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Part III

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Manual for Courts-Martial; Proposed Amendments; Notice

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2014–OS–0140]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), DoD.

ACTION: Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.) and Notice of Public Meeting.

SUMMARY: The Department of Defense is proposing changes to the *Manual for Courts-Martial, United States* (2012 ed.) (MCM). The proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.01, ''Preparing, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony,'' June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

This notice also sets forth the date, time and location for a public meeting of the JSC to discuss the proposed changes.

This notice is provided in accordance with DoD Directive 5500.17, ''Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' May 3, 2003.

This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

The JSC also invites members of the public to suggest changes to the Manual for Courts-Martial and address specific recommended changes with supporting rationale.

DATES: Comments on the proposed changes must be received no later than December 2, 2014. A public meeting for comments will be held on October 29, 2014, at 10:00 a.m. in the United States Court of Appeals for the Armed Forces, 450 E Street NW., Washington, DC 20442–0001.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Capt Allison A. DeVito, Executive Secretary, Joint Service Committee on Military Justice, 1500 West Perimeter Road, Suite 1130, Joint Base Andrews, Maryland 20762, 240–612–4820, email-*allison.a.devito.mil@mail.mil.*

SUPPLEMENTARY INFORMATION: The proposed amendments to the MCM are as follows:

Annex

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

(a) R.C.M. 201(f)(1) is amended to insert the following:

[**Note:** R.C.M. 201(f)(1) and (f)(2) apply to offenses committed on or after 24 June 2014. The previous version of R.C.M. 201(f)(1) and (f)(2) is located in Appendix 29.]

(b) R.C.M. 201(f)(1)(D) is inserted to read as follows:

''(D) *Jurisdiction for Certain Sexual Offenses.* Only a general court-martial has jurisdiction to try offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), UCMJ, forcible sodomy under Article 125, UCMJ, and attempts thereof under Article 80, UCMJ.''

(c) R.C.M. 201(f)(2)(D) is inserted to read as follows:

''(D) *Certain Offenses under Articles 120, 120b, and 125.* Notwithstanding subsection (f)(2)(A), special courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), forcible sodomy under Article 125, UCMJ, and attempts thereof under Article 80, UCMJ. Such offenses shall not be referred to a special court-martial.''

(d) R.C.M. 305(i)(2)(A)(i) is amended to read as follows:

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

(e) R.C.M. 305(i)(2)(A)(iv) is inserted to read as follows:

''(iv) *Victim's right to be reasonably heard.* A victim of an alleged offense committed by the prisoner has the right to reasonable, accurate, and timely notice of the 7-day review; the right to consult with the representative of the command and counsel for the government, if any, present during the review; and the right to be reasonably heard during the review. The right to be heard under this rule includes the right to be heard through counsel. Inability to reasonably afford a victim these rights shall not delay the proceedings.''

(f) R.C.M. 305(i)(2)(C) is amended to read as follows:

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

(g) R.C.M. 305(n) is inserted to read as follows:

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

(h) R.C.M. 404(e) is amended to read as follows:

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

(i) A new rule, R.C.M. 404A, is inserted to read as follows:

''Rule 404A. Disclosure of matters following direction of preliminary hearing

(a) When a convening authority directs a preliminary hearing under R.C.M. 405, counsel for

the government shall, subject to R.C.M. 404A(b)-(d) below, within 5 days of issuance of the Article 32 appointing order, provide to the defense the following information or matters:

(1) Charge sheet;

(2) Article 32 appointing order;

(3) Documents accompanying the charge sheet on which the preferral decision was based;

(4) Documents provided to the convening authority when deciding to direct the preliminary hearing;

(5) Documents the counsel for the government intends to present at the preliminary hearing; and

(6) Access to tangible objects counsel for the government intends to present at the preliminary hearing.

(b) *Contraband.* If items covered by subsection 404A(a) above are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the hearing.

(c) *Privilege.* If items covered by subsection 404A(a) above are privileged, classified or otherwise protected under Section V of Part III, no disclosure of those items is required under this rule. However, counsel for the government may disclose privileged, classified or otherwise protected information covered by subsection 404A(a) above if authorized by the holder of the privilege, or in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

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

(j) R.C.M. 405 is amended in its entirety to read as follows:

''Rule 405. Preliminary hearing

[**Note:** This rule applies to offenses committed on or after 26 December 2014. The previous version of R.C.M. 405 is located in Appendix 30]

(a) *In general.* Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with this rule. A preliminary hearing conducted under this rule is not intended to serve as a means of discovery and will be limited to an examination of those issues necessary to determine whether there is probable cause to conclude that an offense or offenses have been committed and whether the accused committed it; to determine whether a court-martial would have jurisdiction over the offense(s) and the accused; to consider the form of the charge(s); and to recommend the disposition that should be made of the charge(s). Failure to comply with this rule shall have no effect on the disposition of the charge(s) if the charge(s) is not referred to a general court-martial.

