; *see also* Mil. Comm. R. Evid. 105) concerning instructing the members on evidence of uncharged misconduct.

(e) *Interlocutory questions and questions of law.*

(1) *Rulings by the military judge.*

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

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

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

Discussion

Sessions without members are appropriate for interlocutory questions, questions of law, and instructions (*see also* Mil. Comm. R. Evid. 103 and 304). Such sessions should be used to the extent possible consistent with the orderly, expeditious progress of the proceedings.

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

Discussion

A ruling on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion, or request may be required to furnish evidence or legal authority in support of the contention. An interlocutory issue may have a different standard of proof.

Most of the common motions are discussed in specific rules in this Manual, and the burden of persuasion is assigned therein. The prosecution usually bears the burden of persuasion (*see* Mil. Comm. R. Evid. 304(e); *see also* R.M.C. 905-907) once an issue has been raised. What “raises” an issue may vary with the issue. Some issues may be raised by a timely motion or objection (*see, e.g.,* Mil. Comm. R. Evid. 304). Others may not be raised until the defense has made an offer of proof or presented evidence in support of its position. The rules in this Manual should be consulted when a question arises as to whether an issue is raised, as well as which side has the burden of persuasion. The military judge of a military commission may require a party to clarify a motion or objection or to make an offer of proof, regardless of the burden of persuasion, when it appears that the motion or objection is vague, inapposite, irrelevant, or spurious.

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

Discussion

Questions of law and interlocutory questions include all issues which arise during trial other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments. A question may be both interlocutory and a question of law. Challenges are specifically covered in R.M.C. 902 and 912.

Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any, were given by an interrogator to a suspect would be a factual question.

A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory. An issue may arise as both an interlocutory question and a question which may determine the ultimate issue of guilt. An issue is not purely interlocutory if an accused raises a defense or objection and the disputed facts involved determine the ultimate question of guilt.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge.

Discussion

See R.M.C. 808 and 1103 concerning preparation of the record of trial.

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

Rule 802. Conferences

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

Discussion

Conferences between the military judge and counsel may be held when necessary before or during trial. The purpose of such conference is to inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, not to litigate or decide contested issues (*see* section (c) below). No party may be compelled to resolve any matter at a conference.

A conference may be appropriate in order to resolve scheduling difficulties, so that witnesses and members are not unnecessarily inconvenienced. Matters which will ultimately be in the military judge's discretion, such as conduct of voir dire, seating arrangements in the courtroom, or procedures when there are multiple accused may be resolved at a conference. Conferences may be used to advise the military judge of issues or problems, such as unusual motions or objections, which are likely to arise during trial.

Occasionally it may be appropriate to resolve certain issues, in addition to routine or administrative matters, if this can be done with the consent of the parties. For example, a request for a witness which, if litigated and approved at trial, would delay the proceedings and cause expense or inconvenience, might be resolved at a conference. Note, however, that this could only be done by an agreement of the parties and not by a binding ruling of the military judge. Such a resolution must be included in the record (*see* section (b) below).

A military judge may not participate in negotiations relating to pleas (*see* R.M.C. 705; *see also* Mil. Comm. R. Evid. 410).

No place or method is prescribed for conducting a conference. A conference may be conducted by radio or telephone.

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

(c) *Rights of parties.* No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

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

Discussion

Normally the defense counsel may be presumed to speak for the accused.

(e) *Admission.* No admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.

(f) *Limitations.* This rule shall not be invoked in the case of an accused who is not represented by counsel.

Rule 803. Military commission sessions without members

A military judge who has been detailed to the military commission may, after service of charges, call the military commission into session without the presence of members. Such sessions may be held before and after assembly of the military commission, and when authorized in these rules, after adjournment and before action by the convening authority. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.M.C. 804 and 805.

Discussion

The purpose of the sessions without members is "to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters which are amenable to disposition on either a tentative or final basis by the military judge." The military judge and members may, and ordinarily should, call the commission into session without members to ascertain the accused's understanding of the right to counsel, and the accused's choices with respect to these matters; dispose of interlocutory matters; hear objections and motions; rule upon other matters that may legally be ruled upon by the military judge, such as admitting evidence; and perform other procedural functions which do not require the presence of members. (*See* R.M.C. 901-910.) The military judge may, if permitted by regulations of the Secretary, hold the arraignment, receive pleas, and enter findings of guilty upon an accepted plea of guilty.

Evidence may be admitted and process, including a subpoena, may be issued to compel attendance of witnesses and production of evidence at such sessions.

Rule 804. Presence of the accused at trial proceedings

(a) *Presence required.* The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted without members (except for certain *in camera* and *ex parte* presentations as may be permitted under R.M.C. 701-703 and Mil. Comm. R. Evid. 505), *voir dire* and challenges of members, the announcement of findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule.

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

being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom. Prior to exclusion of the accused under this section, the military judge shall consider and may, in his sole discretion, implement alternative measures to preserve the decorum of the proceedings and protect the parties and spectators to the trial.

Discussion

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

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

"Voluntary absence" means voluntary absence from trial. For an absence from commission proceedings to be voluntary, the accused must have known of the scheduled proceedings and intentionally missed them.

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

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

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

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

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

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

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

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

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

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

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

(c) *Voluntary absence for limited purpose of child testimony.*

(1) *Election by accused.* Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. Comm. R. Evid. 611(d), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.M.C. 914A.

(2) *Procedure.* The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, a two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. A one-way closed circuit television system may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) *Effect on accused's rights generally.* An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

(d) *Appearance and security of accused.*

(1) *Appearance.* The accused shall be properly attired in the uniform or dress prescribed by the military judge. The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the Joint Task Force Commander or his designee shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired.

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

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

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

(a) *Military judge.* No military commission proceeding, except the deliberations of the members, may take place in the absence of the military judge.

(b) *Members.* No military commission proceeding may take place in the absence of any detailed member except sessions without members under R.M.C. 803; examination of members under R.M.C. 912(d); when the member has been excused under R.M.C. 505 or 912(f); or as otherwise provided in R.M.C. 1102. No commission proceeding requiring the presence of members may be conducted unless at least five members are present or in a capital cases, at least twelve members are present, unless, as described in R.M.C. 501(a), twelve members are not reasonably available because of physical conditions or military exigencies.

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

Discussion

See R.M.C. 502(d) concerning qualifications of counsel.

Ordinarily, no military commission proceeding should take place if any defense or assistant defense counsel is absent unless the accused expressly consents to the absence. The military judge may, however proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired.

See R.M.C. 502(d)(6) and 505(d)(2) concerning withdrawal or substitution of counsel. *See* R.M.C. 506(d) concerning the right of the accused to proceed without counsel.

(d) *Effect of replacement of member.*

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

Discussion

When a new member is detailed, the military judge should give such instructions as may be appropriate. (*See also* R.M.C. 912 concerning *voir dire* and challenges.)

When the military commission has been reduced below a quorum, a mistrial may be appropriate (*see* R.M.C. 915).

Rule 806. Public trial

(a) *In general.* Except as otherwise provided in the M.C.A. and this Manual, military commissions shall be publicly held. For purposes of this rule, "public" includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.

(b) *Control of spectators and closure.*

(1) *Control of spectators.*

(A) In order to maintain the dignity and decorum of the proceedings or for other

good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.

(B) Any limitations imposed by the military judge under paragraph (b)(1)(A) shall be supported by essential findings of fact appended to the record of trial.

Discussion

The military judge must ensure that the dignity and decorum of the proceedings are maintained and that the other rights and interests of the parties and society are protected. Public access to a session may be limited, specific persons excluded from the courtroom, and, under unusual circumstances, a session may be closed.

(2) *Closure.* No session of a military commission shall be closed to the public unless the military judge specifically finds such closure necessary to accomplish one or both of the purposes in this subsection. Any closure under this subsection shall be supported by essential findings of fact, appended to the record of trial. Closure may be effected only for the purpose of:

(A) protecting information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities; or

(B) ensuring the physical safety of individuals.

Discussion

See 10 U.S.C. § 949d(d). Absent a need to close the proceedings, the military judge may take other lesser measures (such as the use of delayed broadcast technologies as a substitute for live testimony) to protect information and ensure the physical safety of individuals. Any closure under this subsection should be supported by the findings described in paragraph (b)(1)(B). In determining whether to close a proceeding pursuant to paragraphs (b)(2)(A) or (B), the military judge does not conduct a *de novo* review of the classification of sources, methods, or activities information in its original form or as it might possibly be reconstituted in a summarized form. Rather, the military judge should verify that appropriate officials within the agency concerned conducted an authorized review in accordance with governing regulations and determined that such a disclosure of information, in either original or summarized form would or would not be detrimental to national security. The review is to verify the existence of a legal basis for the agency official's determination that the information is classified and that no summary of such information can be provided consistent with national security. This initial review by the trial judge is not for the purpose of conducting a *de novo* review of the propriety of the agency official's determination(s). All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. *See United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

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

(d) *Protective orders.* The military judge may, upon request of any party or *sua sponte*, issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.

Discussion

A protective order may proscribe extrajudicial statements by counsel, parties, and witnesses that might divulge prejudicial matter not of public record in the case. Other appropriate matters may also be addressed by such a protective order. Before issuing a protective order, the military judge must consider whether other available remedies would effectively mitigate the adverse effects that any publicity might create, and consider such an order's likely effectiveness in ensuring an impartial military commission panel. A military judge should not issue a protective order without first providing notice to the parties and an opportunity to be heard. The military judge must state on the record the reasons for issuing the protective order. If the reasons for issuing the order change, the military judge may reconsider the continued necessity for a protective order.

Rule 807. Oaths

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

Discussion

An affirmation is the same as an oath, except in an affirmation the words "so help you God" are omitted.

(b) *Oaths in military commissions.*

(1) *Who must be sworn.*

(A) *Military commission personnel.* The military judge, members of military commission, trial counsel, assistant trial counsel, defense counsel, associate defense counsel, assistant defense counsel, reporter, interpreter, and escort shall take an oath to perform their duties faithfully. For purposes of this rule, "defense counsel," "associate defense counsel," and "assistant defense counsel," include detailed and individual military and civilian counsel; "trial counsel" and "assistant trial counsel" include military and civilian counsel.

(B) *Witnesses.* Each witness before a military commission shall be examined on oath.

Discussion

See R.M.C. 307 concerning the requirement for an oath in swearing of charges. An accused making an unsworn statement is not a "witness" (see R.M.C. 1001(c)(2)(C)).

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

Discussion

When the oath is administered in a session to the military judge, members, or any counsel, all persons in the courtroom should stand. In those rare circumstances in which the trial counsel testifies as a witness, the military judge administers the oath.

Unless otherwise prescribed by the Secretary the forms below may be used, as appropriate, to administer an oath.

(A) *Oath for military judge.* When the military judge is not previously sworn, the trial counsel will administer the following oath to the military judge:

“Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trial by military commission, all the duties incumbent upon you as military judge of this military commission (, so help you God)?”

(B) *Oath for members.* The following oath, as appropriate, will be administered to the members by the trial counsel:

“Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this military commission; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by military commission, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law (, so help you God)?”

(C) *Oaths for counsel.* When counsel for either side, including any associate or assistant, is not previously sworn the following oath, as appropriate, will be administered by the military judge:

“Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense)(associate defense) (assistant defense) counsel in the case now in hearing (, so help you God)?”

(D) *Oath for reporter.* The trial counsel will administer the following oath to every reporter of a military commission who has not been previously sworn: “Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this military commission (, so help you God)?”

(E) *Oath for interpreter.* The trial counsel shall administer the following oath to every interpreter in the trial of any case before a military commission:

“Do you (swear) (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (, so help you God)?”

(F) *Oath for witnesses.* The trial counsel will administer the following oath to each witness before the witness first testifies in a case:

“Do you (swear) (affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (, so help you God)?”

(G) *Oath for escort.* The escort on views or inspections by the military commission will, before serving, take the following oath, which will be administered by the trial counsel:

“Do you (swear) (affirm) that you will escort the military commission and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed) (); and that you will not speak to members concerning (the alleged offense) (), except to describe (the place aforesaid) () (, so help you God)?”

Rule 808. Record of trial

A separate, verbatim, record of the proceedings in each military commission case will be prepared. The trial counsel of a military commission shall take such action as may be necessary to ensure that the record will meet the requirements of R.M.C. 1103.

Discussion

Trial counsel should also ensure that all exhibits and other documents relating to the case are properly maintained for later inclusion in the record. *See also* R.M.C. 1103(f) as to the use of videotapes, audiotapes, and similar recordings for the record of trial. Because of the potential requirement for a verbatim transcript, all proceedings, including sidebar conferences, arguments, and rulings and instructions by the military judge, should be recorded.

Where there is recorder failure or loss of court reporter's notes, the record should be reconstructed as completely as possible. If the interruption is discovered during trial, the military judge should summarize or reconstruct the portion of the proceedings which has not been recorded and then proceed anew and repeat the proceedings from the point where the interruption began.

Rule 809. Contempt proceedings

(a) *In general.* The military commission may exercise contempt power granted under 10 U.S.C. § 950w.

Discussion

10 U.S.C. § 848 (Article 48 of the Code) does not apply to military commissions. *See* 10 U.S.C. § 948b(c).

(b) *Method of disposition.*

(1) *Summary disposition.* When conduct constituting contempt is directly witnessed by the commission, the conduct may be punished summarily.

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

(c) *Procedure.* The military judge shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The military judge shall also determine when during the trial the contempt proceedings shall be conducted; however, if the trial is composed of members, the military judge shall conduct the contempt proceedings outside the members' presence. The military judge may punish summarily under subsection (b)(1) only if the military judge recites the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the trial. Otherwise, the provisions of subsection (b)(2) shall apply.

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

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

Discussion

The immediate commander, if applicable, of the person held in contempt, or, in the case of a civilian, the convening authority should be notified immediately so that the necessary action on the sentence may be taken (*see* R.M.C. 1101).

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

Discussion

Copies of this communication should be furnished to such other persons including the immediate commander, if applicable, of the offender as may be concerned with the execution of the punishment. A copy shall be included with the record of both the trial and the contempt proceeding.

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

(a) *In general.*

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

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

(A) *Contents of the record.* The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not it was given through an interpreter.

Discussion

Matters excluded from the record of the original trial on the merits or improperly admitted on the merits must not be brought to the attention of the members as a part of the original record of trial.

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

(3) *Combined rehearings.* When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the military commission, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After findings on the

merits are announced, the members, if any, shall be advised of the offenses on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure shall be the same as at an original trial, except as otherwise provided in this rule. A single sentence shall be adjudged for all offenses.

(4) Such sessions may be ordered in the sole discretion of the convening authority.

(b) *Composition.*

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

(2) *Military judge.* The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case.

(c) *Examination of record of former proceedings.* No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except when permitted to do so by the military judge after such matters have been received in evidence.

Discussion

When a rehearing is ordered, the trial counsel should be provided a record of the former proceedings, accompanying documents, and any decision or review relating to the case, as well as a statement of the reason for the rehearing.

(d) *Sentence limitations.*

(1) *In general.* Sentences at rehearsings, new trials, or other trials shall be adjudged within the limitations set forth in R.M.C. 1003. Except as otherwise provided in subsection (d)(2) of this rule, offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial or hearing, unless the sentence prescribed for the offense is mandatory. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority shall be the maximum punishment under R.M.C. 1003 for the offenses being reheard as limited above, plus the total maximum punishment under R.M.C. 1003 for any new charges of which the accused has been found guilty.

Discussion

In approving a sentence not in excess of one more severe than one imposed previously, a convening authority is not limited to approving the same or lesser amount of the same type of punishment formerly approved. An appropriate sentence on a retried or reheard offense should be adjudged without regard to any credit to which the accused may be entitled.

See R.M.C. 103(a)(3) and (4) as to when a rehearing may be a capital case. The members should not be advised of the basis for the sentence limitation under this rule.

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

(e) *Definition.* “Other trial” means another trial by military commission in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense.

Rule 811. Stipulations

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

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

Discussion

Although the decision to stipulate should ordinarily be left to the parties, the military judge should not accept a stipulation if there is any doubt of the accused’s or any other party’s understanding of the nature and effect of the stipulation. The military judge should also refuse to accept a stipulation which is unclear or ambiguous. A stipulation of fact which amounts to a complete defense to any offense charged should not be accepted nor, if a plea of not guilty is outstanding, should one which practically amounts to a confession, except as described in the discussion under section (c) of this rule. If a stipulation is rejected, the parties may be entitled to a continuance.

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

Discussion

Ordinarily, before accepting any stipulation the military judge should inquire to ensure that the accused understands the right not to stipulate, understands the stipulation, and consents to it.

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

Discussion

If a party withdraws from an agreement to stipulate or from a stipulation, before or after it has been accepted, the opposing party may be entitled to a continuance to obtain proof of the matters which were to have been stipulated. If a party is permitted to withdraw from a stipulation previously accepted, the stipulation must be disregarded by the commission, and an instruction to that effect should be given.

(e) *Effect of stipulation.* Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the commission and may not be contradicted by the parties thereto. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or document's contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Commission Rules of Evidence apply to the contents of stipulations.

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

Rule 812. Joint and common trials

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

Discussion

See R.M.C. 307(c)(5) concerning preparing charges and specifications for joint trials. *See* R.M.C. 601(e)(3) concerning referral of charges for joint or common trials, and the distinction between the two. *See* R.M.C. 906(b)(8) concerning motions to sever and other appropriate motions in joint or common trials.

In a joint or common trial, each accused may be represented by separate counsel, make challenges for cause, make peremptory challenges (*see* R.M.C. 912), and cross-examine witnesses, elect whether to testify, introduce evidence.

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

Rule 813. Announcing personnel of the military commission and accused

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

- (1) The order, including any amendment, by which the military commission is convened;
- (2) The name, and known aliases of the accused;
- (3) The name and rank of the military judge, if one has been detailed;
- (4) The names and ranks of the members, if any, who are present;

- (5) The names and ranks of members who are absent, if presence of members is required;
- (6) The names and ranks (if any) of counsel who are present;
- (7) The names and ranks (if any) of counsel who are absent; and
- (8) The name and rank (if any) of any detailed court reporter.

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

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

CHAPTER IX. TRIAL PROCEDURES THROUGH FINDINGS

Rule 901. Opening session

(a) *Call to order.* A military commission is in session when the military judge so declares.

Discussion

The military judge should examine the charge sheet, convening order, and any amending orders before calling the initial session to order.

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

Discussion

If the orders detailing the military judge and counsel have not been reduced to writing, an oral announcement of such detailing is required. *See* R.M.C. 503(d).

(c) *Swearing reporter and interpreter.* After the personnel have been accounted for as required in section (b) of this rule, the trial counsel shall announce whether the reporter and interpreter, if any is present, have been properly sworn. If not sworn, the reporter and interpreter, if any, shall be sworn.

Discussion

See R.M.C. 807 concerning the oath to be administered to a court reporter or interpreter. If a reporter or interpreter is replaced at any time during trial, this should be noted for the record, and the procedures in this section should be repeated.

(d) *Counsel.*

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

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

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

Discussion

Counsel may be disqualified because of lack of necessary qualifications, or because of duties or actions which are inconsistent with the role of counsel. *See* R.M.C. 502(d) concerning qualifications of counsel.

If it appears that any counsel may be disqualified, the military judge should conduct an inquiry or hearing. If any detailed counsel is disqualified, the appropriate authority should be informed. If any defense counsel is disqualified, the accused should be so informed.

If the disqualification of trial or defense counsel is one which the accused may waive, the accused should be so informed by the military judge, and given the opportunity to decide whether to waive the disqualification. In the case of defense counsel, if the disqualification is not waivable or if the accused elects not to waive the disqualification, the accused should be informed of the choices available and given the opportunity to exercise such options.

If any counsel is disqualified, the military judge should ensure that the accused is not prejudiced by any actions of the disqualified counsel or any break in representation of the accused.

Disqualification of counsel is not a jurisdictional defect; such error must be tested for prejudice.

If the membership of the prosecution or defense changes at any time during the proceedings, the procedures in this subsection should be repeated as to the new counsel. In addition, the military judge should ascertain on the record whether the accused objects to a change of defense counsel. *See* R.M.C. 505(d)(2) and 506(c).

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

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

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

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

Discussion

Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an R.M.C. 803 session so that an appropriate record can be made.

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

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

Discussion

See R.M.C. 807.

(e) *Presence of members.* The procedures described in R.M.C. 901, 902, 904, and 905 through 910 shall be conducted without members present in accordance with R.M.C. 803.

Rule 902. Disqualification of military judge

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

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

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

(2) Where the military judge has acted as counsel, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

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

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

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

(A) Is a party to the proceeding;

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

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

Discussion

A military judge should inform himself or herself about his or her financial interests, and make a reasonable effort to inform himself or herself about the financial interests of his or her spouse and minor children living in his or her household.

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

(1) “Proceeding” includes pre-trial, trial, post-trial, appellate review, or other stages of litigation.

(2) The “degree of relationship” is calculated according to the civil law system.

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

(d) *Procedure.*

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

Discussion

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

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

Discussion

Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that only matters material to the central issue of the military judge’s possible disqualification are considered, thereby, preventing the proceedings from becoming a forum for unfounded opinion, speculation, or innuendo.

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

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

Rule 904. Arraignment

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

Discussion

Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment.

Once the accused has been arraigned, no additional charges against that accused may be referred to that commission for trial with the previously referred charges. *See* R.M.C. 601(e)(2).

The defense should be asked whether it has any motions to make before pleas are entered. Some motions ordinarily must be made before a plea is entered. *See* R.M.C. 905(b).

Rule 905. Motions generally

(a) *Definitions and form.* A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control.

Discussion

Motions may be motions to suppress (*see* R.M.C. 905(b)(3)); motions for appropriate relief (*see* R.M.C. 906); motions to dismiss (*see* R.M.C. 907); or motions for findings of not guilty (*see* R.M.C. 917).

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

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

Discussion

Such nonjurisdictional defects include unsworn charges and inadequate pre-trial advice. *See* R.M.C. 307; 401; 406–407; 601–604.

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

Discussion

See R.M.C. 307; 906(b)(2).

(3) Motions to suppress evidence;

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

or

Discussion

See also R.M.C. 703; 1001(e).

(5) Motions for severance of charges or accused.

Discussion

See R.M.C. 812; 906(b)(7) and (8).

(c) *Burden of proof.*

(1) *Standard.* Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

Discussion

See Mil. Comm. R. Evid. 104(a) concerning the applicability of the Military Commission Rules of Evidence to certain preliminary questions.

(2) *Assignment.*

(A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party.

Discussion

See, for example, paragraph (c)(2)(B) of this rule, R.M.C. 908, and Mil. Comm. R. Evid. 304(e) for provisions specifically assigning the burden of proof.

(B) In the case of a motion to dismiss for lack of jurisdiction, the burden of persuasion shall be upon the prosecution.

(d) *Ruling on motions.* A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

Discussion

When trial cannot proceed further as the result of dismissal or other rulings on motions, the commission should adjourn and a record of the proceedings should be prepared for the convening authority. *See* R.M.C. 908(b)(8) regarding automatic stay of certain rulings and orders subject to appeal under that rule. Notwithstanding the dismissal of some specifications, trial may proceed in the normal manner as long as one or more charges and specifications remain.

(e) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under

section (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the commission is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

Discussion

See also R.M.C. 910(j) concerning matters waived by a plea of guilty.

(f) *Reconsideration.* On request of any party or *sua sponte*, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

Discussion

Section (f) permits the military judge to reconsider any ruling that affects the legal sufficiency of any finding of guilt or the sentence. *See* R.M.C. 917(d) for the standard to be used to determine the legal sufficiency of evidence. *See also* R.M.C. 1102 concerning procedures for post-trial reconsideration. Different standards may apply depending on the nature of the ruling.

(g) *Effect of final determinations.* Any matter put in issue and finally determined by a military commission, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other commission of the same accused, except that, when the offenses charged at one commission did not arise out of the same transaction as those charged at the commission at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.

(h) *Written motions.* Written motions may be submitted to the military judge after referral and when appropriate they may be supported by affidavits, with service and opportunity to reply to the opposing party. Such motions may be disposed of before arraignment and without a session. Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.

(i) *Service.* Written motions shall be served on all other parties. Unless otherwise directed by the military judge, the service shall be made upon counsel for each party.

(j) *Application to convening authority.* Except as otherwise provided in this Manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening authority is not, except as otherwise provided in this Manual, required, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

(k) *Production of statements on motion to suppress.* Except as provided in this section, R.M.C. 914 shall apply at a hearing on a motion to suppress evidence under subsection (b)(3) of this rule. For purposes of this section, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege the military judge shall excise portions of the statement containing privileged matter.

Rule 906. Motions for appropriate relief

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

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

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

Discussion

The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member. (*See also* R.M.C. 602; 707; 803).

(2) Correction of defects in the pre-trial advice.

Discussion

See R.M.C. 406. If the motion is granted, the military judge should ordinarily grant a continuance so the defect may be corrected.

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

Discussion

See also R.M.C. 307.

An amendment may be appropriate when a specification is unclear, redundant, inartfully drafted, misnames an accused, or is laid under the wrong article. A specification may be amended by striking surplusage, or substituting or adding new language. Surplusage may include irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offense. When a specification is amended after the accused has entered a plea to it, the accused should be asked to plead anew to the amended specification. A bill of particulars (*see* subsection (b)(6) of this rule) may also be used when a specification is indefinite or ambiguous.

If a specification, although stating an offense, is so defective that the accused appears to have been misled, the accused should be given a continuance upon request, or, in an appropriate case (*see* R.M.C. 907(b)(3)), the specification may be dismissed.

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

Discussion

Each specification may state only one offense. R.M.C. 307(c)(4). A duplicitous specification is one which alleges two or more separate offenses. Lesser included offenses are not separate, nor is a continuing offense involving several separate acts. The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification. However, if the duplicitousness is combined with or results in other defects, such as misleading the accused, other remedies may be appropriate. *See* subsection (b)(3) of this rule. *See also* R.M.C. 907(b)(3).

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

Discussion

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

A bill of particulars need not be sworn because it is not part of the specification. A bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient.

(6) Discovery and production of evidence witnesses.

Discussion

See R.M.C. 701 concerning discovery. *See* R.M.C. 703, 914 and 1001(e) concerning production of evidence and witnesses.

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

Discussion

A motion for severance is a request that one or more accused against whom charges have been referred to a joint or common trial be tried separately. Such a request should be liberally considered in a common trial, and should be granted if good cause is shown. For example, a severance is ordinarily appropriate when: the moving party wishes to use the testimony of one or more of the coaccused or the spouse of a coaccused; a defense of a coaccused is antagonistic to the moving party; or evidence as to any other accused will improperly prejudice the moving accused.

If a severance is granted by the military judge, the military judge will decide which accused will be tried first. *See* R.M.C. 801(a)(1). In the case of joint charges, the military judge will direct an appropriate amendment of the charges and specifications.

See also R.M.C. 307(c)(5); 601(e)(3); 604; 812.

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

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

Discussion

See R.M.C. 1003 concerning determination of the maximum punishment. *See also* R.M.C. 907(b)(3)(B) concerning dismissal of charges on grounds of multiplicity.

A ruling on this motion ordinarily should be deferred until after findings are entered.

(10) Preliminary rulings on admissibility of evidence.

Discussion

See Mil. Comm. R. Evid. 104(c).

A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members.

Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge. *But see* R.M.C. 905(b)(3) and (d); Mil. Comm. R. Evid. 304(e)(2).

(11) Motions relating to mental capacity or responsibility of the accused.

Discussion

See R.M.C. 706, 909, and 916(k) regarding procedures and standards concerning the mental capacity or responsibility of the accused.

Rule 907. Motions to dismiss

(a) *In general.* A motion to dismiss is a request to terminate further proceedings to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

(b) *Grounds for dismissal.* Grounds for dismissal include the following—

(1) *Nonwaivable grounds.* A charge or specification shall be dismissed at any stage of the proceedings if:

(A) The military commission lacks jurisdiction to try the accused for the offense;

or

(B) The specification fails to state an offense.

Discussion

See R.M.C. 307(c).

(2) *Waivable grounds.* A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the military commission in that case if:

(A) Dismissal is required under R.M.C. 707;

(B) The accused has previously been tried by military commission or federal civilian court for the same offense, provided that:

(i) No military commission proceeding is a trial in the sense of this rule unless presentation of evidence on the general issue of guilt has begun;

(ii) No military commission proceeding which has been terminated under R.M.C. 604(b) or R.M.C. 915 shall bar later prosecution for the same offense or offenses, if so provided in those rules;

(iii) No military commission proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed; and

(iv) No military commission proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.

(C) Prosecution is barred by:

(i) A pardon issued by the President;

Discussion

A pardon may grant individual or general amnesty.

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

Discussion

See R.M.C. 704.

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

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

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

Discussion

A specification is multiplicitious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicitious with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicitious if the disorderly conduct consists solely of the assault. *See also* R.M.C. 1003(b)(1)(C).

Ordinarily, a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicitious specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.

Rule 908. Appeal by the United States

(a) *In general.* In a trial by a military commission the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that:

- (1) terminates proceedings of the military commission with respect to a charge or specification;
- (2) excludes evidence that is substantial proof of a fact material in the proceeding; or
- (3) relates to the protection of classified information, the closure of the proceedings from the public, or the exclusion of the accused from certain proceedings.

(b) *Procedure*

(1) *Finding of Not Guilty.* The United States may not appeal an order or ruling that amounts to a finding of not guilty by the military judge or by the military commission with respect to a charge or specification.

(2) *Notice of Appeal.* The United States shall take an appeal of an order or ruling by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

(3) *Appeal.* An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court may act only with respect to matters of law.

(4) *Appeal from Adverse Ruling.* The United States may appeal an adverse ruling on an appeal under section (b) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within 10 days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals.

(5) *Delay.* After an order or ruling which may be subject to an appeal by the United States, the military commission may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this

rule. Trial counsel is entitled to no more than 72 hours under this subsection.

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

(7) *Notice of appeal.* If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than five days after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(8) *Effect on the military commission.* Upon written notice to the military judge under subsection (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the military commission may proceed pending disposition by the Court of Military Commission Review of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

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

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

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

(ii) a severance may be granted upon request of the accused and when appropriate under R.M.C. 906(b)(8); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(9) *Record.* Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed. R.M.C. 1103 shall apply and the record shall be authenticated in accordance with R.M.C. 1104(a). The military judge or the Court of Military Commission Review may direct that additional parts of the proceeding be included in the record. R.M.C. 1104(f) shall not apply to such additions;

(10) *Forwarding.* Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by Secretary of Defense as Appellate Counsel for the United States. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence;

and such other matters as the Secretary may prescribe. The person designated by the Secretary of Defense shall promptly decide whether to file the appeal with the Court of Military Commission Review and notify the trial counsel of that decision.

(11) *Appeal filed.* If the United States elects to file an appeal, it shall be filed directly with the Court of Military Commission Review, in accordance with the rules of that court.

(12) *Appeal not filed.* If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(c) *Appellate proceedings.*

(1) *Appellate counsel.* The parties shall be represented before appellate courts in proceedings under this rule as provided in R.M.C. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule. Neither party has a right to oral argument under this rule.

(2) *Court of Military Commission Review.* A government appeal shall, whenever practicable, have priority over all other proceedings before the Court of Military Commission Review. In determining a government appeal, the Court may take action only with respect to matters of law.

(3) *Action following decision of Court of Military Commission Review.* After the Court of Military Commission Review has decided any appeal, the accused may petition for review by the United States Court of Appeals for the District of Columbia Circuit or the United States may appeal an adverse ruling to the United States Court of Appeals for the District of Columbia Circuit. The parties shall be notified of the decision of the Court of Military Commission Review promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the United States Court of Appeals for the District of Columbia Circuit for review within 20 days in accordance with R.M.C. 1205. If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Secretary of Defense, who shall forward a copy to the clerk of the Court of Military Commission Review when required by the Court. If the decision by the Court of Military Commission Review permits it, the military commission trial may proceed as to the affected charges and specifications pending further review by the United States Court of Appeals for the District of Columbia Circuit, unless either court orders the proceedings stayed. Unless the case is reviewed by the United States Court of Appeals for the District of Columbia Circuit, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court. If the case is reviewed by the United States Court of Appeals for the District of Columbia Circuit, R.M.C. 1205 shall apply.

(d) Interlocutory appeal of orders or rulings related to the protection of classified information, the closure of proceedings from the public, or the exclusion of the accused from certain proceedings.

(1) Notwithstanding any other provision of this rule, an interlocutory appeal taken by the United States pursuant to R.M.C. 908(a)(3) either before or during trial shall be expedited by the Court of Military Commission Review. Any appeal taken under this section, whether during or prior to trial, shall be taken within five days after the order or ruling appealed from. After notice of appeal under this section is filed with the military judge, no session of the commission, other than a session convened under R.M.C. 803, shall be convened until the appeal is resolved.

(2) If an appeal is taken during trial, the Court of Military Commission Review:

(A) Shall hear oral argument on such appeal within four days of the adjournment of the commission;

(B) May dispense with written briefs other than the supporting materials previously submitted to the military judge;

(C) Shall render its decision within four days of oral argument; and

(D) May dispense with the issuance of a written opinion in rendering its decision.

(3) Notwithstanding any other provision of this rule, for appeal of a decision under subsections (1) and (2) taken by the United States either before or during trial, trial counsel shall seek expedited review by the United States Court of Appeals for the District of Columbia Circuit.

(A) Prior to trial, trial counsel shall seek appeal within ten days after the ruling appealed from and no session shall be convened, except for a session convened under R.M.C. 803, until the appeal is resolved.

(B) During trial, trial counsel shall seek appeal within ten days after the ruling appealed from and no session of the commission shall be convened, except for a session convened under R.M.C. 803, until the appeal is resolved by the United States Court of Appeals for the District of Columbia Circuit.

(C) Trial counsel shall request that the United States Court of Appeals for the District of Columbia Circuit expedite the appeal and treat it as though it were an appeal under 18 U.S.C. app. 3 § 7(b).

Rule 909. Capacity of the accused to stand trial by military commission

(a) *In general.* No person may be brought to trial by military commission if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against him or her

or to conduct or cooperate intelligently in the defense of the case.

Discussion

See also R.M.C. 916(k).

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.* If an inquiry pursuant to R.M.C. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.M.C. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, then he or she shall refer the matter to the Secretary of Defense or his designee.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.M.C. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with section (e) of this rule.

(e) *Incompetence determination hearing.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the convening authority.

(f) *Hospitalization of the accused.* An accused who is found incompetent to stand trial under this rule may be hospitalized or treated as the convening authority, in consultation with the commander who exercises control over the accused, may determine. If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the convening authority may reconvene the commissions. If, at the end of the period of hospitalization, the accused's mental condition has not so improved, the convening authority shall refer the matter to the Secretary of Defense or his designee.

Rule 910. Pleas

(a) Alternatives.

(1) *In general.* An accused may plead as follows: not guilty; guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any;

Discussion

See paragraph 3, Part IV, concerning lesser included offenses. When the plea is to a named lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit. A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. *See also* section (g) of this rule.

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. *See* R.M.C. 1001(b)(2).

The M.C.A. permits an accused to plead guilty to a capital offense referred to a capital military commission, at which trial death remains an authorized sentence, notwithstanding the accused's plea of guilty.

(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pre-trial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary may prescribe who may consent for the Government; unless otherwise prescribed by the Secretary, the trial counsel may consent on behalf of the Government.

(b) *Refusal to plead; irregular plea.* If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

Discussion

An irregular plea includes pleas such as guilty without criminality or guilty to a charge but not guilty to all specifications thereunder. When a plea is ambiguous, the military judge should have it clarified before proceeding further.

(c) *Advice to accused.* Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered and the maximum possible penalty provided by law;

Discussion

The elements of each offense to which the accused has pleaded guilty should be described to the accused. *See also* section (e) of this rule.

(2) If the accused is not represented by counsel, that the accused has the right to be

represented by counsel at every stage of the proceedings;

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a military commission, and that at such trial the accused has the right to confront and cross-examine witnesses who testify against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(d) *Ensuring that the plea is voluntary.* The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.M.C. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea.* The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that either there is a factual basis for the plea or the accused voluntarily agrees that, having viewed the evidence the Government intends to introduce against him, the accused is personally convinced that the Government could prove the accused guilty of the offenses to which he is pleading guilty, beyond a reasonable doubt. After a plea of guilty has been entered by an accused to one or more offenses, the trial counsel may make an averment of facts, orally or in writing, or both, which facts are (1) susceptible of proof by competent evidence; and (2) sufficient to establish the guilt of the accused beyond a reasonable doubt. The accused shall be questioned under oath about the offenses and/or the Government's averment of evidence, to ensure that there is a factual basis for the plea(s) or that the accused has voluntarily elected to plead guilty because he is convinced that the government could prove its case beyond a reasonable doubt.

Discussion

The inquiry required by *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), pertaining to trials by courts-martial, is impracticable in military commissions and the constitutional and policy concerns raised in *Care* are inapposite.

(f) *Plea agreement inquiry.*

(1) *In general.* A plea agreement may not be accepted if it does not comply with R.M.C. 705.

(2) *Notice.* The parties shall inform the military judge if a plea agreement exists.

(3) *Disclosure.* If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted.

(4) *Inquiry.* The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

Discussion

If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused's understanding of any term in the agreement, the military judge should explain such term to the accused.

(g) *Findings.* Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an R.M.C. 803 session unless:

(1) Such action is not permitted by regulations of the Secretary; or

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged.

Discussion

If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered. *See* R.M.C. 913(a) and R.M.C. 920(e), Discussion, paragraph 3.

(h) *Later action.*

(1) *Withdrawal by the accused.* If after the acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) *Statements by accused inconsistent with plea.* If after findings but before the sentence is announced the accused makes a statement to the commission, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the sufficiency of the plea. If, following such inquiry, it appears that the accused entered the plea through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

Discussion

When the accused withdraws a previously accepted plea for guilty or a plea of guilty is set aside, counsel should be given a reasonable time to prepare to proceed. A mistrial will ordinarily be necessary.

(3) *Pre-trial agreement inquiry.* After sentence is announced the military judge shall inquire into any parts of a pre-trial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

Discussion

See subsection (f)(3) of this rule.

(i) *Record of proceedings.* A verbatim record of the guilty plea proceedings shall be made.

(j) *Waiver.* Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule 911. Assembly of the military commission

The military judge shall announce the assembly of the military commission.

Discussion

Assembly of the commission is significant because it marks the point after which substitution of the members may no longer take place without good cause (*see* R.M.C. 505; 902; 912).

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

(a) *Pre-trial matters.*

(1) *Questionnaires.* Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;

(B) Sex;

(C) Race;

(D) Marital status and sex, age, and number of dependents;

(E) Home of record;

(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) Current unit to which assigned;

(H) Past duty assignments;

(I) Awards and decorations received;

(J) Date of rank; and

(K) Whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition. Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member.

Discussion

Using questionnaires before trial may expedite *voir dire* and may permit more informed exercise of challenges. If the questionnaire is marked or admitted as an exhibit at the military commission it must be attached to or included in the record of trial. *See* R.M.C. 1103(a)(2)(B) and (C).

(2) *Other materials.* A copy of any written materials considered by the convening authority in selecting the members detailed to the military commission shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(3) Upon the request of either party, the military judge may issue protective orders sufficient to protect the safety of military members and their families. Such an order may strictly limit the disclosure of information including, but not limited to, addresses, names, ages, and locations of dependents.

(b) *Challenge of selection of members.*

(1) *Motion.* Before the examination of members under section (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

Discussion

See R.M.C. 502(a) and 503(a) concerning selection of members. Members are also improperly selected when, for example, a certain group or class is arbitrarily excluded from consideration as members.

(2) *Procedure.* Upon a motion under subsection (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are

properly selected.

(3) *Waiver.* Failure to make a timely motion under this section shall waive the improper selection unless it constitutes a violation of R.M.C. 501(a), 502(a)(1), or 503(a).

(c) *Stating grounds for challenge.* The trial counsel shall state any ground for challenge for cause against any member of which the trial counsel is aware.

(d) *Examination of members.* The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

Discussion

Examination of the members is called “*voir dire*.” If the members have not already been placed under oath for the purpose of *voir dire* (see R.M.C. 807(b)(2) Discussion (B)), they should be sworn before they are questioned.

The opportunity for *voir dire* should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use *voir dire* to present factual matter which will not be admissible or to argue the case.

The nature and scope of the examination of members is within the discretion of the military judge. Members may be questioned individually or collectively. Ordinarily, the military judge should permit counsel to personally question the members. Trial counsel ordinarily conducts an inquiry before the defense. Whether trial counsel will question all the members before the defense begins or whether some other procedure will be followed depends on the circumstances. For example, when members are questioned individually outside the presence of other members, each party would ordinarily complete questioning that member before another member is questioned. The military judge and each party may conduct additional questioning, after initial questioning by a party, as necessary.

Ordinarily the members should be asked whether they are aware of any ground for challenge against them. This may expedite further questioning. The members should be cautioned, however, not to disclose information in the presence of other members which might disqualify them.

(e) *Evidence.* Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) *Challenges and removal for cause.*

(1) *Grounds.* A member shall be excused for cause whenever it appears that the member:

- (A) Is not competent to serve as a member under R.M.C. 502(a)(1);
- (B) Has not been properly detailed as a member of the military commission;
- (C) Is an accuser as to any offense charged;
- (D) Will be a witness in the military commission;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has investigated any offense charged;

(G) Has acted in the same case as convening authority or as the legal advisor to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal advisor to the convening authority;

(I) Has forwarded charges in any manner in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the military commission which heard the case before;

(L) Is in arrest or confinement;

(M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the military commission free from substantial doubt as to legality, fairness, and impartiality.

Discussion

Examples of matters which may be grounds for challenge under paragraph (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offense charged.

(2) *When made.*

(A) *Upon completion of examination.* Upon completion of any examination under section (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) *Other times.* A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) *Procedure.* Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily the trial counsel shall enter any challenges for cause before the defense counsel. The military judge shall rule finally on each challenge. When a challenge for cause is granted, the member concerned shall be excused. The burden of establishing that grounds for a challenge exist is upon the party

making the challenge. A member successfully challenged shall be excused.

(4) *Waiver.* The grounds for challenge in paragraph (f)(1)(A) of this rule may not be waived. Any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

Discussion

See also Mil. Comm. R. Evid. 606 when a member may be a witness.

(g) *Peremptory challenges.*

(1) *Procedure.* Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense. Whenever additional members are detailed to a military commission and after any challenges for cause against such additional members are presented and decided, each of accused and trial counsel is entitled to one peremptory challenge against members not previously subject to peremptory challenge regardless of whether those parties utilized their peremptory challenge against the other remaining members.

(2) *Waiver.* Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.M.C. 505(c)(3), even if presentation of evidence on the merits has begun.

(h) *Definitions.*

(1) *Witness.* For purposes of this rule, “witness” includes one who testifies at a commission and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

Rule 913. Presentation of the case on the merits

(a) *Preliminary instructions.* The military judge may give such preliminary instructions as may

be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered.

(b) *Opening statements.* Each party may make one opening statement to the military commission before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the military commission at other times.

Discussion

Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues in the case.

(c) *Presentation of evidence.* Each party shall have full opportunity to present evidence.

(1) *Order of presentation.* Ordinarily the following sequence shall be followed:

- (A) Presentation of evidence for the prosecution;
- (B) Presentation of evidence for the defense;
- (C) Presentation of prosecution evidence in rebuttal;
- (D) Presentation of defense evidence in surrebuttal;
- (E) Additional rebuttal evidence in the discretion of the military judge; and
- (F) Presentation of evidence requested by the military judge or members.

(2) *Taking testimony.* The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual. However, upon the request of either party, and if necessary to protect the safety of a witness, the military judge may permit a witness for either party to testify under such circumstances as may assist in protecting the identity of that witness from public disclosure. Any measure approved by the military judge that restricts the public's ability to identify a witness shall be the subject of essential findings of fact and conclusions of law, appended by the military judge to the record of trial.

Discussion

Each witness must testify under oath. *See* R.M.C. 807(b)(1)(B); Mil. Comm. R. Evid. 603. After a witness is sworn, the witness should be identified for the record. The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and re-cross-examination are conducted as necessary, followed by any questioning by the military judge and members. *See* Mil. Comm. R. Evid. 611; 614.

All documentary and real evidence (except marks or wounds on a person's body) should be marked for identification when first referred to in the proceedings and should be included in the record of trial whether admitted

in evidence or not. *See* R.M.C. 1103(a)(2). “Real evidence” includes physical objects, such as clothing, weapons, and marks or wounds on a person’s body. If it is impracticable to attach an item of real evidence to the record, the item should be clearly and accurately described by testimony, photographs, or other means so that it may be considered on review. Similarly, when documentary evidence is used, if the document cannot be attached to the record (as in the case of an original official record or a large map), a legible copy or accurate extract should be included in the record. When a witness points to or otherwise refers to certain parts of a map, photograph, diagram, chart, or other exhibit, the place to which the witness pointed or referred should be clearly identified for the record, either by marking the exhibit or by an accurate description of the witness’ actions with regard to the exhibit.

(3) *Views and inspections.* The military judge may, as a matter of discretion, permit the military commission to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all parties, the members (if any), and the military judge. A person familiar with the scene may be designated by the military judge to escort the military commission. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made part of the record.

Discussion

A view or inspection should be permitted only in extraordinary circumstances. The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible.

(4) *Evidence subject to exclusion.* When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

Discussion

The military judge should not exclude evidence which is not objected to by a party except in extraordinary circumstances. Counsel should be permitted to try the case and present the evidence without unnecessary interference by the military judge. *See also* Mil. Comm. R. Evid. 103.

(5) *Reopening case.* The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

Rule 914. Production of statements of witnesses

(a) *Motion for production.* After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by the trial counsel, known to trial counsel or, in the exercise of due diligence, may become known to trial counsel; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

Discussion

See also R.M.C. 701 (Discovery). Counsel should anticipate legitimate demands for statements under this and similar rules and avoid delays in the proceedings by voluntary disclosure before arraignment.

As to procedures for certain government information as to which a privilege is asserted, *see* Mil. Comm. R. Evid. 505; 506.

(b) *Production of entire statement.* If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge shall order that the statement be delivered to the moving party.

(c) *Production of excised statement.* If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection, the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by the trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) *Recess for examination of the statement.* Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) *Remedy for failure to produce statement.* If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(f) *Definition.* As used in this rule, a “statement” of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital or an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a stenolinet, mechanical, electrical, or other recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a Federal grand jury.

Rule 914A. Use of remote live testimony of a witness whose presence at trial cannot be procured by legal process, or of a child, victim, or protected entity

(a) *General procedures.* A witness whose presence at trial cannot be procured by legal process, a child, a victim, or a protected entity may be allowed to testify from an area outside the courtroom or from a remote location after the military judge has determined that the requirements of Mil. Comm. R. Evid. 611(d) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be limited to the child, victim, protected entity, or witness and, counsel for each side (not including an accused *pro se*), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;

(4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Prohibitions.* In case of a child victim, the procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.M.C. 804(c).

Rule 915. Mistrial

(a) *In general.* The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

(b) *Procedure.* On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.

(c) *Effect of declaration of mistrial.*

(1) *Withdrawal of charges.* A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the military commission.

Discussion

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

(2) *Further proceedings.* A declaration of a mistrial shall not prevent trial by another military commission on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was:

(A) An abuse of discretion and without the consent of the defense; or

(B) The direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

Rule 916. Defenses

(a) *In general.* As used in this rule, “defenses” includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.

(b) *Burden of proof.* Except for the defense of lack of mental responsibility, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) *Justification.* A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. A religious duty, whether actual or perceived, does not form the basis for the defense of justification.

Discussion

The duty may be imposed by statute, regulation, or order. For example, the use of force by a law enforcement officer when reasonably necessary in the proper execution of a lawful apprehension is justified because the duty to apprehend is imposed by lawful authority. Killing in compliance with the law of war is justified.

(d) *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

Discussion

The defense of obedience to orders is only available when the accused was acting pursuant to the orders of a responsible commander of the armed force to which he belonged and only if that armed force was commanded by a person responsible for his subordinates and possessed an internal disciplinary system to enforce compliance with the law of war.

Ordinarily the lawfulness of an order is finally decided by the military judge. *See* R.M.C. 801(e). An exception might exist when the sole issue is whether the person who gave the order in fact occupied a certain position at the time.

An act performed pursuant to a lawful order is justified. *See* section (c) of this rule. An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and

understanding would have known it to be unlawful.

(e) *Self-defense.*

(1) *Homicides.* It is a defense to a homicide or battery involving deadly force that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

Discussion

The words “involving deadly force” described the factual circumstances of the case, not specific assault offenses. If the accused is charged with simple assault, battery or any form of aggravated assault, or if simple assault, battery or any form of aggravated assault is in issue as a lesser included offense, the accused may rely on this subsection if the test specified in paragraphs (A) and (B) is satisfied.

The test for the first element of self-defense is objective. Thus, the accused’s apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such matters as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.

The test for the second element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused’s emotional control, education, and intelligence are relevant in determining the accused’s actual belief as to the force necessary to repel the attack.

See also Mil. Comm. R. Evid. 404(a)(2) as to evidence concerning the character of the victim.

(3) *Other assaults.* It is a defense to any assault or battery charged under the M.C.A. that the accused:

(A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

Discussion

The principles in the discussion under subsection (e)(1) apply here.

If, in using only such force as the accused was entitled to use under this aspect of self-defense, death or serious injury to the victim results, this aspect of self-defense may operate in conjunction with the defense of accident (*see* section (f) of this rule) to excuse the accused’s acts. The death or serious injury must have been an unintended and unexpected result of the accused’s proper exercise of the right of self-defense.

(4) *Loss of right to self-defense.* The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an

aggressor, engaged in mutual affray, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, mutual affray, or provocation and before the offense alleged occurred. Additionally, the right of self defense is not available if the accused's act is a violation of the law of war.

Discussion

A person does not become an aggressor or provocateur merely because that person approaches another to seek an interview, even if the approach is not made in a friendly manner. For example, one may approach another and demand an explanation of offensive words or redress of a complaint. If the approach is made in a nonviolent manner, the right to self-defense is not lost.

A mutual affray occurs when private parties engage in a consensual fight on equal terms. Combat between two parties in the context of an armed conflict is not a mutual affray.

Failure to retreat, when retreat is possible, does not deprive the accused of the right to self-defense if the accused was lawfully present. The availability of avenues of retreat is one factor that may be considered in addressing the reasonableness of the accused's apprehension of bodily harm and the sincerity of the accused's belief that the force used was necessary for self-protection.

The "accused's act" refers to the *actus reus* of the charged offense.

(5) *Defense of another.* The principles of self-defense under subsection (e)(1) through (4) of this rule apply to defense of another. It is a defense to any homicide, attempted homicide, assault with intent to kill, or any assault that the accused acted reasonably in defense of another, against an immediate and unlawful use of force, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

Discussion

The accused acts at the accused's peril when defending another. Thus, if the accused goes to the aid of an apparent assault victim, the accused is guilty of any assault the accused commits on the apparent assailant if, unbeknownst to the accused, the apparent victim was in fact the aggressor and not entitled to use self-defense.

(f) *Accident.* A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

Discussion

The defense of accident is not available when the act which caused the death, injury, or event was a negligent act.

(g) *Entrapment.* It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.

Discussion

The "Government" includes agents of the Government and persons cooperating with them (for example, informants). The fact that persons acting for the Government merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials.

When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition. *See* Mil. Comm. R. Evid. 404(b).

(h) *Coercion or duress.* It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

(i) *Inability.* It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

Discussion

The test of inability is objective in nature. The accused's opinion that a physical impairment prevented performance of the duty will not suffice unless the opinion is reasonable under all the circumstances.

(j) *Ignorance or mistake of fact.* It is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(k) *Lack of mental responsibility.*

(1) *Lack of mental responsibility.* It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

Discussion

See R.M.C. 706 concerning sanity inquiries; R.M.C. 909 concerning the capacity of the accused to stand trial; and R.M.C. 1102A concerning any post-trial hearing for an accused found not guilty only by reason of lack of mental responsibility.

(2) *Partial mental responsibility.* A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not an affirmative defense.

Discussion

Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense. The defense must notify the trial counsel before the beginning of trial on the merits if the defense intends to introduce expert testimony as to the accused's mental condition. See R.M.C. 701(b)(2)(B).

(3) *Procedure.*

(A) *Presumption.* The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense.

Discussion

The accused is presumed to be mentally responsible, and this presumption continues throughout the proceedings unless the finder of fact determines that the accused has proven lack of mental responsibility by clear and convincing evidence. *See* section (b) of this rule.

(B) *Inquiry.* If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under R.M.C. 706.

(1) *Not defenses generally.*

(1) *Ignorance or mistake of law.* Ignorance or mistake of law ordinarily is not a defense.

(2) *Voluntary intoxication.* Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Rule 917. Motion for a finding of not guilty

(a) *In general.* The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected. If a motion for a finding of not guilty at the close of the prosecution's case is denied, the defense may offer evidence on that offense without having reserved the right to do so.

(b) *Form of motion.* The motion shall specifically indicate wherein the evidence is insufficient.

(c) *Procedure.* Before ruling on a motion for a finding of not guilty, whether made by counsel or *sua sponte*, the military judge shall give each party an opportunity to be heard on the matter.

Discussion

The military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion.

(d) *Standard.* A motion for a finding of not guilty shall be granted only in the absence of some

evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

(e) *Motion as to greater offense.* A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

(f) *Effect of ruling.* A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time prior to authentication of the record of trial.

(g) *Effect of denial on review.* If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Rule 918. Findings

(a) *General findings.* The general findings of a military commission state whether the accused is guilty of each offense charged. If two or more accused are tried together, separate findings as to each shall be made.

(1) *As to a specification.* General findings as to a specification may be: guilty; not guilty of an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; not guilty only by reason of lack of mental responsibility; or, not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

Discussion

Exceptions and substitutions. One or more words or figures may be excepted from a specification and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by military commission. Changing the date or place of the offense may, but does not necessarily, change the nature or identity of an offense.

If A and B are jointly accused and A is convicted but B is acquitted of the offense charged, A should be found guilty by excepting the name of B from the specification as well as any other words indicating the offense was a joint one.

Lesser included offenses. If the evidence fails to prove the offense charged but does prove an offense necessarily included in the offense charged, the factfinder may find the accused not guilty of the offense charged but

guilty of a named lesser offense, which is included in the offense charged, without the use of exceptions and substitutions. Ordinarily an attempt is a lesser included offense even if the evidence establishes that the offense charged was consummated. *See* Part IV Punitive Articles, Paragraph 3 concerning lesser included offenses.

Offenses arising from the same act or transaction. The accused may be found guilty of two or more offenses arising from the same act or transaction, whether or not the offenses are separately punishable. *But see* R.M.C. 906(b)(9); 907(b)(3)(B); 1003(b)(1)(C).

(2) *As to a charge.* General findings as to a charge may be: guilty; not guilty, but guilty of a violation of section _____; not guilty only by reason of lack of mental responsibility; or not guilty.

Discussion

Where there are two or more specifications under one charge, conviction of any of those specifications requires a finding of guilty of the corresponding charge. Under such circumstances any findings of not guilty as to the other specifications do not affect that charge. If the accused is found guilty of one specification and of a lesser included offense prohibited by a different section as to another specification under the same charge, the findings as to the corresponding charge should be: Of the Charge as the specification 1: Guilty; as to specification 2; not guilty, but guilty of a violation of section _____.

A military commission may not find an offense as a violation under which it was not charged solely for the purpose of increasing the authorized punishment or for the purpose of adjudging less than the prescribed mandatory punishment.

(b) *Basis of findings.* Findings may be based on direct or circumstantial evidence. Only matters properly before the military commission on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.

Rule 919. Argument by counsel on findings

(a) *In general.* After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.

(b) *Contents.* Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.

Discussion

The military judge may exercise reasonable control over argument. *See* R.M.C. 801(a)(3).

Argument may include comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices. In argument counsel may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses. Counsel may not cite legal authorities or the facts of other cases when arguing to members on findings.

Trial counsel may not comment on the accused's exercise of the right against self-incrimination or the right to counsel. *See* Mil. Comm. R. Evid. 512. Trial counsel may not argue that the prosecution's evidence is un rebutted if the only rebuttal could come from the accused. When the accused is on trial for several offenses and testifies only as to some of the offenses, trial counsel may not comment on the accused's failure to testify as to the others. When the accused testifies on the merits regarding an offense charged, trial counsel may comment on the accused's failure

in that testimony to deny or explain specific incriminating facts that the evidence for the prosecution tends to establish regarding that offense.

Trial counsel may not comment on the failure of the defense to call witnesses or upon the probable effect of the military commission's findings on the relations between the military and civilian communities.

The rebuttal argument of trial counsel is generally limited to matters argued by the defense. If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument.

(c) *Waiver of objection to improper argument.* Failure to object to improper argument before the military judge begins to instruct members on findings shall constitute waiver of the objection.

Discussion

If an objection that an argument is improper is sustained, the military judge should immediately instruct the members that the argument was improper and that they must disregard it. In extraordinary cases improper argument may require a mistrial. *See* R.M.C. 915. The military judge should be alert to improper argument and take appropriate action when necessary.

Rule 920. Instructions on findings

(a) *In general.* The military judge shall give the members appropriate instructions on findings.

Discussion

Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented.

(b) *When given.* Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

Discussion

After members have reached a finding on a specification, instructions may not be given on an offense included therein which was not described in an earlier instruction unless the finding is illegal. This is true even if the finding has not been announced. When instructions are to be given is a matter within the sole discretion of the military trial judge.

(c) *Requests for instructions.* At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

Discussion

Requests for and objections to instructions should be resolved at an R.M.C. 803 session.

If an issue has been raised, ordinarily the military judge must instruct on the issue when requested to do so. The military judge is not required to give the specific instruction requested by counsel, however, as long as the issue is adequately covered in the instructions.

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

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

(d) *How given.* Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) *Required instructions.* Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue;

(3) A description of any special defense under R.M.C. 916 in issue;

(4) A direction that only matters properly before the military commission may be considered;

(5) A charge that—

(A) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

(B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused.]

(6) Directions on the procedures under R.M.C. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given.

Discussion

A matter is “in issue” when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. An instruction on a lesser included offense is proper when an element from the charged offense which distinguishes that offense from the lesser offense is in dispute.

Matters which may be the subject of instruction in appropriate cases include: the limited purpose for which evidence was admitted (regardless of whether such evidence was offered by the prosecution or defense) (*see* Mil. Comm. R. Evid. 105); the effect of character evidence (*see* Mil. Comm. R. Evid. 404; 405); the effect of judicial notice (*see* Mil. Comm. R. Evid. 201, 201A); the weight to be given a pre-trial statement (*see* Mil. Comm. R. Evid. 304(e)); the effect of stipulations (*see* R.M.C. 811); that, when a guilty plea to a lesser included offense has been accepted, the members should accept as proved the matters admitted by the plea, but must determine whether the remaining elements are established; that a plea of guilty to one offense may not be the basis for inferring the existence of a fact or element of another offense; the absence of the accused from trial should not be held against the accused; and that no adverse inferences may be drawn from an accused’s failure to testify (*see* Mil. Comm. R. Evid. 301(g)).

The military judge may summarize and comment upon evidence in the case in instructions. In doing so, the military judge should present an accurate, fair, and dispassionate statement of what the evidence shows; not depart from an impartial role; not assume as true the existence or nonexistence of a fact in issue when the evidence is conflicting or disputed, or when there is no evidence to support the matter; and make clear that the members must exercise their independent judgment as to the facts.

(f) *Waiver*. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify of what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings

(a) *In general*. After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment.

(b) *Deliberations*. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the military commission be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.

(c) *Voting*.

(1) *Secret ballot*. Voting on the findings for each charge and specification shall be by

secret written ballot. All members present shall vote.

(2) Numbers of votes required to convict. A finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty.

Discussion

In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, if there are five members, the concurrence of at least four would be required to convict. The military judge should instruct the members on the specific number of votes required to convict. Although conviction of a capital offense may be achieved by a vote of at least two thirds of the members present, only a unanimous vote by a panel of at least 12 members will establish the prerequisite for a capital sentence proceeding (except as provided in R.M.C. 501(a)(3)). *See* R.M.C. 922(b)(2).

(3) *Acquittal*. If fewer than two-thirds of the members present vote for a finding of guilty—or, when the death penalty is mandatory, if fewer than all the members present vote for a finding of guilty—a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) *Not guilty only by reason of lack of mental responsibility*. When the defense of lack of mental responsibility is in issue under R.M.C. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members present (all members for offenses where the death penalty is mandatory) vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

Discussion

If lack of mental responsibility is in issue with regard to more than one specification, the members should determine the issue of lack of mental responsibility on each specification separately.

(5) *Included offenses*. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) *Procedure for voting*.

(A) *Order*. Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.M.C. 924.

(d) *Action after findings are reached.* After members have reached findings on each charge and specification before them, the military commission shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

Discussion

Ordinarily a findings worksheet should be provided to the members as an aid to putting the findings in proper form. If the military judge examines any writing by the members or otherwise assists them to put findings in proper form, this must be done in an open session and counsel should be given the opportunity to examine such a writing and to be heard on any instructions the military judge may give.

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

Rule 922. Announcement of findings

(a) *In general.* Findings shall be announced in the presence of all parties promptly after they have been determined.

(b) *Findings by members.* The president shall announce the findings by the members.

(1) If a finding is based on a plea of guilty, the president shall so state.

(2) In a capital case, if a finding of guilty is unanimous with respect to a capital offense, the president shall so state. This provision shall not apply during reconsideration under R.M.C. 924(a) of a finding of guilty previously announced in open court unless the prior finding was announced as unanimous.

Discussion

If the findings announced are ambiguous, the military judge should seek clarification. *See also* R.M.C. 924. A non-unanimous finding of guilty as to a capital offense may be reconsidered, but not for the purpose of rendering a unanimous verdict in order to authorize a capital sentencing proceeding. The president shall not make a statement regarding unanimity with respect to reconsideration of findings as to an offense in which the prior findings were not unanimous.

(c) *Findings by military judge in the event of a guilty plea.* The military judge shall announce the findings of guilt unless the plea is to a lesser included offense and the prosecution intends to

proceed to trial on the offense charged.

(d) *Erroneous announcement.* If an error was made in the announcement of the findings of the military commission, the error may be corrected by a new announcement in accordance with this rule. The error must be discovered and the new announcement made before the final adjournment of the military commission in the case.

Discussion

See R.M.C. 1102 concerning the action to be taken if the error in the announcement is discovered after final adjournment.

(e) *Polling prohibited.* Except as provided in Mil. Comm. R. Evid. 606, members may not be questioned about their deliberations and voting.

Rule 923. Impeachment of findings

Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion

Deliberations of the members ordinarily are not subject to disclosure. *See* Mil. Comm. R. Evid. 606. Unsound reasoning by a member, misconception of the evidence, or misapplication of the law is not a proper basis for challenging the findings. However, when a showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground. The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached.

Rule 924. Reconsideration of findings

(a) *Time for reconsideration.* Members may reconsider any finding reached by them before such finding is announced in open session.

(b) *Procedure.* Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-third of the members vote for reconsideration. When the death penalty is mandatory, a request by any member for reconsideration of a guilty finding requires reconsideration. Any finding of not guilty only by reason of lack of mental responsibility shall be reconsidered on the issue of the finding of guilty of the elements if more than one-third of the members vote for reconsideration, and on the issue of mental responsibility if a majority vote for reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.M.C. 921 shall apply

Discussion

After the initial secret ballot vote on a finding in closed session, no other vote may be taken on that finding unless a vote to reconsider succeeds.

CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, the prosecution and defense may present matters pursuant to this rule to aid the commission members in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of evidence of prior convictions, military or civilian, and evidence of aggravation.

(B) Presentation by the defense of evidence in extenuation or mitigation or both.

(C) Rebuttal.

(D) Argument by the trial counsel on sentence.

(E) Argument by the defense counsel on sentence.

(F) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matter to be presented by the prosecution.*

(1) *Evidence of prior convictions of the accused.*

(A) *In general.* The trial counsel may introduce evidence of military or civilian convictions, foreign or domestic, of the accused. For purposes of this rule, there is a “conviction” in a military commission case when a sentence has been adjudged. In a civilian case, a “conviction” includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a

“civilian conviction” does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(C) *Method of proof.* Previous convictions may be proved by any evidence admissible under the Military Commission Rules of Evidence.

(2) *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, gender, color, religion, national origin, ethnicity, disability, or sexual orientation of any person or that any offense of which the accused has been convicted comprises a violation of the law of war.

(c) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless of whether the defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense that do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the military commission, or to furnish grounds for a recommendation of clemency.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused.* The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the military commission, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the military commission. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) *Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, and other writings of similar authenticity and reliability.

(d) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Commission Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(e) *Production of witnesses.* (1) *In general.* During the presentence proceedings, the military judge may permit greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in R.M.C. 703(c), (e), and (f).

(2) *Limitations.* A witness may be produced to testify during presentence proceedings through subpoena or travel orders at Government expense only if—

(A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) Other forms of evidence, such as oral depositions, written interrogatories, telephonic testimony, two-way video teleconference or other similar technology, or former testimony would not be sufficient to meet the needs of the military commission in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of

producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with intelligence activities, military operations or deployments, mission accomplishment, or essential training.

(f) *Additional matters to be considered.* In addition to matters introduced under this rule, the military commission may consider—

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

(g) *Argument.* After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Rule 1002. Sentence determination

Subject to limitations in this Manual, or when appropriate, the limitations in the law of war, the sentence to be adjudged is a matter within the discretion of the military commission. Except as instructed by the military judge, a military commission may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

Rule 1003. Punishments

(a) *In general.* Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a military commission. Only the following punishments may be adjudged:

(1) *Fine.* Any military commission may adjudge a fine. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired.

(2) *Confinement.* The place of confinement shall not be designated by the military commission. A military commission shall not adjudge a sentence to solitary confinement or to confinement without hard labor.

(3) *Death.* Death may be adjudged only in accordance with R.M.C. 1004.

(b) *Limits on punishments.*

(1) *Based on offenses.*

(A) *Offenses listed in Part IV; maximum confinement.* The maximum authorized period of confinement is set forth for each offense listed in Part IV of this Manual. This limitation is for each separate offense, not for each charge.

(B) *Offenses not listed Part IV.* For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(C) *Multiplicity.* When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.

Rule 1004. Capital cases

(a) *In general.* Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by the concurrence of all the members, not less than twelve (except as provided in Rule 501(a)(3)), of the military commission present at the time the vote was taken; and

(3) The requirements of sections (b) and (c) of this rule have been met.

(b) *Procedure.* In addition to the provisions in R.M.C. 1001, the following procedures shall apply in capital cases—

(1) *Notice.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under section (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under section (c) of this

rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.M.C. 1001(b)(2) tending to establish one or more of the aggravating factors in section (c) of this rule.

(3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(4) *Necessary findings.* Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under section (c) existed;

(B) Notice of such factor was provided in accordance with subsection (1) of this section and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.M.C. 1001(b)(2), including the factors under section (c) of this rule.

(5) *Basis for findings.* The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings, or both.

(6) *Instructions.* In addition to the instructions required under R.M.C. 1005, the military judge shall instruct the members of such aggravating factors under section (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under section (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.M.C. 1006.

(8) *Announcement.* If death is adjudged, the president shall, in addition to complying with R.M.C. 1007, announce which aggravating factors under section (c) of this rule were found by the members.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the accused was convicted of an offense, referred as capital, that is a violation of the law of war;

- (2) That the offense resulted in the death of one or more than one persons;
- (3) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered;
- (4) That the offense was committed for the purpose of receiving money or a thing of value;
- (5) That the accused procured another by means of compulsion, torture, mutilation, or cruel, inhuman, or degrading treatment to commit the offense;
- (6) That the crime was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim or to another person. For purposes of this subsection, “substantial physical harm” means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term “substantial physical harm” does not mean minor injuries, such as a black eye or bloody nose. The term “substantial mental or physical pain or suffering” is accorded its common meaning and includes torture.
- (7) That the accused has been found guilty in the same case of another capital crime;
- (8) That the victim was under the age of 15;
- (9) That the victim was a protected person or that the offense was committed in such a way or under circumstances that the life of one or more protected persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Offenses 1 (Murder of Protected Persons) and 9 (Using Protected Persons as a Shield);
- (10) That the offense was committed—
 - (A) through the employment of a substance or a weapon that releases a substance and the such substance causes death or serious damage to health in the ordinary course of events through its asphyxiation, poisonous, or bacteriological properties, except that this factor shall not apply to a violation of Offense 8 (Employing Poison or Similar Weapon); or
 - (B) through the employment of a weapon that causes unnecessary suffering in violation of the law of war;
- (11) That the offense was committed through the use of treachery or perfidy, except that this factor shall not apply to a violation of Offense 17 (Treachery or Perfidy);
- (12) That the offense was committed with the intent to intimidate or terrorize the civilian population, except that this factor shall not apply to a violation of Offense 24 (Terrorism);
- (13) That the offense was committed while the accused intentionally targeted a protected

place;

(14) That the accused committed Offense 27 (Spying).

Discussion

The offense of spying includes the aggravating factor that the conduct took place in the context of and was associated with armed conflict.

(d) *Other penalties.* When death is an authorized punishment for an offense, all other punishments authorized under R.M.C. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty.

Rule 1005. Instructions on sentence

(a) *In general.* The military judge shall give the members appropriate instructions on sentence.

(b) *When given.* Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

(c) *Requests for instructions.* After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

(d) *How given.* Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) *Required instructions.* Instructions on sentence shall include:

(1) A statement of the maximum authorized punishment that may be adjudged;

(2) A statement of the procedures for deliberation and voting on the sentence set out in R.M.C. 1006;

(3) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

(4) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.M.C. 1001(b)(1).

(5) In the event of a pretrial agreement under Rule 705, in which a range of punishment is specified as a condition of the agreement, the military judge shall instruct the members, without informing them of the existence of a pretrial agreement, as to the minimum permissible punishment (as reflected in the quantum agreed to by the accused and the convening authority), and the maximum permissible punishment (also as reflected in the quantum portion).

(f) *Waiver.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 1006. Deliberations and voting on sentence

(a) *In general.* The members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) *Deliberations.* Deliberations may properly include full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the military commission be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) *Proposal of sentences.* Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president.

(d) *Voting.*

(1) *Duty of members.* Each member has the duty to vote for a proper sentence for the offenses of which the military commission found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused.

(2) *Secret ballot.* Proposed sentences shall be voted on by secret written ballot.

(3) *Procedure.*

(A) *Order.* All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

(4) *Number of votes required.*

(A) *Death.* A sentence which includes death may be adjudged only if all members present vote for that sentence.

(B) *Confinement for life, or more than 10 years.* A sentence that includes confinement for life, or more than 10 years may be adjudged only if at least three-fourths of the members present vote for that sentence.

(C) *Other.* A sentence other than those described in paragraphs (d)(4)(A) or (B) of this rule may be adjudged only if at least two-thirds of the members present vote for that sentence.

(5) *Mandatory sentence; pretrial agreement.* When a pretrial agreement is in effect, the members shall vote on a sentence in accordance with Rule 1005(e)(5), subject to (6), below.

(6) *Effect of failure to agree.* If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

(e) *Action after a sentence is reached.* After the members have agreed upon a sentence, the military commission shall be opened and the president shall inform the military judge that a sentence has been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the sentence in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

Discussion

Ordinarily a sentence worksheet should be provided to the members as an aid to putting the sentence in proper form. If a sentence worksheet has been provided, the military judge should examine it before the president announces the sentence. If the military judge intends to instruct the members after such examination, counsel should be permitted to examine the worksheet and to be heard on any instructions the military judge may give. The president should not disclose any specific number of votes for or against any sentence. If the sentence is ambiguous or apparently illegal, see R.M.C. 1009(c).

Rule 1007. Announcement of sentence

(a) *In general.* The sentence shall be announced by the president, in the presence of all parties, promptly after it has been determined.

(b) *Erroneous announcement.* If the announced sentence is not the one actually determined by the military commission, the error may be corrected by a new announcement made before the

record of trial is authenticated and forwarded to the convening authority. This action shall not constitute reconsideration of the sentence. If the military commission has been adjourned before the error is discovered, the military judge may call the military commission into session to correct the announcement.

(c) *Polling prohibited.* Except as provided in Mil. Comm. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting.

Rule 1008. Impeachment of sentence

A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Rule 1009. Reconsideration of sentence

(a) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) *Exceptions.*

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence upon reconsideration in accordance with section (e) of this rule.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense, the sentence may be reconsidered after announcement in accordance with section (e) of this rule.

(c) *Clarification of sentence.* A sentence may be clarified at any time prior to action of the convening authority on the case. When an adjudged sentence appears ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the military commission is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members who adjudged the sentence as soon as practical after the ambiguity is discovered.

(d) *Action by the convening authority.* When a sentence adjudged by the military commission is ambiguous, the convening authority may return the matter to the military commission for clarification. When a sentence adjudged by the military commission is apparently illegal, the convening authority may return the matter to the military commission for reconsideration or may approve a sentence no more severe than the legal, unambiguous portions of the adjudged sentence.

(e) *Reconsideration procedure.* Any member of the military commission may propose that a sentence reached by the members be reconsidered.

(1) *Instructions.* When a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration.

(2) *Voting.* The members shall vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

(3) *Number of votes required.*

(A) *With a view to increasing.* Subject to section (b) of this rule, members may reconsider a sentence with a view of increasing it only if at least a majority vote for reconsideration.

(B) *With a view to decreasing.* Members may reconsider a sentence with a view to decreasing it only if:

(i) In the case of a sentence which includes death, at least one member votes to reconsider;

(ii) In the case of a sentence which includes confinement for life, with or without eligibility for parole, or more than 10 years, more than one-fourth of the members vote to reconsider; or;

(iii) In the case of any other sentence, more than one-third of the members vote to reconsider.

(4) *Successful vote.* If a vote to reconsider a sentence succeeds, the procedures in R.M.C. 1006 shall apply.

Rule 1010. Notice concerning post-trial and appellate rights

(a) In each military commission, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

(1) The right to submit matters to the convening authority to consider before taking action;

(2) The right to appellate review, as applicable, and the effect of waiver or withdrawal of such right;

(3) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

(b) The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.

Discussion

The post-trial duties of the defense counsel concerning the appellate rights of the accused are set forth in paragraph (E)(iv) of the Discussion accompanying R.M.C. 502(d)(6). The defense counsel shall explain the appellate rights to the accused and prepare the written document of such advisement prior to or during trial.

Rule 1011. Adjournment

The military judge may adjourn the military commission at the end of the trial of an accused or proceed to trial of other cases referred to that military commission. Such an adjournment may be for a definite or indefinite period.

CHAPTER XI. POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement and fine

(a) *Report of the result of trial.* After final adjournment of the military commission in a case, the trial counsel shall promptly notify the convening authority or the convening authority's designee, the commander who currently exercises control of the accused, and, if appropriate, the officer in charge of the confinement facility, of the findings and sentence.

(b) *Post-trial confinement.*

(1) *In general.* An accused may be placed in post-trial confinement if the sentence adjudged by the military commission includes death or confinement.

(2) *Who may order confinement.* Unless limited by superior authority, a commander who exercises control of the accused may order the accused into post-trial confinement when post-trial confinement is authorized under subsection (b)(1) of this rule. A commander or other official authorized to order post-trial confinement under this subsection may delegate this authority to the trial counsel.

(3) *Confinement or detention on other grounds.* Nothing in this rule shall prohibit confinement or detention of a person after a military commission on proper grounds other than the offenses for which the accused was tried at the military commission.

Discussion

This section acknowledges that even in the face of an acquittal, continued detention may be appropriate under the law of war.

(c) *Deferment of confinement or fine.*

(1) *In general.* Deferment of a sentence to confinement or fine is a postponement of the imposition of a component of the sentence. A deferment may be approved by the authority in (2) below, with or without request from an accused. Any accused may, by written application, at any time after the adjournment of the military commission, request deferment of a fine or a sentence to confinement that has not been ordered executed.

(2) *Who may defer.*

(A) The convening authority, if at the time of deferment the accused is subject to the military commission jurisdiction of the convening authority;

(B) If the accused is no longer in the convening authority's jurisdiction, a general or flag officer in command, whose subordinate organization exercises control over the accused;
or

(C) If the accused is no longer under the jurisdiction or control of any convening authority or military commander, any official so empowered by the Secretary of Defense, the Attorney General of the United States (if appropriate), or their designee.

(3) *Action on deferment request.* The authority acting on the deferment request may, in that authority's discretion, defer imposition of a fine or service of a sentence to confinement. The accused shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; and the accused's character, mental condition, medical fitness, and family situation. The decision of the authority acting on the deferment request shall be subject to judicial review only for abuse of discretion. The action of the authority acting on the deferment request shall be in writing and a copy shall be provided to the accused.

(4) *Orders.* The action granting deferment shall be reported in the convening authority's action under R.M.C. 1107 and shall include the date of the action on the request when it occurs prior to or concurrently with the action. Action granting deferment after the convening authority's action under R.M.C. 1107 shall be reported in writing and included in the record of trial.

(5) *Restraint when deferment is granted.* When a sentence to confinement is deferred, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, consistent with subsection (b)(3) of this rule, be detained or confined for any other proper reason, including when the accused is otherwise detained pursuant to his status as an enemy combatant.

(6) *End of deferment.* Deferment of a sentence to a fine or confinement ends when:

(A) The convening authority takes action under R.M.C. 1107, unless the convening authority specifies in the action that imposition of a fine or service of confinement after the action is deferred;

(B) The fine is suspended (but only as to deferment of the fine and not as to any confinement);

(C) The deferment expires by its own terms; or

(D) The deferment is otherwise rescinded in accordance with subsection (c)(7) of this rule. Deferment of confinement may not continue after the conviction is final under R.M.C. 1209.

(7) *Rescission of deferment.*

(A) *Who may rescind.* The authority who granted the deferment or, if the accused is no longer subject to that authority's jurisdiction, the appropriate official described in (c)(2)(B) or (C) of this rule, may rescind the deferment.

(B) *Action.* A deferment may be rescinded when, in the sole discretion of the official acting on the rescission, additional information is presented, which considered with all other information in the case, constitutes grounds for such action. The accused shall promptly be informed of the basis for the rescission and of the right to submit written matters in the accused's behalf and to request that the rescission be reconsidered. However, the accused may be required to serve the sentence to confinement or pay the fine pending this action.

(C) *Execution.* When deferment of confinement is rescinded after the convening authority's action under R.M.C. 1107, the confinement may be ordered executed. However, no such order to rescind a deferment of confinement may be issued within 7 days of notice of the rescission of a deferment of confinement to the accused under paragraph (c)(7)(B) of this rule, to afford the accused an opportunity to respond. The authority rescinding the deferment may extend this period for good cause shown. The accused shall be credited with any confinement actually served during this period.

(D) *Orders.* Rescission of a deferment before or concurrently with the initial action in the case shall be reported in the action under R.M.C. 1107, which action shall include the dates of the granting of the deferment and the rescission. Rescission of a deferment of confinement after the convening authority's action shall be made in writing and appended to the record of trial.

Rule 1102. Post-trial sessions

(a) *In general.* Post-trial sessions may be proceedings in revision or R.M.C. 803 sessions. Such sessions may be directed by the military judge or the convening authority in accordance with this rule.

(b) *Purpose.*

(1) *Proceedings in revision.* Proceedings in revision may be ordered, in the sole discretion of the convening authority, to correct an apparent error, omission, or improper or inconsistent action by the military commission, which can be rectified by reopening the proceedings without material prejudice to the accused.

(2) *Sessions without members.* A session under R.M.C. 803 may be called by the military judge or directed by the convening authority under this rule for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence. The session may be called or ordered upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence.

(c) *Matters not subject to post-trial sessions.* Post-trial session may not be directed:

(1) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(2) For reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some section of the M.C.A.; or

(3) For increasing the severity of the sentence unless:

(A) the commission failed to adjudge a sentence prescribed by the M.C.A. as mandatory for an offense of which the accused was found guilty; or

(B) the adjudged sentence was less than that agreed to by the accused and the convening authority in a pretrial agreement, if any, pertaining to an offense or offenses of which the accused, pursuant to his plea, was found guilty.

(d) *When directed.* The military judge may direct a post-trial R.M.C. 803 session any time before the record is authenticated. The convening authority may direct a post-trial session any time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed.

(e) *Procedure.*

(1) *Personnel.* The requirements of R.M.C. 505 and 805 shall apply at post-trial sessions except that—

(A) If the matter subject to a proceeding in revision requires the presence of members:

(i) The absence of any members does not invalidate the proceedings if at least three members are present; and

(ii) A different military judge may be detailed, subject to R.M.C. 502(c) and 902, if the military judge who presided at the earlier proceedings is not reasonably available.

(B) For a post-trial session without members, a different military judge may be detailed, subject to R.M.C. 502(c) and 902, for good cause.

(2) *Action.* The military judge shall take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take.

(3) *Record.* Subject to Mil. Comm. R. Evid. 505 and 506, and R.M.C. 806, all post-trial sessions, except any deliberations by the members, shall be held in open session. The record of the post-trial sessions shall be prepared, authenticated, and served in accordance with R.M.C. 1103 and 1104 and shall be included in the record of the prior proceedings.

Rule 1102A. Post-trial hearing for person found not guilty only by reason of lack of mental responsibility

(a) *In general.* The military judge shall conduct a hearing not later than 40 days following the finding that an accused is not guilty only by reason of a lack of mental responsibility.

(b) *Psychiatric or psychological examination and report.* Prior to the hearing, the military judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing.

(c) *Post-trial hearing.*

(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.

(2) The military judge is not bound by the rules of evidence except with respect to privileges.

(3) An accused found not guilty only by reason of a lack of mental responsibility of:

(A) an offense involving death or serious bodily injury to another; or

(B) a grave breach under the law of war;

(C) serious damage to the property of another; or

(D) involving a substantial risk of such injury or damage,

has the burden of proving by clear and convincing evidence that his release or detention under less than the most stringent and controlled circumstances would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. With respect to any other offense, the accused has the burden of such proof by a preponderance of the evidence.

(4) After the hearing, the military judge shall report his findings to the convening authority and the commander of the facility in which the accused is then confined.

Rule 1103. Preparation of record of trial

(a) *In general.* The convening authority shall keep a record of the proceedings in each trial by military record.

(1) Under the supervision of the military judge, the trial counsel shall prepare the record of trial.

(2) *Contents.*

(A) *In general.* The record of trial in each military commission shall be separate, complete, and independent of any other document. The record may be in written or electronic form. It will include a verbatim transcript of all sessions except sessions closed for deliberations and voting.

(B) *Other matters.* A complete record shall include:

- (i) The original charge sheet or a duplicate;
- (ii) A copy of the convening document and any amending documents;
- (iii) The original dated, signed action by the convening authority; and
- (iv) Exhibits, or, with the permission of the military judge, copies, photographs, or descriptions:
 - (v) if the trial was a rehearing or new or other trial of the case, the record of the former hearing(s); and
 - (vi) written special findings, if any, by the military judge.

(C) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence;

(D) Any matter filed by the accused under R.M.C. 1105, or any written waiver of the right to submit such matter;

(E) Any deferment request and the action on it;

(F) Explanation for any substitute authentication under R.M.C. 1104;

(G) Explanation for any failure to serve the record of trial on the accused under R.M.C. 1104;

(H) The post-trial recommendation of the legal advisor and proof of service on defense counsel in accordance with R.M.C. 1106;

(I) Any response by defense counsel to the post-trial review;

(J) Recommendations and other papers relative to clemency;

(K) Any statement why it is impracticable for the convening authority to act;

(L) Conditions of suspension, if any, and proof of service on probationer under R.M.C. 1108;

(M) Any waiver or withdrawal of appellate review under R.M.C. 1110; and

(N) Records of any proceedings in connection with vacation of suspension under R.M.C. 1109.

(b) *Copies of the record of trial.* The trial counsel shall cause to be prepared an original and four copies of the record of trial. The convening or higher authority may direct that additional copies of the record of trial be prepared.

(c) *Security classification.* If the record of trial contains matter which must be classified under applicable security regulations, the trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

(d) *Examination and correction before authentication.* The trial counsel shall examine the record of trial before authentication and cause those changes to be made which are necessary to report the proceedings accurately. The trial counsel shall not change the record after authentication.

(e) *Examination by defense counsel.* Except when unreasonable delay will result, subject to review of that determination by the military judge, prior to authentication, the trial counsel shall permit the defense counsel to examine the record before authentication.

(f) *Videotape and similar records.*

(1) *Recording proceedings.* If authorized by regulations of the Secretary of Defense, proceedings may be recorded by videotape, audiotape, or similar material from which sound and visual images may be reproduced to accurately depict the entire military commission. Such means of recording may be used in lieu of recording by a qualified court reporter, when one is required, subject to this rule.

(2) *Preparation of written record.* When the military commission or any part of it is recorded by videotape, audiotape, or similar material, a written transcript shall be prepared in accordance with this rule and R.M.C. 1104 before the record is forwarded.

(3) *Military exigency.* If military exigency prevents preparation of a written transcript or summary, as required, and when the military commission has been recorded by videotape, audiotape, or similar material under subsection (f)(1) of this rule, the videotape, audiotape, or similar material, together with the matters in paragraph (a)(2)(B) of this rule shall be authenticated and forwarded in accordance with R.M.C. 1104, provided that in such case the convening authority shall cause to be attached to the record a statement of the reasons why a written record could not be prepared, and provided further that in such case the defense counsel shall be given reasonable opportunity to listen to or to view and listen to the recording whenever defense counsel is otherwise entitled to examine the record under these rules.

(4) *Further review.* Before review by the Court of Military Commission Review of a case in which the record includes an authenticated recording prepared under subsection (f)(3) of this rule, a complete written transcript shall be prepared and certified as accurate by the military judge. The authenticated recording shall be retained for examination by appellate authorities.

(5) *Accused's copy.* When a record includes an authenticated recording under subsection (f)(3) of this rule, the Government shall, in order to comply with R.M.C. 1104(b):

(A) Provide the accused with a duplicate copy of the videotape, audiotape, or similar matter and copies of any written contents of and attachments to the record, and give the accused reasonable opportunity to use such viewing equipment as is necessary to listen to or view and listen to the recording; or

(B) With the written consent of the accused, defer service of the record until a written record is prepared under subsection (4) of this rule.

Rule 1104. Records of trial: Authentication; service; loss; correction; forwarding

(a) *Authentication.* A record of trial by military commission shall be authenticated by the signature of the military judge who presided over the portion of the proceedings that he or she is authenticating. If any military judge is unavailable to authenticate a record because of the military judge's death, disability, or absence, the trial counsel present at the end of the proceedings shall authenticate the record of trial. If the trial counsel cannot authenticate the record of trial because of the trial counsel's death, disability, or absence, a member shall authenticate the record of trial. Authentication is an attestation that the record accurately reports the proceedings. No person may be required to authenticate a record of trial if that person is not satisfied that it accurately reports the proceedings.

(b) *Service.* The trial counsel shall cause a copy of the record of trial to be served on the accused as soon as the record of trial is authenticated. The trial counsel shall cause the accused's receipt for the copy of the record of trial to be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record of trial is forwarded to the convening authority, the trial counsel shall prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused, including the means of transmission and the address, and cause the certificate to be attached to the original record of trial. In such a case the accused's receipt shall be forwarded to the convening authority as soon as it is obtained.

(c) *Substitute service.* If it is impracticable to serve the record of trial on the accused because of the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the military commission or in writing, the accused's copy of the record shall be forwarded to the accused's defense counsel, if any. Trial counsel shall attach a statement to the record explaining why the accused was not served personally. If the accused has more than one counsel, R.M.C. 1106(e)(2) shall apply. If the accused has no counsel and if the accused cannot be located, the trial counsel shall prepare an explanation for the failure to serve the record. The explanation and the accused's copy of the record shall be forwarded with the original record. The accused shall be provided with a copy of the record as soon as practicable.

(d) *Information subject to Mil. Comm. R. Evid. 505 & 506.*

(A) *Forwarding to convening authority.* If the copy of the record of trial prepared for the accused contains classified or government information, the trial counsel, unless directed otherwise by the convening authority, shall forward the accused's copy to the convening authority, before it is served on the accused.

(B) *Responsibility of the convening authority.* The convening authority shall:

(i) cause any classified or government information to be deleted or withdrawn from the accused's copy of the record of trial;

(ii) cause a certificate indicating that classified or government information has been deleted or withdrawn to be attached to the record of trial; and

(iii) cause the expurgated copy of the record of trial and the attached certificate regarding classified or government information to be served on the accused as provided in this rule except that the accused's receipt shall show that the accused has received an expurgated copy of the record of trial.

(C) *Contents of certificate.* The certificate regarding deleted or withdrawn classified or government information shall indicate:

(i) that the original record of trial may be inspected in the Office of Military Commissions under such regulations as the Secretary of Defense may prescribe;

(ii) the pages of the record of trial from which matter has been deleted;

(iii) the pages of the record of trial which have been entirely deleted; and

(iv) the exhibits which have been withdrawn.

(e) *Loss of record.* If the authenticated record of trial is lost or destroyed, the trial counsel shall, if practicable, cause another record of trial to be prepared for authentication. The new record of

trial shall become the record of trial in the case if the requirements of R.M.C. 1103 and this rule are met.

(f) *Correction of record after authentication; certificate of correction.*

(1) *In general.* A record of trial found to be incomplete or defective after authentication may be corrected to make it accurate. A record of trial may be returned to the convening authority by superior competent authority for correction under this rule.

(2) *Procedure.* An authenticated record of trial believed to be incomplete or defective may be returned to the military judge for a certificate of correction. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties shall be given reasonable access to any original reporter's notes or tapes of the proceedings.

(3) *Authentication of certificate of correction; service on the accused.* The certificate of correction shall be authenticated as provided in section (a) of this rule and a copy served on the accused as provided in section (b) of this rule. The certificate of correction and the accused's receipt for the certificate of correction shall be attached to each copy of the record of trial required to be prepared under R.M.C. 1103.

(g) *Forwarding.* After every military commission, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action. The convening authority shall refer the record to the legal advisor for recommendation under R.M.C. 1106 before the convening authority takes action.

Rule 1105. Matters submitted by the accused

(a) *In general.* After a sentence is adjudged, the accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. The convening authority is only required to consider written submissions. Submissions are not subject to the Military Commission Rules of Evidence and may include:

(1) Allegations of errors affecting the legality of the findings or sentence;

(2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(3) Matters in mitigation which were not available for consideration at the military commission; and

(4) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

(b) *Time periods.* The accused may submit matters within the later of 20 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the legal advisor, or an addendum to the recommendation containing new matter is served on the accused. If, within the 20-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's legal advisor may, for good cause, extend the 20-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension. A post-trial session under R.M.C. 1102 shall have no effect on the running of any time period in this rule, except when such session results in the announcement of a new sentence, in which case the period shall run from that announcement.

(c) *Good cause.* For purposes of this rule, good cause for an extension ordinarily does not include the need for securing matters which could reasonably have been presented at the military commission.

(d) *Waiver.*

(1) *Failure to submit matters.* Failure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters.

(2) *Submission of matters.* Submission of any matters under this rule shall be deemed a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing.

(3) *Written waiver.* The accused may expressly waive, in writing, the right to submit matters under this rule. Once filed, such waiver may not be revoked.

(4) *Absence of accused.* If, as a result of the unauthorized absence of the accused, the record cannot be served on the accused in accordance with R.M.C. 1104 and if the accused has no counsel to receive the record, the accused shall be deemed to have waived the right to submit matters under this rule within the time limit which begins upon service on the accused of the record of trial.

Discussion

The accused is not required to raise objections to the trial proceedings in order to preserve them for later review.

Rule 1106. Recommendation of the legal advisor

(a) *In general.* Before the convening authority takes action under R.M.C. 1107 on a record of trial by military commission the convening authority's legal advisor shall forward to the convening authority a recommendation under this rule.

(b) *Disqualification.* No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, or associate or assistant defense counsel, or investigating officer in any case may later act as a legal advisor to any reviewing or convening authority in the same case.

Discussion

The legal advisor may also be ineligible when, for example, the legal advisor: served as the defense counsel in a companion case; testified as to a contested matter (unless the testimony is clearly uncontroverted); has other than an official interest in the same case; or must review that officer's own pretrial action (such as the pretrial advice) when the sufficiency or correctness of the earlier action has been placed in issue.

(c) *Form and content of recommendation.*

(1) The purpose of the recommendation of the legal advisor is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The legal advisor shall use the record of trial in the preparation of the recommendation.

(2) *Form.* The recommendation of the legal officer shall be a concise written communication.

(3) *Required contents.* Except as provided in section (d) of this rule, the recommendation of the legal advisor shall include concise information as to:

(A) The findings and sentence adjudged by the military commission;

(B) A recommendation for clemency by the military commission, made in conjunction with the announced sentence;

(C) A statement of the nature and duration of the accused's detention prior to trial;

(E) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and

(F) A specific recommendation as to the action to be taken by the convening authority on the sentence.

(4) *Legal errors.* The legal advisor is not required to examine the record for legal errors. However, if a claim of legal error is raised in the matters submitted under R.M.C. 1105, the legal advisor shall state whether, in the legal advisor's opinion, corrective action on the findings or sentence should be taken. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the legal advisor's statement, if any, concerning legal errors is not required.

(5) *Optional matters.* The recommendation of the legal advisor may include, in addition to matters included under subsections (c)(3) and (4) of this rule, any additional matters deemed appropriate by the legal advisor. Such matter may include matters outside the record.

(6) *Effect of error.* In case of error in the recommendation not otherwise waived under subsection (e)(6) of this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

(d) *No findings of guilty; findings of not guilty only by reason of lack of mental responsibility.* If the proceedings resulted in an acquittal or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if, after the trial began, the proceedings were terminated without findings and no further action is contemplated, a recommendation under this rule is not required.

(e) *Service of recommendation on defense counsel and accused; defense response.*

(1) *Service of recommendation on defense counsel and accused.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.M.C. 1107, the legal advisor shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the military commission or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

(2) *Counsel for the accused.* The accused may, at trial or in writing to the legal advisor before the recommendation has been served under this rule, designate which counsel (detailed or civilian) will be served with the recommendation. In the absence of such designation, the legal advisor shall cause the recommendation to be served in the following order of precedence, as applicable, on: (1) civilian counsel or (2) detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel has been relieved or is not reasonably available to represent the accused, substitute military counsel to represent the accused shall be detailed by an appropriate authority. Substitute counsel shall attempt to enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response.

(3) *Record of trial.* The legal advisor shall, upon request of counsel for the accused served with the recommendation, provide that counsel with a copy of the record of trial for use while preparing the response to the recommendation.

(4) *Response.* Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter.

(5) *Time period.* Counsel for the accused shall be given 20 days from service of the record of trial under R.M.C. 1104(b) or receipt of the recommendation, whichever is later, in which to submit comments on the recommendation. The convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days.

(6) *Waiver.* Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error.

(7) *New matter in addendum to recommendation.* The legal advisor may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 20 days from service of the addendum in which to submit comments. Substitute service of the accused's copy of the addendum upon counsel for the accused is permitted in accordance with the procedures outlined in subsection (e)(1) of this rule.

Rule 1107. Action by convening authority

(a) *Who may take action.* The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, forward the case to an official designated by the Secretary of Defense for action under this rule.

(b) *General considerations.*

(1) *Discretion of convening authority.* The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a military commission is a matter of prerogative. The convening authority is not required to review the case for legal errors or for factual sufficiency.

(2) *When action may be taken.* The convening authority may take action only after the applicable time periods under R.M.C. 1105(b) have expired or the accused has waived the right to present matters under R.M.C. 1105(d), whichever is earlier, subject to regulations of the Secretary concerned.

(3) *Matters considered.*

(A) *Required matters.* Before taking action, the convening authority shall consider:

(i) The result of trial;

(ii) The recommendation of the legal advisor under R.M.C. 1106, if applicable; and

(iii) Any matters submitted by the accused under R.M.C. 1105 or, if applicable, R.M.C. 1106(e).

(B) *Additional matters.* Before taking action the convening authority may consider:

(i) The record of trial;

(ii) Any relevant records pertaining to the accused; and

(iii) Such other matters as the convening authority deems appropriate.

However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut.

(4) *When proceedings resulted in finding of not guilty or not guilty only by reason of lack of mental responsibility, or there was a ruling amounting to a finding of not guilty.* The convening authority shall not take action disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty. When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority, however, may commit the accused to a suitable facility or otherwise make provisions for appropriate treatment of the accused, pending a hearing and disposition in accordance with R.M.C. 1102A.

(5) *Action when accused lacks mental capacity.* The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the convening authority may direct an examination of the accused in accordance with R.M.C. 706 before deciding whether the accused lacks mental capacity, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the post-trial proceedings. The convening authority may approve the sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. Nothing in this subsection shall prohibit the convening authority from disapproving the findings of guilty and sentence.

(c) *Action on findings.* Action on the findings is not required. However, the convening authority may, in the convening authority's sole discretion:

(1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(2) Set aside any finding of guilty and—

(A) Dismiss the specification and, if appropriate, the charge, or

(B) Direct a rehearing in accordance with section (e) of this rule.

Discussion

The convening authority may for any reason or no reason disapprove a finding of guilty or approve a finding of guilty only of a lesser offense. However, see section (e) of this rule if a rehearing is ordered. The convening authority is not required to review the findings for legal or factual sufficiency and is not required to explain a decision to order or not to order a rehearing, except as provided in section (e) of this rule. The power to order a rehearing, or to take other corrective action on the findings, is designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under the rule.

(d) *Action on the sentence.*

(1) *In general.* The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a military commission. The approval or disapproval shall be explicitly stated.

(2) *Determining what sentence should be approved.* The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. When the military commission has adjudged a punishment pursuant to a pretrial agreement, the convening authority may nevertheless approve a lesser sentence.

(3) *Deferring service of a sentence to confinement.*

(A) In a case in which a military commission sentences an accused referred to in paragraph (B), below, to confinement, the convening authority may defer service of a sentence to confinement by a military commission, without the consent of the accused, until after the accused has been permanently released to U.S. custody by a foreign country.

(B) Paragraph (A) applies to an accused who, while in custody of a foreign country, is temporarily returned by that foreign country to the U.S. for trial by military commission; and after the military commission is returned to that, or another, foreign country under the authority of a mutual agreement or treaty, as the case may be.

(e) *Ordering rehearing.*

(1) *In general.* The convening authority may in the convening authority's discretion order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only.

(2) *Limitation: Lack of sufficient evidence.* A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which

the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(3) *Rehearing on sentence only.* A rehearing on sentence only shall be referred to the same type of military commission that made the original findings, provided however that the convening authority may elect to refer to a noncapital military commission the rehearing on sentence only of a case previously tried before a capital military commission. This latter referral precludes death as an authorized punishment. If the convening authority determines a rehearing on sentence is impracticable, the convening authority may approve a sentence of no punishment without conducting a rehearing.

(f) *Contents of action and related matters.*

(1) *In general.* The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action shall be signed personally by the convening authority.

(2) *Modification of initial action.* The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified.

(3) *Findings of guilty.* If any findings of guilty are disapproved, the action shall so state. If a rehearing is not ordered, the affected charges and specifications shall be dismissed by the convening authority in the action. If a rehearing or other trial is directed, the reasons for the disapproval shall be set forth in the action.

(4) *Action on sentence.*

(A) *In general.* The action shall state whether the sentence adjudged by the military commission is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

(B) *Execution; suspension.* The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(C) *Place of confinement.* If the convening authority orders a sentence of confinement into execution, the convening authority shall designate the place of confinement in the action, unless otherwise prescribed by the Secretary of Defense or the Attorney General of the United States.

(5) *Action on rehearing or new or other trial.*

(A) *Rehearing or other trial.* In acting on a rehearing or other trial the convening authority shall be subject to the sentence limitations prescribed in R.M.C. 810(d). Except when a

rehearing or other trial is combined with a trial on additional offenses and except as otherwise provided in R.M.C. 810(d), if any part of the original sentence was suspended and the suspension was not properly vacated before the order directing the rehearing, the convening authority shall take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended. The convening authority may approve a sentence adjudged upon a rehearing or other trial regardless whether any kind or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment to be actually served or executed under the new sentence, the accused shall be credited with any kind or amount of the former sentence included within the new sentence that was served or executed before the time it was disapproved or set aside. The convening authority shall, if any part of a sentence adjudged upon a rehearing or other trial is approved, direct in the action that any part or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside shall be credited to the accused. If, in the action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on these findings, the convening authority shall, unless a further rehearing is ordered, provide in the action that all rights, privileges, and property affected by any executed portion of the sentence adjudged at the former hearing shall be restored. The convening authority shall take the same restorative action if a military commission at a rehearing acquits the accused of all charges and specifications which were tried at the former hearing.

(B) *New trial.* The action of the convening authority on a new trial shall, insofar as practicable, conform to the rules prescribed for rehearings and other trials in paragraph (f)(5)(A) of this rule.

(g) *Incomplete, ambiguous, or erroneous action.* When the action of the convening or of a higher authority is incomplete, ambiguous, or contains clerical error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by superior authority to withdraw the original action and substitute a corrected action.

(h) *Service on accused.* A copy of the convening authority's action shall be served on the accused or on defense counsel. If the action is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

Rule 1108. Suspension of execution of sentence; remission

(a) *In general.* Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted. Remission cancels the unexecuted part of a sentence to which it applies.

(b) *Who may suspend and remit.* The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a military commission, except for a sentence of death. The Secretary of Defense may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a sentence of confinement for life that has been ordered executed.

(c) *Conditions of suspension.* The authority who suspends the execution of the sentence of a military commission shall:

- (1) Specify in writing the conditions of the suspension;
- (2) Cause a copy of the conditions of the suspension to be served on the accused; and
- (3) Cause a receipt to be secured from the accused for service of the conditions of the suspension.

Unless otherwise stated, an action suspending a sentence includes as a condition that the accused not commit any further offense subject to this chapter.

(d) *Limitations on suspension.* Suspension shall be for a stated period or until the occurrence of an anticipated future event. The convening authority shall provide in the action that unless the suspension is sooner vacated, the expiration of the period of suspension shall remit the suspended portion of the sentence. An appropriate authority may, before the expiration of the period of suspension, remit any part of the sentence, including a part which has been suspended; reduce the period of suspension; or, subject to R.M.C. 1109, vacate the suspension in whole or in part.

(e) *Termination of suspension by remission.* Expiration of the period provided in the action suspending a sentence or part of a sentence shall remit the suspended portion unless the suspension is sooner vacated. Death or action that terminates status as a person subject to this chapter shall result in remission of the suspended portion of the sentence.

Rule 1109. Vacation of suspension of sentence

(a) *In general.* Suspension of execution of the sentence of a military commission may be vacated for violation of the conditions of the suspension as provided in this rule.

(b) *Timeliness.*

(1) *Violation of conditions.* Vacation shall be based on a violation of the conditions of suspension which occurs within the period of suspension.

(2) *Vacation proceedings.* Vacation proceedings under this rule shall be completed within a reasonable time.

(3) *Order vacating the suspension.* The order vacating the suspension shall be issued before the expiration of the period of suspension.

Rule 1110. Waiver or withdrawal of appellate review

(a) *In general.* After any military commission, except one in which the approved sentence includes death, the accused may waive or withdraw appellate review.

(b) *Right to counsel.*

(1) *In general.* The accused shall have the right to consult with counsel qualified under R.M.C. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

(2) *Waiver.*

(A) *Counsel who represented the accused at the military commission.* The accused may consult with any civilian or detailed counsel who represented the accused at the military commission concerning whether to waive appellate review unless such counsel has been excused under R.M.C. 505(d)(2)(B).

(B) *Associate appellate counsel.* If counsel who represented the accused at the military commission has not been excused but is not available to consult with the accused, because of military exigency, separation from the service, or other reasons, associate defense counsel shall be detailed to the accused upon request by the accused. Such counsel shall communicate with counsel who represented the accused at the military commission, and shall advise the accused concerning whether to waive appellate review.

(C) *Substitute counsel.* If counsel who represented the accused at the military commission has been excused under R.M.C. 505(d), substitute defense counsel shall be detailed to advise the accused concerning waiver of appellate rights.

(3) *Withdrawal.*

(A) *Appellate defense counsel.* If the accused is represented by appellate defense counsel, the accused shall have the right to consult with such counsel concerning whether to withdraw the appeal.

(B) *Associate appellate defense counsel.* If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused, because of physical separation or other reasons, associate appellate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with appellate defense counsel and shall advise the accused whether to withdraw the appeal.

(C) *No counsel.* If appellate defense counsel has not been assigned to the accused, defense counsel shall be detailed for the accused. Such counsel shall advise the accused concerning whether to withdraw the appeal. If practicable, counsel who represented the accused at the military commission shall be detailed.

(4) *Civilian counsel.* Whether or not the accused was represented by civilian counsel at the military commission, the accused may consult with civilian counsel, at no expense to the United States, concerning whether to waive or withdraw appellate review.

(5) *Record of trial.* Any defense counsel with whom the accused consults under this rule shall be given reasonable opportunity to examine the record of trial.

(6) *Consult.* The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

(c) *Compulsion, coercion, inducement prohibited.* No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

(d) *Form of waiver or withdrawal.* A waiver or withdrawal of appellate review shall:

(1) Be written;

(2) State that the accused and defense counsel have discussed the accused's right to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

(3) State that the waiver or withdrawal is submitted voluntarily; and

(4) Be signed by the accused and by defense counsel.

(e) *To whom submitted.*

(1) *Waiver.* A waiver of appellate review shall be filed with the convening authority. The waiver shall be attached to the record of trial.

(2) *Withdrawal.* A withdrawal of appellate review may be filed with the convening authority and shall be attached to the record of trial.

(f) *Time limit.*

(1) *Waiver.* The accused may sign a waiver of appellate review at any time after the sentence is announced. The waiver must be filed within 10 days after the accused or defense counsel is served with a copy of the action under R.M.C. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, by not more than 30 days.

(2) *Withdrawal.* Except in a case in which the sentence includes death, the accused may file a withdrawal from appellate review at any time before such review is completed.

(g) *Effect of waiver or withdrawal.* A waiver or withdrawal of appellate review under this rule shall bar review by the Court of Military Commission Review. Once submitted, a waiver or withdrawal in compliance with this rule may not be revoked.

Rule 1111. Disposition of the record of trial after action

In all cases where there is a finding of guilt approved by the convening authority, except where appellate review has been waived pursuant to R.M.C. 1110, the convening authority shall send each record of trial and the convening authority's action directly to the Court of Military Commission Review. Two additional copies of the record of trial shall accompany the original record.

Rule 1113. Execution of sentences

(a) *In general.* No sentence of a military commission may be executed unless it has been approved by the convening authority.

(b) *Punishments which the convening authority may order executed in the initial action.* Except as provided in section (c) of this rule, the convening authority may order all or part of the sentence of a military commission executed when the convening authority takes initial action under R.M.C. 1107.

(c) A punishment of death may be ordered executed only by the President.

(1) *Manner carried out.* A sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary.

(2) *Action when accused lacks mental capacity.* An accused lacking the mental capacity to understand the punishment to be suffered or the reason for imposition of the death sentence may not be put to death during any period when such incapacity exists. The accused is presumed to have such mental capacity. If a substantial question is raised as to whether the accused lacks capacity, the convening authority shall order a hearing on the question. A military judge, counsel for the government, and counsel for the accused shall be detailed. The convening authority shall direct an examination of the accused in accordance with R.M.C. 706, but the examination may be limited to determining whether the accused understands the punishment to be suffered and the reason therefore. The military judge shall consider all evidence presented, including evidence provided by the accused. The accused has the burden of proving such lack of capacity by a preponderance of the evidence. The military judge shall make findings of fact, which will then be forwarded to the convening authority ordering the hearing. If the accused is found to lack capacity, the convening authority shall stay the execution until the accused regains appropriate capacity.

(d) *Confinement.*

(1) *Effective date of confinement.* Any period of confinement included in the sentence of a military commission begins to run from the date the sentence is adjudged, but the following shall be excluded in computing the service of the term of confinement:

(A) Periods during which the sentence to confinement is suspended or deferred;

(B) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to the M.C.A., has postponed the service of a sentence to confinement.

(C) Periods during which the accused has escaped or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon the prisoner's petition for writ of habeas corpus under a court order which is later reversed; and

(D) Periods during which another sentence by military commission to confinement is being served. When a prisoner serving a military commission sentence to confinement is later convicted by a military commission of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitted remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(2) *Place of confinement.* The authority who orders a sentence to confinement into execution shall designate the place of confinement under regulations prescribed by the Secretary of Defense or as directed by the Attorney General of the United States.

(3) *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. The Court of Military Commission Review; Chief Judge

(a) *In general.* Within the Office of the Secretary of Defense there is a Court of Military Commission Review, as authorized in 10 U.S.C. § 950f.

(b) *Composition of the court.* The Court of Military Commission Review shall be composed of one or more panels of three appellate military judges each, who shall sit as panels to review each case submitted to them under the M.C.A. and this Manual.

(1) The Secretary shall appoint appellate military judges to the Court of Military Commission Review pursuant to 10 U.S.C. § 950f. Each Judge Advocate General shall nominate four appellate military judges, meeting the qualifications of 10 U.S.C. § 950f, for duty as appellate military judges on the Court of Military Commission Review.

(2) The Secretary of Defense shall appoint, from those nominated by the Judge Advocates General or from among other qualified appellate military judges, a Chief Judge of the Court of Military Commission Review.

(3) The Chief Judge shall assign the appellate military judges of the Court of Military Commission Review to panels of three appellate military judges each.

(4) In consultation with the other appellate military judges of the Court of Military Commission Review, and subject to the review and approval of the Secretary, the Chief Judge shall prescribe procedures for appellate review by the Court of Military Commission Review.

(c) *Cases reviewed by the Court of Military Commission Review.* As provided in 10 U.S.C. §§ 950c and 950d, the Court of Military Commission Review shall review all cases and matters referred to it under R.M.C. 908 and 1111. The Secretary of Defense shall promulgate regulations permitting both parties to submit written briefs and other pertinent materials to the Court of Military Commission Review.

(d) *Action on cases reviewed by the Court of Military Commission Review.*

(1) Except in those cases in which appellate review has been waived pursuant to R.M.C. 1110, the findings and sentence of each case tried by military commission pursuant to the M.C.A. and this chapter shall be reviewed by the Court of Military Commission Review for errors of law. No relief may be granted unless an error of law prejudiced a substantial trial right of the accused.

(2) *Action when accused lacks mental capacity.* An appellate authority may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite

mental capacity of the accused, the Court of Military Commission Review may direct that the record be forwarded to an appropriate authority for an examination of the accused in accordance with R.M.C. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. Unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity, the proceedings shall not be further stayed and the case will be returned to the Court of Military Commission Review for action under this Rule. Nothing in this subsection shall prohibit any appellate authority from making a determination in favor of the accused which will result in the setting aside of a conviction.

(e) *Notification to accused.*

(1) *Notification of decision.* The accused shall be notified of the decision of the Court of Military Commission Review.

(2) *Notification of right to petition the United States Court of Appeals for the District of Columbia Circuit.* The accused shall be provided with a copy of the decision of the Court of Military Commission Review bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 20 days from the time the accused was in fact notified of the decision of the Court of Military Commission Review; and

(B) Must be filed directly with the United States Court of Appeals for the District of Columbia Circuit.

Rule 1202. Appellate counsel

The Secretary of Defense may promulgate regulations governing detail, duties, and responsibilities of counsel representing the Government and the accused in any case before the Court of Military Commission Review.

Rule 1205. Further review

(a) *Petition to the United States Court of Appeals for the District of Columbia Circuit.* The accused may petition for review of the decision of the Court of Military Commission Review if such petition is filed within 20 days from the time the accused was in fact notified of the decision of the Court of Military Commission Review.

(b) *Review by the Supreme Court.* Under 28 U.S.C. § 1257 and 10 U.S.C. § 950(d), decisions of the United States Court of Appeals for the District of Columbia Circuit may be reviewed by the Supreme Court by writ of certiorari.

Rule 1207. Sentences requiring approval by the President

(a) No part of a military commission sentence extending to death may be executed until approved by the President.

(b) *Sentence commuted by the President.* When the President has commuted a death sentence to a lesser punishment, the Secretary of Defense may remit or suspend any remaining part or amount of the unexecuted portion of the sentence.

Rule 1209. Finality of military commissions.

A military commission conviction is final when review is completed by the Court of Military Commission Review and:

(a) a petition for review is not timely filed with or is denied by the United States Court of Appeals for the District of Columbia Circuit; or

(b) the conviction is affirmed by the United States Court of Appeals for the District of Columbia Circuit and a writ of certiorari is not timely filed with or is denied by the United States Supreme Court; or

(c) the conviction is affirmed by the United States Supreme Court.

Rule 1210. New trial

(a) *In general.* At any time within two years after approval by the convening authority of a military commission sentence, the accused may petition the convening authority for a new trial on the ground of newly discovered evidence or fraud on the military commission. A petition may not be submitted after the death of the accused. A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the accused was found guilty of the relevant offense pursuant to a guilty plea.

(b) *Who may petition.* A petition for a new trial may be submitted by the accused personally, or by accused's counsel.

(c) *Form of petition.* A petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

(1) The name and address or current location of the accused;

(2) The date and location of the trial;

(3) The sentence or a description thereof as approved or affirmed, with any later reduction thereof by clemency or otherwise;

(4) A brief description of any finding or sentence believed to be unjust;

(5) A full statement of the newly discovered evidence or fraud on the military commission which is relied upon for the remedy sought;

(6) Affidavits or other statements pertinent to the matters in subsection (c)(4) of this rule; and

(7) The affidavit or other statement of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.

(d) *Effect of petition.* The submission of a petition for a new trial does not stay the execution of a sentence, except a sentence of death.

(e) *Who may act on petition.* The convening authority may consider and grant a petition for new trial, in his discretion. If the convening authority declines to consider or grant a petition for new trial, he shall refer the petition to the Court of Military Commission Review for action.

(f) *Grounds for new trial.*

(1) *In general.* A new trial may be granted only on grounds of newly discovered evidence or fraud on the military commission.

(2) *Newly discovered evidence.* A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

(A) The evidence was discovered after the trial;

(B) The evidence is not such that it would have been discovered by the accused at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a military commission in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) *Fraud on the military commission.* No fraud on the military commission warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

Discussion

Examples of fraud on a military commission which may warrant granting a new trial are: confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect on a

finding of guilty and without which there probably would not have been a finding of guilty of the offense; willful concealment by the prosecution from the defense of evidence favorable to the defense which, if presented to the military commission, would probably have resulted in a finding of not guilty; and willful concealment of a material ground for challenge of the military judge or any member or of the disqualification of counsel or the convening authority, when the basis for challenge or disqualification was not known to the defense at the time of trial, *see* R.M.C. 912.

(g) *Action on the petition.* The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in its discretion, the authority considering the petition may accept and consider legal briefs on the matter.

(h) *Action when new trial is granted.*

(1) *Charges at new trial.* At a new trial, the accused may not be tried for any offense of which the accused was found not guilty or upon which the accused was not tried at the earlier military commission.

(2) *Action by convening authority.* The convening authority's action on the record of a new trial is subject to the same rules and regulations as in other military commissions under the M.C.A. and this Manual.

(3) *Records of trial and orders.* The record of a new trial and pertinent orders shall be governed by the rules pertinent to original trials under the M.C.A. and this Manual.

(i) *Number of petitions under this rule.* Once a petition for new trial has been granted by any authority or denied by the Court of Military Commission Review, no new or additional petition pertaining to the same trial by military commission, and filed by the accused or any representative of the accused, may be considered or granted by any authority under the M.C.A. or this Manual.

PART III
MILITARY COMMISSION RULES OF EVIDENCE

SECTION I
GENERAL PROVISIONS

Rule 101. Scope

(a) *Applicability.* These rules apply in trials by military commissions convened pursuant to the Military Commissions Act of 2006 (10 U.S.C. Chapter 47A) (hereinafter “the M.C.A.”).

(b) *Secondary sources.* If not otherwise prescribed in this Manual or these rules, and insofar as practicable and consistent with military and intelligence activities, and not inconsistent with or contrary to the M.C.A. or this Manual, military commissions shall apply:

(1) First, the Military Rules of Evidence (“Mil. R. Evid.”), as applied in trials by courts-martial under 10 U.S.C. Chapter 47;

(2) Second, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and

(3) Third, when not inconsistent with subsections (b)(1) and (b)(2), the rules of evidence at common law.

Rule 102. Purpose and construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, the protection of national security, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Ruling on evidence

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling that admits or excludes evidence unless the ruling materially prejudices a substantial right of a party; and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the military judge makes a definitive

ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim or error for appeal.

(b) *Record of offer and ruling.* The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.

(c) *Hearing of members.* During military commissions, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.

(d) *Plain error.* Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

Rule 104. Preliminary questions

(a) *Questions of admissibility and procedure generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, whether to protect the identity of a witness, whether to afford protective testimonial procedures to a victim or child witness, or the availability of a witness to testify either at the site of trial or a remote site, shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence, except those with respect to privileges.

(b) *Probative value conditioned on fact.* When the probative value of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit the evidence upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary. If either party represents to the military judge that fulfillment of the condition may require consideration of classified evidence, the military judge will proceed pursuant to Mil. Comm. R. Evid. 505.

(c) *Hearing of members.* Hearings on the admissibility of statements of an accused shall in all cases be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) *Weight and credibility.* This rule does not limit the right of a party to introduce

before the members evidence probative of weight or credibility.

Rule 105. Limited admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly.

Rule 106. Remainder of or related writings or recorded statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it, consistent with Mil. Comm. R. Evid. 505.

SECTION II JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts

- (a) *Scope of rule.* This rule governs only judicial notice of adjudicative facts.
- (b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) *When discretionary.* The military judge may take judicial notice, whether requested or not. The parties shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establishing an element of the case.
- (d) *When mandatory.* The military judge shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.
- (g) *Instructing members.* The military judge shall instruct the members that they may, but are not required to, accept as conclusive any factual matter judicially noticed.

Rule 201A. Judicial notice of law

- (a) *Domestic law.* The military judge may take judicial notice of domestic law. Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. Comm. R. Evid. 201—except Mil. Comm. R. Evid. 201(g)—apply.
- (b) *Foreign law.* A party who intends to raise an issue concerning the law of a foreign country, the law of an international forum, or the international law of war shall give reasonable written notice. The military judge, in determining such law, may consider any relevant material or source, including testimony of lay and expert witnesses, whether or not submitted by a party or admissible under these rules. Such a determination shall be treated as a ruling on a question of law.

SECTION III
RULES RELATED TO SELF-INCRIMINATION AND CERTAIN OTHER
STATEMENTS

Rule 301. Privilege concerning compulsory self-incrimination

(a) *General rule.* No person shall be required to testify against himself at a proceeding of a military commission under these rules. The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31, to the extent that either may be invoked in proceedings before military commissions, are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied.

Discussion

Alien unlawful enemy combatants have a statutory privilege against self incrimination under 10 U.S.C. § 948r. Other witnesses, such as United States citizens, may invoke privileges under the U.S. Constitution or Article 31 of the U.C.M.J., to the extent they apply.

(b) *Standing.*

(1) *In general.* Any privilege a witness may have to refuse to respond to a potentially incriminating question is a personal one that the witness may exercise or waive at the discretion of the witness.

(2) *Judicial advice.* If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

(c) *Exercise of the privilege.* If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless: (1) facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness, or (2) the witness has, with respect to the question, waived the privilege against self-incrimination, or (3) the relevant privilege against self-incrimination does not apply. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of a statute of limitations, or similar reason.

(1) *Immunity generally.* In evaluating the sufficiency of a grant of immunity to overcome the privilege exerted by a witness, the military judge shall ensure that the immunity is granted by an appropriate authority and that the grant provides, at least, that neither the testimony of the witness nor any evidence obtained from that testimony may

be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) *Notification of immunity or leniency.* When a prosecution witness before a military commission has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required in the interests of justice.

(d) *Waiver by a witness.* A witness who answers a question without having asserted a privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to that fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given and does not extend to a rehearing or new or other trial, and is subject to Mil. Comm. R. Evid. 608(b).

(e) *Waiver by the accused.* When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified.

Discussion

If the accused voluntarily introduces his own prior hearsay statements through the direct examination of a defense witness, but the accused exercises his right not to testify himself at the proceeding, the military judge shall instruct the members prior to the beginning of their deliberations: “The accused has the absolute right to testify as a witness or to choose not to testify in this proceeding. That the accused exercised (his)(her) right not to testify should not be held against (him)(her). However, in this case, the accused has voluntarily offered his prior statements as part of (his)(her) defense by eliciting those statements through other defense witnesses. At the same time, the accused, by electing not to testify in the proceeding, has prevented the Government from subjecting those statements to cross-examination. In evaluating the weight to be accorded to the accused’s hearsay statements, you may consider the fact that the accused chose not to be cross-examined on those statements and that those statements were not sworn testimony.”

(f) *Effect of claiming the privilege.*

(1) *Generally.* The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.

(2) *On cross-examination.* If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

(g) *Instructions.* When the accused does not testify at trial, defense counsel may request that the members of the commission be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.

Discussion

References to the Fifth Amendment of the U.S. Constitution and Article 31 of the U.C.M.J. that can be found in Mil. R. Evid. 301 have been deleted as inapposite. Under the M.C.A., an alien unlawful enemy combatant's privilege against self-incrimination is limited to his testimony before a military commission. *See* 10 U.S.C. § 948r(a).

Rule 302. Privilege concerning mental examination of an accused

(a) *General rule.* The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.M.C. 706 from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings.

(b) *Exceptions.*

(1) There is no privilege under this rule when the accused first introduces into evidence such statements.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in subsection (1).

(c) *Release of evidence.* If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.M.C. 706. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) *Noncompliance by the accused.* The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.M.C. 706 from presenting any expert medical testimony as to any issue that would have been the subject

of the mental examination.

(e) *Procedure.* The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. Comm. R. Evid. 304 for an objection or a motion to suppress.

Rule 303. Degrading questions

No person may be compelled to make a statement or produce evidence before any military commission if the statement or evidence is not material to the issue and may tend to degrade that person.

Rule 304. Confessions, admissions, and other statements

(a) *General rules.*

(1) A statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made.

(2) A statement alleged to be the product of coercion may only be admitted as provided in section (c) below.

(3) A statement produced by torture or otherwise not admissible under section (c) may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

Discussion

This rule tracks 10 U.S.C. § 948r, which differs from Mil. R. Evid. 304. In determining whether a statement was “obtained by use of torture” or is the subject of a “dispute” as to the “degree of coercion,” the military judge should consider the totality of the circumstances under which the contested statement was produced or obtained. *See* 10 U.S.C. § 948r.

(b) *Definitions.* As used in these rules:

(1) *Confession.* A “confession” is an acknowledgment of guilt.

(2) *Admission.* An “admission” is a self-incriminating statement not comprising an acknowledgment of guilt, whether or not intended by its maker to be exculpatory.

(3) *Torture.* For the purpose of determining whether a statement must be excluded under section (a) of this rule, “torture” is defined as an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within the actor’s custody or physical control. “Severe mental pain or suffering” is defined as the prolonged mental harm caused by or resulting from:

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Discussion

See 18 U.S.C. § 2340.

(4) *Cruel, inhuman or degrading treatment.* The cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

(c) *Statements allegedly produced by coercion.* When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.

(1) As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.

(2) As to statements obtained on or after December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (B) the interests of justice would best be served by admission of the statement into evidence; and (C) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment.

Discussion

The Detainee Treatment Act, or “D.T.A.,” enacted on December 30, 2005, provides that no individual in the custody or under the physical control of the United States Government shall be subject to cruel, inhuman, or degrading treatment or punishment, as defined by reference to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution, regardless of the nationality or location of the individual. Therefore, the M.C.A. requires military judges in military commissions to treat allegedly coerced statements differently, depending on whether the statement was made before or after December 30, 2005. *See* 10 U.S.C. § 948r(c), (d). For statements made on or after that date, the military judge may admit

an allegedly coerced statement only if the judge determines that the statement is reliable and possessing sufficient probative value, that the interests of justice would best be served by admitting the statement, and that the interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment or punishment prohibited by the D.T.A. If a party moves to suppress or object to the admission of a proffered statement made before December 30, 2005, the military judge may admit the statement if the judge determines that the statement is reliable and possessing sufficient probative value, and that the interests of justice would best be served by admitting the statement. In evaluating whether the statement is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement.

(d) *Procedure.*

(1) *Disclosure.* Subject to the requirements of Mil. Comm. R. Evid. 505, prior to arraignment, the prosecution shall disclose to the defense the contents of all relevant statements, oral, written, or recorded, made or adopted by the accused, that are within the possession, custody or control of the Government; the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense under R.M.C. 701 or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

(2) *Motions and objections.*

(A) Motions to suppress or objections under this rule to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(3) *Specificity.* The military judge may require the defense to specify, to the extent practicable, the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement or otherwise to obtain information necessary to specify the grounds for a motion to suppress, the military judge may, subject to the requirements and protections of Mil. Comm. R. Evid. 505, make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

Discussion

Where a party moves to suppress or object to evidence under section (c) on the ground that the degree of coercion is disputed, the military judge may require the party to state with specificity the grounds for the

motion or objection before requiring the party proposing the evidence to introduce evidence in support. See, e.g., *United States v. Jones*, 14 M.J. 700, 701 (N-M. C.M.R. 1982).

(4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(5) *Effect of guilty plea.* Except as otherwise expressly provided in R.M.C. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

(e) *Burden of proof.* When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subsection (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(1) *In general.* The military judge must find by a preponderance of the evidence that a statement by the accused comports with the requirements of this rule before it may be received into evidence.

(2) *Weight of the evidence.* If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances.

(f) *Defense evidence.* The defense may present matters relevant to the admissibility of any statement as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that, under the circumstances, the statement is admissible under this rule. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this section. When the accused testifies under this section, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

Discussion

This rule departs from the Mil. R. Evid. 304(f) so as to comport with 10 U.S.C. § 948r.

(g) *Miscellaneous.*

(1) *Oral statements.* An oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(2) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement, consistent with the provisions of Mil. Comm. R. Evid. 505.

Discussion

Mil. Comm. R. Evid. 304 contains no requirement for corroboration for admission of an inculpatory statement by the accused (*compare* Mil. R. Evid. 304(g)); however, in determining the probative value and reliability of such a statement, the military judge may consider the degree of corroboration, if any.

Rule 306. Statements by one of several accused

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculcating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

SECTION IV PROBATIVE EVIDENCE AND ITS LIMITS

Rule 401. Scope of probative evidence in military commissions

Evidence has “probative value to a reasonable person” when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.

Rule 402. Evidence having “probative value to a reasonable person” generally admissible

All evidence having probative value to a reasonable person is admissible, except as otherwise provided by these rules, this Manual, or any Act of Congress applicable to trials by military commissions. Evidence that does not have probative value to a reasonable person is not admissible.

Rule 403. Exclusion of probative evidence on grounds of prejudice, confusion, or waste of time

The military judge shall exclude any evidence the probative value of which is substantially outweighed: (1) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or (2) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally.* Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. Comm. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution;

(2) *Character of the alleged victim.* Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or assault case to rebut evidence that the alleged victim was an aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in

Mil. Comm. R. Evid. 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods of proving character

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) *Affidavits.* The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this section, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) *Definitions.* "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" includes, but is not limited to, a town, city, tribal area, and as to the armed forces also includes post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit; routine practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements

(a) *In general.* Except as otherwise provided in this rule, evidence of the following is

not admissible in any military commission proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) a plea of guilty that was later withdrawn;

(2) any statement made in the course of any judicial inquiry regarding the foregoing pleas; or

(3) any statement made in the course of plea discussions with the convening authority, legal advisor, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (A) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (B) in a military commission proceedings for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) *Definitions.* A “statement made in the course of plea discussions” includes a statement made by the accused solely for the purpose of requesting disposition under any authorized alternative procedure for release from United States custody or other action in lieu of trial by military commission; “on the record” includes the written statement submitted by the accused in furtherance of such request.

Rule 412. Nonconsensual sexual offenses; relevance of victim’s behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct, except as provided in sections (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) *Exceptions.* In a proceeding under this chapter, the following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would adversely affect the integrity or fairness of the proceeding.

Discussion

Mil. Comm. R. Evid. 412(b)(3) departs from Mil. R. Evid. 412(b)(3) insofar as the constitutional standard reflected in the latter does not apply here. Mil. Comm. R. Evid. 412(b)(3) nonetheless permits the military judge to ensure that evidence is admitted where the exclusion would adversely affect the integrity or fairness of the proceeding.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under section (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer probative evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a military commission, the military judge shall conduct the hearing outside the presence of the members pursuant to R.M.C. 803. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the commission or a superior court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in subsection (2) of this section that the probative value of the evidence that the accused seeks to offer outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term “sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the members.

(e) A “nonconsensual sexual offense” is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, sexual assault, sexual abuse, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a military commission in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it has probative value to a reasonable person.

(b) In a trial by military commission in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 20 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "offenses of sexual assault" means an offense punishable under titles 10 or 18 of the United States Code, or any similar offense arising under the laws of any nation or under international law or the law of war that involved—

(1) any sexual act or sexual contact, without consent, proscribed by the law applicable to the site of that act or contact;

(2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;

(3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subsections (1) through (4).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a

hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term “sexual contact” means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

SECTION V PRIVILEGES

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

- (1) The Constitution of the United States, as applicable;
- (2) An Act of Congress applicable to trials by military commissions;
- (3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by military commissions is practicable and not contrary to or inconsistent with the M.C.A., these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term “person” includes an appropriate representative of the Federal Government, a State, or political subsection thereof, or any other entity claiming to be the holder of a privilege.

Rule 502. Lawyer-client privilege

(a) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client’s representative and the lawyer or the lawyer’s representative, (2) between the lawyer and the lawyer’s representative, (3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(b) *Definitions.* As used in this rule:

(1) A “client” is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a military commission case or in any military investigation or proceeding. The term “lawyer” does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist, unless the member:

(A) is detailed, assigned, or otherwise provided to represent a person in a military commission case or in any military investigation or proceeding;

(B) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or

(C) is authorized to practice law and renders professional legal services during off-duty employment.

(3) A “representative” of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) *Who may claim the privilege.* The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer’s representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule under the following circumstances:

(1) *Crime or fraud.* If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to clergy

(a) *General rule of privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions.* As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) *Who may claim the privilege.* The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule if the communication clearly contemplated the future commission of a fraud or crime, including concealment or asportation of evidence of a past crime, or if the consultation of the clergyman was sought or obtained to enable or aid anyone to commit or plan to commit what the maker of the communication knew or reasonably should have known to be a crime or fraud.

Rule 504. Husband-wife privilege

(a) *Spousal incapacity.* A person has a privilege to refuse to testify against his or her spouse.

(b) *Confidential communication made during marriage.*

(1) *General rule of privilege.* A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) *Definition.* A communication is “confidential” if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) *Who may claim the privilege.* The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions.*

(1) *Spousal incapacity only.* There is no privilege under section (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) *Spousal incapacity and confidential communications.* There is no privilege under sections (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse; or

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in section (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in section (b), the relationship was a sham at the time of the communication.

(3) *Criminal activities.* There is no privilege under this rule if the communication clearly contemplated the future commission of a fraud or crime, including concealment or

asportation of evidence of a past crime, or if the communication with the spouse was sought or obtained to enable or aid anyone to commit or plan to commit what the maker of the communication knew or reasonably should have known to be a crime or fraud.

Rule 505. Classified information

(a) *General rule of privilege.* Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. This rule applies to all stages of the proceedings.

Discussion

This Manual contains numerous explicit cross-references to Mil. Comm. R. Evid. 505. The omission of such a cross-reference, however, should not be interpreted to prejudice the applicability of Mil. Comm. R. Evid. 505, which applies to all stages of the proceedings.

(b) *Definitions.* As used in this rule:

(1) *Classified information.* “Classified information” means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

(2) *National security.* “National security” means the national defense and foreign relations of the United States.

(3) *In camera presentation.* In accordance with 10 U.S.C. § 949d(f)(2)(C), an *in camera* presentation is not a “proceeding” within the meaning of 10 U.S.C. § 949d(b). Unless conducted *ex parte*, such presentations may be conducted as a conference under the provisions of R.M.C. 802, except that, at the request of the trial counsel, the accused shall be excluded. Any ruling of the military judge pursuant to such presentations will be in writing, appended to the record, and appropriately protected from disclosure. If so provided in this rule, an *in camera* presentation may be *ex parte*, in which case the presentation will be made by the trial counsel, in writing, to the military judge, outside the presence of the accused and defense counsel.

Discussion

See Mil. Comm. R. Evid. 506(i)(1) for the definition of an “*in camera* proceeding,” which is a session under R.M.C. 803 from which the public is excluded. Such proceedings fall within the scope of 10 U.S.C. § 949d.

(c) *Who may claim the privilege.* The privilege may be claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a representative, witness or trial counsel to claim the privilege and make the finding on behalf of such a

person on his or her behalf. The authority of the representative, witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

Discussion

Upon delegation of the authority, the representative of the agency head exercises the authority to claim the privilege as if the agency head were making the claim personally and need not consult with the agency head prior to making the claim. The delegation of the authority can involve authorization for the representative to act in a single instance or by provision of blanket authorization on behalf of the agency head. This serves to resolve any question on the permissible scope of the delegation authority in favor of a broad interpretation of that delegation authority.

(d) *Pretrial session.* At any time after referral of charges, any party may move for a session under R.M.C. 803 to consider matters relating to classified information that may arise in connection with the trial. Following such motion or *sua sponte*, the military judge promptly shall hold a session under R.M.C. 803 to establish the timing of requests for discovery, provision of notice under section (g) and the initiation of the procedures under section (h). In addition, the military judge may consider any other matters that relate to classified information or that may promote a fair and expeditious trial.

(e) *Protection of classified information if disclosed; alternatives to disclosure; protection of the fairness of the proceedings; certain witness statements; protection of sources, methods or activities; record of trial.*

(1) *Protective order.* The military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the defense. The terms of any such protective order may include, among other things, provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge;

(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(D) Ordering all persons requiring security clearances to cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance;

(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(F) Regulating the making and handling of notes taken from material containing classified information; or

(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(2) *Additional protective orders.* At the request of the government the military judge shall enter such additional protective orders as are necessary for the protection of national security information to include protective orders limiting the scope of direct examination and cross examination of witnesses.

(3) *Alternatives to discovery of classified information.* The military judge, upon motion of the Government, shall authorize, to the extent practicable, (A) the deletion of specified items of classified information from materials to be made available to the defense, (B) the substitution of a portion or summary of the information for such classified materials, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, subject to subsection (e)(4) of this rule. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge *in camera* and *ex parte*.

(4) *Protection of the fairness of the proceeding.* If the military judge determines that the government's proposed alternative to full disclosure under subsection (3) would be inadequate or impracticable, and the Government objects to disclosure of the information in a form approved by the military judge, the military judge, upon a finding that the information in question is evidence that the Government seeks to use at trial, exculpatory evidence, or evidence necessary to enable the defense to prepare for trial, shall issue any order that the interests of justice require. Such an order may include:

(A) striking or precluding all or part of the testimony of a witness at trial;

(B) declaring a mistrial;

(C) finding against the Government on any issue as to which the evidence is probative and material to the defense;

(D) dismissing the charges, with or without prejudice; or

(E) dismissing the charges or specifications or both to which the information relates with or without prejudice.

Any such order shall permit the Government to avoid a sanction issued for nondisclosure by agreeing to the disclosure of the information at the pertinent military commission proceeding.

(5) *Disclosure at trial of certain statements previously made by a witness.*

(A) *Scope.* After a witness called by the Government has testified on direct examination, the military judge, on motion of the defense, may order production of

statements in the possession of the United States under R.M.C. 914. This provision does not preclude discovery or assertion of a privilege otherwise authorized under these rules or this Manual.

(B) *Review.* If the privilege in this rule is invoked during consideration of a motion under R.M.C. 914, the Government may deliver such statement for the inspection only by the military judge *in camera* and *ex parte*. If the military judge finds that disclosure of any portion of the statement identified by the Government as classified would be detrimental to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise the portion from the statement. If the military judge finds that such portion of the statement is inconsistent with the witness' testimony he shall, upon motion of the Government, review alternatives to disclosure in accordance with subsection (e)(3) above.

Discussion

When conducting a review pursuant to subsection (e)(5), the military judge does not conduct a *de novo* review of the classification of sources, methods, or activities information in its original form or as it might possibly be reconstituted in a summarized form. Rather, the military judge should verify that appropriate officials within the agency concerned conducted an authorized review in accordance with governing regulations and determined that such a disclosure of information, in either original or summarized form would or would not be detrimental to national security. The review is to verify the existence of a legal basis for the agency official's determination that the information is classified and that no summary of such information can be provided consistent with national security. This initial review by the trial judge is not for the purpose of conducting a *de novo* review of the propriety of the agency official's determination(s). All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. *See United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

(6) *Protection of sources, methods, or activities.* The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that the sources, methods, or activities by which the United States acquired the evidence are classified and the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

Discussion

This subsection contemplates that the military judge's determinations of reliability and admissibility may be made *in camera*, *ex parte*. Because there may be no prior evaluation of the evidence by the defense and little or no statement of any specific defense objection, the military judge's consideration must encompass a broad range of potential objections.

(7) *Record of trial.* If, under this section, any information is withheld from the defense, the defense objects to such withholding, and the trial is continued to an

adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be sealed and attached to the record of trial as an appellate exhibit. Such material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(f) *Introduction of classified information.*

(1) *Assertion of privilege at trial.* During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

(2) *Classification status.* Writings, recordings and photographs containing classified information may be admitted into evidence without change in their classification status.

(3) *Precautions by the military judge.* In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording or photograph or may order admission into evidence of the whole, writing, recording or photograph with the excision of some or all of the classified information contained therein.

(4) *Contents of writing, recording or photograph.* The military judge may permit proof of the contents of a writing, recording or photograph that contain classified information without requiring introduction into evidence of the original or a duplicate.

(5) *Closed session.* The military judge may exclude the public during any portion of the presentation of evidence that discloses classified information upon making a specific finding that such closure is necessary to protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities.

(6) *Record of trial.* The record of trial with respect to any classified matter will be prepared under R.M.C. 1103(c) and 1104(d).

(g) *Notice of the defense's intention to disclose classified information.*

(1) *Notice by the defense.* If the defense reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a military commission proceeding, defense counsel shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given

within the time specified by the military judge under section (d), or, if no time has been specified, prior to arraignment of the accused.

(2) *Continuing duty to notify.* Whenever the defense learns of classified information not covered by a notice under subsection (1) that the defense reasonably expects to disclose at any such proceeding, the defense shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) *Content of notice.* The notice required by this subsection shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The defense must state, with particularity, which items of classified information it reasonably expects will be revealed by the defense.

(4) *Prohibition against disclosure.* The defense may not disclose any information known or believed to be classified until notice has been given under this subsection and until the Government has been afforded a reasonable opportunity to seek a determination under this rule.

(5) *Failure to comply.* If the defense fails to comply with the requirements of this subsection, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defense of any witness with respect to any such information.

(h) *In camera presentation for cases involving classified information.*

(1) *Motion for in camera presentation.* Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an *in camera* presentation concerning the invocation of the national security privilege or the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an *in camera* presentation, at which, upon request of the trial counsel, the accused shall be excluded, concerning the use of additional classified information.

(2) *Demonstration of national security nature of the information.* In order to obtain an *in camera* presentation under this rule, the Government may submit at the request of the military judge (or make available for review) the classified information and an affidavit *ex parte* for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(3) *In camera presentation.* Upon finding that the Government has met the standard set forth in subsection (h)(2) with respect to some or all of the classified information at issue, the military judge shall conduct an *in camera* presentation from

which the accused, upon motion of the trial counsel, shall be excluded. Prior to the *in camera* presentation, the Government shall provide the defense with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the defense in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the defense in connection with pretrial proceedings. Following briefing and argument by the parties in the *in camera* presentation the military judge shall determine whether the information may be disclosed at the commission proceeding. Where the Government's motion under this subsection is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

(4) *Standard.* Classified information is not subject to disclosure under this section unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.

(5) *Ruling.* Unless the military judge makes a written determination that the information meets the standard set forth in subsection (4), the information may not be disclosed or otherwise elicited at a commission proceeding. The record of the *in camera* presentation shall be sealed and attached to the record of trials as an appellate exhibit.

(6) *Alternative to full disclosure.* If the military judge makes a determination under this section that would permit disclosure of the information or if the Government elects not to contest the relevance, necessity and admissibility of any classified information, the Government may move that in lieu of the disclosure of such specific classified information, the military judge order:

(A) the substitution for such classified information of a statement admitting the relevant facts that the specific classified information would tend to prove;
or

(B) the substitution for such classified information of a summary of the specific classified information.

The military judge shall order that such statement, portion or summary be used by the defense in place of the classified unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

(7) *Sanctions.* If the military judge determines that the alternative to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice may require. Such an order may include:

(A) striking or precluding all or part of the testimony of a witness at trial;

(B) declaring a mistrial;

(C) finding against the Government on any issue as to which the evidence is probative and material to the defense;

(D) dismissing the charges, with or without prejudice; or

(E) dismissing the charges or specifications or both to which the information relates with or without prejudice.

Any such order shall permit the Government to avoid the sanction for nondisclosure by permitting disclosure of the information at the pertinent military commission proceeding.

Discussion

When conducting a review pursuant to section (h), the military judge does not conduct a *de novo* review of the classification of sources, methods, or activities information in its original form or as it might possibly be reconstituted in a summarized form. Rather, the military judge should verify that appropriate officials within the agency concerned conducted an authorized review in accordance with governing regulations and determined that such a disclosure of information, in either original or summarized form would or would not be detrimental to national security. The review is to verify the existence of a legal basis for the agency official's determination that the information is classified and that no summary of such information can be provided consistent with national security. This initial review by the trial judge is not for the purpose of conducting a *de novo* review of the propriety of the agency official's determination(s). All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. See *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

Rule 506. Government information other than classified information

(a) *General rule of privilege.* Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

(b) *Scope.* "Government information" includes official communication and documents and other non-classified information within the custody or control of the Federal Government.

(c) *Who may claim the privilege.* The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General of the executive or military department or government agency concerned may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) *Action prior to referral of charges.* Prior to referral of charges, the Government shall respond in writing to a request for government information if the privilege in this rule is claimed for such information. The Government shall:

(1) delete specified items of government information claimed to be privileged from documents made available to the defense;

(2) substitute a portion or summary of the information for such documents;

(3) substitute a statement admitting relevant facts that the government information would tend to prove;

(4) provide the document subject to conditions similar to those set forth in section (g) of this rule; or

(5) withhold disclosure if actions under subsections (1) through (4) cannot be taken without causing identifiable damage to the public interest.

(e) *Pretrial session.* At any time after referral of charges and prior to arraignment, any party may move for a session under R.M.C. 803 to consider matters relating to government information that may arise in connection with the trial. Following such motion, or *sua sponte*, the military judge promptly shall hold a pretrial session under R.M.C. 803 to establish the timing of requests for discovery, the provision of notice under section (h), and the initiation of the procedure under section (i). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

(f) *Action after motion for disclosure of information.* After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this rule, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under section (i);

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates;
or

(4) take other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

(g) *Disclosure of government information to the defense.* If the Government agrees to

disclose government information to the defense subsequent to a claim of privilege under this rule, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the defense. The terms of any such protective order may include provisions:

(1) Prohibiting the disclosure of the information except as authorized by the military judge;

(2) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed; upon reasonable notice;

(3) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

(5) Regulating the making and handling of notes taken from material containing government information; or

(6) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Prohibition against disclosure.* The defense may not disclose any information known or believed to be subject to a claim of privilege under this rule unless the military judge authorizes such disclosure.

(i) *In camera proceedings.*

(1) *Definition.* For the purpose of this section, an “*in camera* proceeding” is a session under R.M.C. 803 from which the public is excluded.

(2) *Motion for in camera proceeding.* Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an *in camera* proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege may grant the Government leave to move for an *in camera* proceeding concerning the use of additional government information.

(3) *Demonstration of public interest nature of the information.* In order to obtain an *in camera* proceeding under this rule, the Government shall demonstrate, through the submission of affidavits and information for examination only by the military judge, that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(4) *In camera* proceeding.

(A) *Finding of identifiable damage.* Upon finding that the disclosure of some or all of the information submitted by the Government under subsection (i)(3) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an *in camera* proceeding.

(B) *Disclosure of the information to the defense.* Subject to paragraph (F), below, the Government shall disclose government information for which a claim of privilege has been made to the defense, for the limited purpose of litigating, *in camera*, the admissibility of the information at trial. The military judge shall enter an appropriate protective order to the defense and all other appropriate trial participants concerning the disclosure of the information according to section (g), above. The defense shall not disclose any information provided under this section unless, and until, such information has been admitted into evidence by the military judge. In the *in camera* proceeding, both parties shall have the opportunity to brief and argue the admissibility of the government information at trial.

(C) *Standard.* Government information is subject to disclosure at the military commission proceeding under this section if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the military commission proceeding.

(D) *Ruling.* No information may be disclosed at the military commission proceeding or otherwise unless the military judge makes a written determination that the information is subject to disclosure under the standard set forth in paragraph (C), above. The military judge will specify in writing any information that he or she determines is subject to disclosure. The record of the *in camera* proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The defense may seek reconsideration of the determination prior to or during trial.

(E) *Alternatives to full disclosure.* If the military judge makes a determination under this paragraph that the information is subject to disclosure, or if the Government elects not to contest the relevance, necessity, and admissibility of the government information, the Government may proffer a statement admitting for purposes of the military commission any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The military judge shall order that such statement, portion, summary, or some other form of information which the military judge finds to be consistent with the interests of justice, be used by the defense in place of the government information, unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

(F) *Sanctions.* Government information may not be disclosed over the

Government's objection. If the Government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require. Such an order may include:

- (i) striking or precluding all or part of the testimony of a witness;
- (ii) declaring a mistrial;
- (iii) finding against the Government on any issue as to which the evidence is relevant and necessary to the defense;
- (iv) dismissing the charges, with or without prejudice; or
- (v) dismissing the charges or specifications or both to which the information relates.

(j) *Appeals of orders and rulings.* The Government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The Government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the United States to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The Government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

(k) *Introduction of government information subject to a claim of privilege.*

(1) *Precautions by military judge.* In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the government information contained therein.

(2) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

(3) *Taking of testimony.* During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose governmental information not previously found relevant and necessary to the defense if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring the Government to provide the military judge with a proffer of the witness' response to the

question or line of inquiry and requiring the defense to provide the military judge with a proffer of the nature of the information the defense seeks to elicit.

(l) *Procedures to safeguard against compromise of government information disclosed to military commissions.* The Secretary of Defense may prescribe procedures for protection against the compromise of government information submitted to military commissions and appellate authorities after a claim of privilege.

Rule 507. Identity of informants

(a) *Rule of privilege.* The United States has a privilege to refuse to disclose the identity of an informant.

(1) An “informant” is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime, for the United States government or a foreign government.

(2) Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant’s identity.

(b) *Who may claim the privilege.* The privilege may be claimed by an appropriate representative of the United States, including the trial counsel, if authorized to do so.

(c) *Exceptions.*

(1) *Voluntary disclosures; informant as witness.* No privilege exists under this rule: (A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant’s own action; (B) if the informant appears as a witness for the prosecution; or (C) if the government introduces a statement by the informant on the merits.

(2) *Testimony on the issue of guilt or innocence.* If a claim of privilege has been made under this rule, the military judge shall, upon motion by the defense, determine whether disclosure of the identity of the informant is necessary to the accused’s defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant’s testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused’s defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) *Fair trial considerations.* If the military judge determines that extending the privilege, in part or in full, would adversely affect the integrity or fairness of the

proceedings, the military judge may decline to extend the privilege, in part or in full, to the claimant or may issue any order required in the interests of justice.

(d) *Procedures.* If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time disclosure is not made, the military judge, *sua sponte* or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

Rule 508. Political vote

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 509. Deliberations of courts, juries, and military commissions

Except as provided in Mil. Comm. R. Evid. 606, the deliberations of courts, grand and petit juries, and military commissions are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

Rule 510. Waiver of privilege by voluntary disclosure

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege

(a) Evidence of a statement or other disclosure of privileged matter is not admissible

against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

(b) The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege; instruction

(a) *Comment or inference not permitted.*

(1) The claim of privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

(b) *Claiming privilege without knowledge of members.* In a trial before a military commission, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members.

(c) *Instruction.* Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subsection (a)(2).

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the U.C.M.J. or the M.C.A., if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social

worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An “assistant to a psychotherapist” is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) “Evidence of a patient’s records or communications” is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient’s mental or emotional condition.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense to counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient’s mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.M.C. 706 or Mil. Comm. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is required to avoid an adverse effect on the integrity or fairness of the proceeding.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subsection (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a military commission composed of military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or

communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

SECTION VI WITNESSES

Rule 601. General rule of competency

Every person is competent to be a witness, except as otherwise provided in these rules.

Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Mil. Comm. R. Evid. 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

Rule 605. Competency of military judge as witness

- (a) The military judge presiding at the military commission may not testify in that military commission as a witness. No objection need be made to preserve the point.
- (b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

Rule 606. Competency of military commission member as witness

- (a) *At the military commission.* A member of the military commission may not testify as a witness before the other members in the trial of the case in which the member is sitting. If the member is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the members.
- (b) *Inquiry into validity of findings or sentence.* Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the military commission or, to the effect of anything upon the member's or any other member's mind or emotions as

influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the military commission, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

Rule 607. Who may impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of character, conduct, and bias of witness

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Mil. Comm. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(c) *Evidence of bias.* Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Rule 609. Impeachment by evidence of conviction of crime

(a) *General rule.* For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Mil. Comm. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of

such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 of the U.C.M.J., at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the military judge determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of impeachment until review has been completed pursuant to Article 64 or Article 66 of the U.C.M.J., if applicable. Evidence of the pendency of an appeal is admissible.

(f) *Definition.* For purposes of this rule, there is a “conviction” in a trial by court-martial or a military commission when a sentence has been adjudged.

Rule 610. Religious beliefs or opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation

(a) *Control by the military judge.* The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination, consistent with Mil. Comm. R. Evid. 505.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness or a witness identified with an adverse party, interrogation may be by leading questions.

(d) *Alternative forms of testimony of a child, victim, protected entity, or witness whose presence at trial cannot be procured by legal process.*

(1) In a case involving a child witness, the military judge shall, subject to the requirements below, allow the child or victim to testify from an area outside the courtroom as prescribed in R.M.C. 914A.

(A) The term “child” means a person who is under the age of 16 at the time of his or her testimony. The term victim is defined as a person who has suffered a direct physical, emotional, or pecuniary harm or loss as a result of the commission of an offense as defined in the Act, the law of war, or under this Manual.

(B) The military judge will permit remote testimony by a child witness upon a finding that the child or victim is unable to testify in open court in the presence of the accused, for any of the following reasons:

(i) The child is unable to testify because of fear;

(ii) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(iii) The child suffers from a mental or other infirmity; or

(iv) Conduct by an accused or defense counsel causes the child or victim to be unable to testify or to continue testifying. Such conduct may include pretrial statements or actions calculated to, or having a reasonable likelihood of tending to, threaten or otherwise intimidate the child or victim, or any member of the child's immediate family.

(2) In a case involving a person whose identity or name and appearance is classified, privileged, or otherwise protected from disclosure under any Act of Congress, this Manual, or these Rules, the military judge may, subject to the provisions of Mil. Comm. R. Evid. 505, 506, and 507, allow the witness to be identified by a pseudonym during all commissions sessions, and to testify from behind a protective screen (out of the view of the accused and counsel, but within view of the military judge and the members) or from a screened area outside the courtroom, consistent with R.M.C. 914A, but the military judge may extend that area worldwide.

(3) If the presence at trial of any relevant and necessary civilian witness cannot be obtained by the process described in R.M.C. 703, the military judge may, subject to the requirements below, permit the witness to testify by two-way video feed from a remote location. The party requesting remote testimony by a witness must establish by a preponderance of the evidence that:

(A) either the witness was served with process and offered sufficient logistical support to effect travel to the trial site, reasonable attempts at such service and offer were made, or military and intelligence or security imperatives would prevent the witness from physically appearing before the commission; and

(B) the witness declined to travel to the trial site, could not effectively be served, or was unavailable because of military and intelligence or security imperatives, as described in paragraph (A); and

(C) remote testimony of the witness would better serve the confrontation interests of the opposing party and ends of justice than any alternative form of testimony and confrontation available to the commission.

(4) In applying the provisions of this rule, the military judge may decline to extend any protective measure under this rule to any witness if the judge determines that applying the protective measure, as requested, would adversely affect the integrity or fairness of the proceedings.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing pro-

duced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in the discretion of the military judge it is determined that the interests of justice so require, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

Rule 613. Prior statements of witnesses

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. Comm. R. Evid. 801(d)(2).

Rule 614. Calling and interrogation of witnesses by the military commission

(a) *Calling by the military commission.* The military judge may, *sua sponte*, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine, after hearing the position of the parties on the question, whether it is appropriate to do so under these rules or this Manual.

(b) *Interrogation by the military commission.* The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the military commission by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) *Objections.* Objections to the calling of witnesses by the military judge or the

members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

Rule 615. Exclusion of witnesses

At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case, or (4) a person authorized by statute to be present at military commissions, or (5) any victim of an offense from the trial of an accused for that offense on the grounds that such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings.

SECTION VII OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses

The military judge shall permit testimony from any witness whose opinion, whether lay or expert, would have probative value to a reasonable person. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based in scientific, technical, or other specialized knowledge within the scope of Mil. Comm. R. Evid. 702.

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the members by the proponent of the opinion or inference unless the military judge determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on ultimate issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion

The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Experts appointed by the military commission

(a) *Appointment and compensation.* The trial counsel, the defense counsel, and the military commission have reasonable opportunity to obtain expert witnesses. The employment and compensation of expert witnesses is governed by R.M.C. 703.

(b) *Disclosure of employment.* In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

(c) *Accused's experts of own selection.* Nothing in this rule limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense.

Rule 707. Polygraph examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

SECTION VIII HEARSAY

Rule 801. Definitions

The following definitions apply under this rule:

(a) *Statement.* A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A “declarant” is a person who makes a statement.

(c) *Hearsay.* “Hearsay” is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party’s own statement in either the party’s individual or representative capacity, or (B) a statement of which the party has manifested the party’s adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under paragraph (C), the agency or employment relationship and the scope thereof under paragraph (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under paragraph (E).

Rule 802. Hearsay rule

Hearsay may be admitted on the same terms as any other form of evidence except as provided by these rules or by any Act of Congress applicable in trials by military commissions.

Discussion

The M.C.A. recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Because hearsay is admissible on the same terms as other evidence, the proponent still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403.

Rule 803. Admissibility of hearsay

(a) Hearsay evidence may be admitted in trials by military commission if the evidence would be admitted under the rules of evidence applicable in trial by general courts-martial, and the evidence would otherwise be admissible under these Rules or this Manual.

(b)(1) Hearsay evidence not admissible under section (a) may be admitted in trials by military commission if the proponent of the evidence makes known to the adverse party:

(A) the intention of the proponent to offer the evidence; and

(B) the particulars of the evidence (including information on the general circumstances under which the evidence was obtained, the name of the declarant, and, where available, the declarant's address).

(2) The proponent of the evidence may satisfy the requirement of subsection (1) by notifying the opposing party, in writing, of the statement and its circumstances 30 days in advance of trial or hearing and by providing the opposing party with any materials regarding the time, place, and conditions under which the statement was produced that are in the possession of the proponent of the evidence. Absent such notice, the military judge shall determine whether the proponent has provided the adverse party with a fair opportunity under the totality of the circumstances.

(3) The disclosure of information under this section is subject to the requirements and limitations applicable to the disclosure of classified information in Mil. Comm. R. Evid. 505.

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.

Discussion

As recognized under Mil. Comm. R. Evid. 802, as a general matter, hearsay shall be admitted on the same terms as any evidence. Thus, where the evidence has probative value to a reasonable person, the question of its weight is a matter that should ordinarily be determined by the trier of fact. This rule, however, provides the party opposing the admission of the evidence with an opportunity to demonstrate that under the totality of the circumstances (which may include extrinsic evidence), the evidence in question is not reliable and therefore should not be considered by the trier of fact.

Rule 806. Hearsay within hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 807. Attacking and supporting credibility of declarant

When a hearsay statement, or a statement defined in Mil. Comm. R. Evid. 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

SECTION IX
AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification

Evidence shall be admitted as authentic if:—

- (a) the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be; and
- (b) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

PART IV—CRIMES AND ELEMENTS

(950p) – Statement of substantive offenses

This part of the Manual provides guidance with respect to crimes that may be tried by military commission and enumerates the elements of those crimes.

1. (Section 950q) – Principals

a. *Text.* “Any person is punishable as a principal under this chapter who—

- (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
- (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or
- (3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

2. (Section 950r) – Accessory after the fact

a. *Text.* “Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) That an offense punishable by the M.C.A. was committed by a certain person;
- (2) That the accused knew that this person had committed such an offense;
- (3) That thereafter the accused received, comforted, or assisted the offender; and
- (4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. *Maximum punishment.* Any person subject to this chapter who is found guilty as an accessory after the fact to an offense punishable by the M.C.A. shall be subject to the maximum punishment authorized for the principle offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

3. (Section 950s) – Conviction of lesser included offense

a. *Text.* “An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an attempt to commit either the

offense charged or an offense necessarily included therein.”

4. (Section 950t) – Attempts

a. *Text.* “(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.”

b. *Elements.*

- (1) That the accused did a certain overt act;
- (2) That the act was done with the specific intent to commit a certain offense under the M.C.A.;
- (3) That the act amounted to more than mere preparation; and
- (4) That the act apparently tended to effect the commission of the intended offense.

c. *Maximum punishment.* Any person subject to this chapter who is found guilty of an attempt under Section 950t to commit any offense punishable by this chapter shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.

5. (Section 950u) – Solicitation

a. *Text.* “Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) That the accused wrongfully solicited, ordered, induced, or advised a person or persons to commit a substantive offense triable by military commission; and
- (2) That the accused intended that the offense actually be committed.

c. *Maximum punishment.* Confinement for 10 years.

6. (Section 950v) – Crimes triable by military commissions

(a) DEFINITIONS AND CONSTRUCTION.—In this section:

(1) MILITARY OBJECTIVE.—The term ‘military objective’ means—

(A) combatants; and

(B) those objects during an armed conflict—

(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability; and

(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

(2) PROTECTED PERSON.—The term ‘protected person’ means any person entitled to protection under one or more of the Geneva Conventions, including—

(A) civilians not taking an active part in hostilities;

(B) military personnel placed *hors de combat* by sickness, wounds, or detention; and

(C) military medical or religious personnel.

(3) PROTECTED PROPERTY.—The term ‘protected property’ means property specifically protected by the law of war (such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.

(1) MURDER OF PROTECTED PERSONS.

a. *Text.* “Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused without justification or excuse, intentionally and unlawfully kills a protected person;

(2) The accused knew or should have known of the factual circumstances that established that person’s protected status; and

(3) The killing took place in the context of and was associated with armed conflict.

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Death.

(2) ATTACKING CIVILIANS.

a. *Text.* “Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused engaged in an attack;
- (2) The object of the attack was a civilian population as such, or individual civilians not taking direct or active part in hostilities;
- (3) The accused intended the civilian population as such, or individual civilians not taking direct or active part in hostilities, to be an object of the attack;
- (4) The accused knew or should have known of the factual circumstances that established the civilian status; and
- (5) The attack took place in the context of and was associated with armed conflict.

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the attack on civilians. Otherwise, confinement for life.

(3) ATTACKING CIVILIAN OBJECTS.

a. *Text.* “Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused engaged in an attack;
- (2) The object of the attack was civilian property, that is, property that was not a military objective;
- (3) The accused intended such civilian property to be an object of the attack;
- (4) The accused knew or should have known that such property was not a military objective; and
- (5) The attack took place in the context of and was associated with armed conflict.

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Confinement for 20 years.

(4) ATTACKING PROTECTED PROPERTY.

a. *Text.* “Any person subject to this chapter who intentionally engages in an attack upon protected property shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused engaged in an attack;
- (2) The object of the attack was protected property;
- (3) The accused intended such protected property to be an object of the attack;
- (4) The accused knew or should have known of the factual circumstances that established the property’s protected status; and
- (5) The attack took place in the context of and was associated with armed conflict.

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Confinement for 20 years.

(5) PILLAGING.

a. *Text.* “Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused appropriated or seized certain property;
- (2) The accused intended to appropriate or seize such property for private or personal use;
- (3) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and
- (4) The appropriation or seizure took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Confinement for 20 years.

(6) DENYING QUARTER.

a. *Text.* “Any person subject to this chapter who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;
- (2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;
- (3) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;
- (4) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Confinement for life.

(7) TAKING HOSTAGES.

a. *Text.* “Any person subject to this chapter who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused seized, detained, or held hostage one or more persons;
- (2) The accused threatened to kill, injure, or continue to detain such person or persons;
- (3) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons, to act or refrain from acting as an explicit or implicit condition for the safety or release of such person; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.* This offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by law of armed conflict.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the hostage taking. Otherwise, confinement for life.

(8) EMPLOYING POISON OR SIMILAR WEAPONS.

a. *Text.* “Any person subject to this chapter who intentionally, as a method of warfare, employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be punished, if death results to one or more of the victims, by death or such

other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused intentionally employed a substance or a weapon that releases a substance as a result of its employment;
- (2) The substance was such that causes death or serious damage to health in the ordinary course of events through its asphyxiating, poisonous, bacteriological properties;
- (3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, bacteriological properties as a method of warfare;
- (4) The accused knew or should have known of the nature of the substance or weapon employed; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) The “death or serious damage to health” required of the offense must be a direct result of the substance’s effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense).
- (2) The clause “serious damage to health” does not include temporary incapacitation or sensory irritation.
- (3) The use of the “substance or weapon” at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.
- (4) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the employment of the substance or weapon. Otherwise, confinement for life.

(9) USING PROTECTED PERSONS AS A SHIELD.

a. *Text.* “Any person subject to this chapter who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused positioned or took advantage of the location of a protected person;
- (2) The accused did so with the intent to shield a military objective from attack or to

shield, favor, or impede military operations; and

(3) The act took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Death, if the death of any person occurs as a result of the use of a protected person as a shield. Otherwise, confinement for life.

(10) USING PROTECTED PROPERTY AS A SHIELD.

a. *Text.* “Any person subject to this chapter who positions, or otherwise takes advantage of the location of, protected property with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused positioned or otherwise took advantage of the location of protected property;

(2) The accused did so with the intent to shield a military objective from attack, or to shield, favor, or impede military operations; and

(3) The act took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Confinement for life.

(11) TORTURE.

a. *Text.* “Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(2) The accused did so for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind;

(3) The accused intended to inflict such severe physical or mental pain or suffering;

(4) The infliction of pain or suffering was not incidental to lawful sanctions;

(5) Such person or persons were in the custody or under the control of the accused at the time of the alleged offense; and

(6) The conduct took place in the context of and was associated with armed conflict.

c. *Explanation.*

(1) This offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed sanctions or punishments. This offense does not include the incidental infliction of pain or suffering associated with the lawful conduct of hostilities.

(2) Severe “mental pain or suffering” is the prolonged mental harm caused by or resulting from:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering;

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) “Prolonged mental harm” is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(4) Element (b)(4) of this offense does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the torture. Otherwise, confinement for life.

(12) CRUEL OR INHUMAN TREATMENT.

a. *Text.* “Any person subject to this chapter who commits an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused wrongfully and unlawfully inflicted severe or serious physical or mental pain or suffering upon one or more persons;

(2) The accused intended to inflict such severe or serious physical or mental pain or suffering upon the person;

(3) The infliction of such pain or suffering was not incidental to lawful sanctions;

(4) Such person or persons were in the custody or under the control of the accused at the time of the alleged offense; and

(5) The conduct took place in the context of and was associated with armed conflict.

c. *Definitions.*

- (1) The term “serious physical pain or suffering” means bodily injury that involves—
 - (A) a substantial risk of death;
 - (B) extreme physical pain;
 - (C) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
 - (D) significant loss or impairment of the function of a bodily member, organ, or mental faculty.
- (2) The term “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;
- (3) The term “serious mental pain or suffering” means the prolonged mental harm (if the alleged act occurred prior to or on October 17, 2006) or serious and non-transitory mental harm which need not be prolonged (if the alleged act occurred after October 17, 2006) caused by or resulting from—
 - (A) the intentional infliction or threatened infliction of serious physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, serious physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

d. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

e. *Maximum punishment.* Death, if the death of any person occurs as a result of the cruel or inhuman treatment. Otherwise, confinement for life.

(13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.

a. *Text.* “Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused caused serious injury to the body or health of one or more persons;
- (2) The accused intended to inflict such serious injury upon the person or persons;
- (3) The injury was done with unlawful force or violence;
- (4) The serious bodily injury inflicted by the accused was in violation of the law of war; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Definition.* **SERIOUS BODILY INJURY DEFINED.**— the term ‘serious bodily injury’ means bodily injury which involves—

- (i) a substantial risk of death;
- (ii) extreme physical pain;
- (iii) protracted and obvious disfigurement; or
- (iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

d. *Comment.* For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.

e. *Maximum punishment.* Death, if the death of any person occurs as a result of the serious bodily injury. Otherwise, 20 years confinement.

(14) MUTILATING OR MAIMING.

a. *Text.* “Any person subject to this chapter who intentionally injures one or more protected persons by disfiguring the person or persons by any mutilation of the person or persons, or by permanently disabling any member, limb, or organ of the body of the person or persons, without any legitimate medical or dental purpose, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused injured one or more persons by permanently disfiguring the person or persons or by permanently disabling any member, limb, or organ of the body of the person or persons;
- (2) The accused intended to subject such person or persons to such mutilation;
- (3) The person or persons was or were protected persons;
- (4) The injuries were done with unlawful force and violence;
- (5) The conduct caused the death or seriously damaged or endangered the physical health or mental health or physical appearance of such person or persons;
- (6) The injuries did not have any legitimate medical or dental purpose; and
- (7) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.* It is mutilation or maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also mutilation or maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is mutilation or maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the mutilation or maiming. Otherwise, confinement for 20 years.

(15) MURDER IN VIOLATION OF THE LAW OF WAR.

a. *Text.* "Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct."

b. *Elements.*

- (1) One or more persons are dead;
- (2) The death of the persons resulted from the act or omission of the accused;
- (3) The killing was unlawful;
- (4) The accused intended to kill the person or persons;
- (5) The killing was in violation of the law of war; and
- (6) The killing took place in the context of and was associated with an armed conflict.

c. *Comment.* See comment to "Intentionally Causing Serious Bodily Injury."

d. *Maximum punishment.* Death.

(16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR.

a. *Text.* “Any person subject to this chapter who intentionally destroys property belonging to another person in violation of the law of war shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused destroyed property;
- (2) The property belonged to another person;
- (3) The accused destroyed the property without that person’s consent;
- (4) The accused intended to destroy such property;
- (5) The destruction of the property was in violation of the law of war; and
- (6) The destruction took place in the context of and was associated with an armed conflict.

c. *Comment.* A “violation of the law of war,” may be established by proof of the status of the accused as an unlawful combatant or by proof of the character of the property destroyed, or both.

d. *Maximum punishment.* Confinement for 10 years.

(17) USING TREACHERY OR PERFIDY.

a. *Text.* “Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused invited the confidence or belief of one or more persons that they were entitled, or obliged to accord, protection under the law of war;
- (2) The accused intended to betray that confidence or belief;
- (3) The accused killed, injured or captured one or more persons;
- (4) The accused made use of that confidence or belief in killing, injuring or capturing such person or persons; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) Ruses of war are legitimate so long as they do not involve treachery or perfidy on the part of the belligerent resorting to them. They are, however, forbidden if they contravene any generally accepted rule.

(2) The line of demarcation between legitimate ruses and forbidden acts of perfidy is sometimes indistinct, but the following examples indicate the correct principles. It would be an improper practice to secure an advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth. For example, it is improper to feign surrender so as to secure an advantage over the opposing belligerent thereby. So similarly, to broadcast to the enemy that an armistice had been agreed upon when such is not the case would be treacherous. On the other hand, it is a perfectly proper ruse to summon a force to surrender on the ground that it is surrounded and thereby induce such surrender with a small force.

(3) Treacherous or perfidious conduct in war is forbidden because it destroys the basis for a restoration of peace short of the complete annihilation of one belligerent by the other.

(4) One may commit an act of treachery or perfidy by, for example, feigning an intent to negotiate under a flag of truce or a surrender or feigning incapacitation by wounds or sickness or feigning a civilian, non-combatant status or feigning a protected status by the use of signs, emblems, or uniforms of the United Nations or a neutral State or a State not party to the conflict.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the improper use of the treachery or perfidy. Otherwise, confinement for life.

(18) IMPROPERLY USING A FLAG OF TRUCE.

a. *Text.* “Any person subject to this chapter who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused used a flag of truce;

(2) The accused made such use of the flag in order to feign an intention to negotiate, surrender, or otherwise suspend hostilities;

(3) The accused had no intention to negotiate, surrender, or otherwise suspend hostilities; and

(4) The conduct took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Confinement for 20 years.

(19) IMPROPERLY USING A DISTINCTIVE EMBLEM.

a. *Text.* “Any person subject to this chapter who intentionally uses a distinctive emblem recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused used a distinctive emblem recognized by the law of war for combatant purposes;
- (2) The accused used the distinctive emblem in a manner prohibited by the law of war;
- (3) The accused knew or should have known of the prohibited nature of such use; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) “Combatant purposes,” means purposes directly related to hostilities and does not include medical, religious, or similar activities.
- (2) The use of the emblem of the Red Cross and other equivalent insignia must be limited to the indication or protection of medical units and establishments, the personnel and material protected by the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field* and other similar conventions. The following are examples of the improper use of the emblem: using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other non-medical stores; and in general using it for cloaking acts of hostility.

d. *Maximum punishment.* Confinement for 20 years.

(20) INTENTIONALLY MISTREATING A DEAD BODY.

a. *Text.* “Any person subject to this chapter who intentionally mistreats the body of a dead person, without justification by legitimate military necessity, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused mistreated or otherwise violated the dignity of the body of a dead person;
- (2) The accused’s actions were not justified by legitimate military necessity;
- (3) The accused intended to mistreat or violate the dignity of such body; and
- (4) This act took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) This offense is designed to criminalize only the most serious conduct.
- (2) To mistreat or otherwise violate the dignity of the body of a dead person requires severe physical desecrations, such as dismemberment, sexual or other defilement, or mutilation of dead bodies, especially if publicly displayed, that, as a result, do not respect the remains of the deceased; it does not include photography of a corpse unaccompanied by acts of severe disrespect.

d. *Maximum punishment.* Confinement for 20 years.

(21) RAPE.

a. *Text.* “Any person subject to this chapter who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused wrongfully invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused, with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- (2) The invasion was committed by force, threat of force or coercion or against a person incapable of giving consent; and
- (3) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) This offense recognizes that consensual conduct does not give rise to this offense.
- (2) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.
- (3) The concept of “invasion” is linked to the inherent wrongfulness requirement. In this case, for example, a legitimate body cavity search could not give rise to this offense.
- (4) The concept of “invasion” is gender neutral.

d. *Maximum punishment.* Confinement for life.

(22) SEXUAL ASSAULT OR ABUSE.

a. *Text.* “Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused wrongfully engaged in sexual contact with one or more persons or wrongfully caused one or more persons to engage in sexual contact;
- (2) The sexual contact was committed by force, threat of force or coercion or against a person incapable of giving consent; and
- (3) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.* Sexual assault or abuse is defined as intentional sexual contact, characterized by use of force, physical threat of force or abuse of authority or when the victim does not or cannot

consent. Sexual assault includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim.

d. *Maximum punishment.* Confinement for life.

(23) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.

a. *Text.* “Any person subject to this chapter who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused seized, exercised control over, or endangered the safe navigation of a vessel, or an aircraft;
- (2) The accused intended to seize, exercise control over, or endanger the safe navigation of such vessel or aircraft;
- (3) The vessel or aircraft was not a legitimate military objective; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) *General.* A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties would not satisfy the wrongfulness requirement for this crime.
- (2) *Hazard.* “Hazard” means to put in danger of loss or injury. Actual damage to, or loss of, a vessel or aircraft by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that the vessel or aircraft was hazarded but not of the fact of culpability on the part of any particular person. Hazarding a vessel or aircraft includes shooting at it with missiles, firearms, laser devices, or attacking it with other instruments intended to endanger the safe navigation of the vessel or aircraft.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the hijacking or hazarding of a vessel or aircraft. Otherwise, confinement for life.

(24) TERRORISM.

a. *Text.* “Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct,

shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced a wanton disregard for human life;
- (2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and
- (3) The killing, harm or wanton disregard for human life took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) This offense includes the concept of causing death or bodily harm, even if indirectly.
- (2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the terrorist act. Otherwise, confinement for life.

(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.

a. *Text.* “Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.”

b. *Elements.* The elements of this offense can be met either by meeting (i) all of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B:

- A. (1) The accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24));
- (2) The accused knew or intended that the material support or resources were to be used for those purposes; and
- (3) The conduct took place in the context of and was associated with an armed conflict.

or

- B. (1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;
- (2) The accused intended to provide such material support or resources to such an international terrorist organization;
- (3) The accused knew that such organization has engaged or engages in terrorism; and
- (4) The conduct took place in the context of and was associated with an armed conflict.

c. *Definition.* “Material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

d. *Maximum Punishment.* Confinement for life.

(26) WRONGFULLY AIDING THE ENEMY.

a. *Text.* “Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused aided the enemy;
- (2) The accused intended to aid the enemy;
- (3) At the time of the accused’s actions, the accused had an allegiance or duty to the United States;
- (4) The accused’s acts and intentions, taken together, comprised a breach of the accused’s allegiance or duty to the United States; and
- (5) The conduct took place in the context of and was associated with an armed conflict.

c. *Comment.*

- (1) The means the accused can use to aid the enemy include but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.
- (2) The requirement that conduct be wrongful for the crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence quarters in accordance with applicable orders or policy is not aiding the enemy.
- (3) The requirement that conduct be wrongful for this crime may necessitate that the accused owe allegiance or some duty to the United States of America. For example,

citizenship, resident alien status, or a contractual relationship in or with the United States is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

d. *Maximum punishment.* Confinement for life.

(27) SPYING.

a. *Text.* “Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused collected or attempted to collect certain information by clandestine means or while acting under false pretenses;
- (2) The accused intended or had reason to believe the information collected would be used to injure the United States or to provide an advantage to a foreign power;
- (3) The accused intended to convey such information to an enemy of the United States or one of the co-belligerents of the enemy; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Death.

(28) CONSPIRACY.

a. *Text.* “Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;
- (2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

c. *Comment.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact “triable by military commission.” Although the accused must be subject to the MCA, other co-conspirators need not be.

(3) The overt act must be done by the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. It is not essential that any substantive offense, including the object offense, be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the conspiracy

or joint enterprise. Otherwise, confinement for life.

(29) (Section 950w) – PERJURY, FALSE TESTIMONY, AND OBSTRUCTION OF JUSTICE

(a) Perjury and false testimony

a. *Text.* “A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.”

b. *Elements.*

- (1) The accused testified at a military commission, testified in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;
- (2) Such testimony or information was material;
- (3) Such testimony or information was false;
- (4) The accused knew such testimony or information to be false.

c. *Maximum Punishment.* Confinement for 5 years.

(b) Obstruction of Justice.

a. *Text.* “A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.”

b. *Elements.*

- (1) The accused did an act;
- (2) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and
- (3) The accused did such act in the case of a certain person against whom the accused had reason to believe:
 - (A) there were or would be proceedings before a military commission; or
 - (B) there was an ongoing investigation of offenses triable by military commission.

c. *Maximum punishment.* Confinement for 5 years.