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

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

(d) *Personnel.*

(1) *Preliminary hearing officer.* Whenever practicable, the convening authority directing a preliminary hearing under this rule shall detail an impartial judge advocate certified under Article 27(b), not the accuser, as a preliminary hearing officer, who shall conduct the preliminary hearing and make a report that addresses whether there is probable cause to believe that an offense or offenses have been committed and that the accused committed the offense(s); whether a court-martial would have jurisdiction over the offense(s) and the accused; the form of the charges(s); and a recommendation as to the disposition of the charge(s).

When the appointment of a judge advocate as the preliminary hearing officer is not practicable, or in exceptional circumstances in which the interest of justice warrants, the convening authority directing the preliminary hearing may detail an impartial commissioned officer, who is not the accuser, as the preliminary hearing officer. If the preliminary hearing officer is not a judge advocate, an impartial judge advocate certified under Article 27(b) shall be available to provide legal advice to the preliminary hearing officer.

When practicable, the preliminary hearing officer shall be equal or senior in grade to the military counsel detailed to represent the accused and the government at the preliminary hearing. The Secretary concerned may prescribe additional limitations on the appointment of preliminary hearing officers.

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

(2) *Counsel to represent the United States.* A judge advocate, not the accuser, shall serve as counsel to represent the United States, and shall present evidence on behalf of the government relevant to the limited scope and purpose of the preliminary hearing as set forth in subsection (a) of this rule.

(3) *Defense counsel.*

(A) *Detailed counsel.* Except as provided in subsection (d)(3)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

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

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(3)(A) and (B) of this rule.

(4) *Others.* The convening authority who directed the preliminary hearing may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) A reporter; and

(B) An interpreter.

(e) *Scope of preliminary hearing.*

(1) The preliminary hearing officer shall limit the inquiry to the examination of evidence, including witnesses, necessary to:

(A) Determine whether there is probable cause to believe an offense or offenses have been committed and whether the accused committed it;

(B) Determine whether a court-martial would have jurisdiction over the offense(s) and the accused;

(C) Consider whether the form of the charge(s) is proper; and

(D) Make a recommendation as to the disposition of the charge(s).

(2) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged

offense(s), the preliminary hearing officer may examine evidence and hear witnesses relating to the subject matter of such offense(s) and make the findings and recommendations enumerated in subsection (e)(1) of this rule regarding such offense(s) without the accused first having been charged with the offense. The accused's rights under subsection (f)(2) of this rule, and, where it would not cause undue delay to the proceedings, subsection (g) of this rule, are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, the preliminary hearing officer shall inform the accused of the general nature of each uncharged offense considered, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the preliminary hearing of any charged offense.

(f) *Rights of the accused.*

(1) Prior to any preliminary hearing under this rule the accused shall have the right to:

(A) Notice of any witnesses that the government intends to call at the preliminary hearing and copies of or access to any written or recorded statements made by those witnesses that relate to the subject matter of any charged offense;

(i) For purposes of this rule, a ''written statement'' is one that is signed or otherwise adopted or approved by the witness that is within the possession or control of counsel for the government; and

(ii) For purposes of this rule, a ''recorded statement'' is an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a digital or other recording or a transcription thereof that is within the possession or control of counsel for the government.

(B) Notice of, and reasonable access to, any other evidence that the government intends to offer at the preliminary hearing; and

(C) Notice of, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces the degree of guilt of the accused for an offense charged.

(2) At any preliminary hearing under this rule the accused shall have the right to:

(A) Be represented by counsel;

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

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

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

(E) Cross-examine witnesses on matters relevant to the limited scope and purpose of the preliminary hearing;

(F) Present matters in defense and mitigation relevant to the limited scope and purpose of the preliminary hearing; and

(G) Make a statement relevant to the limited scope and purpose of the preliminary hearing.

(g) *Production of Witnesses and Other Evidence.*

(1) *Military Witnesses.*

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

(B) If the government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

(C) If the government does not object to the proposed defense military witness or the preliminary hearing officer determines that the military witness is relevant, not cumulative, and necessary, counsel for the government shall request that the commanding officer of the proposed military witness make that person available to provide testimony. The commanding officer shall determine whether the individual is available based on operational necessity or mission requirements, except that a victim, as defined in this rule, who declines to testify shall be deemed to be not available. If the commanding officer determines that the military witness is available, counsel for the government shall make arrangements for that individual's testimony. The commanding officer's determination of unavailability due to operational necessity or mission requirements is final. The military witness's commanding officer determines the availability of the witness and, if there is a dispute among the parties, determines whether the witness testifies in person, by videoteleconference, by telephone, or similar means of remote testimony.

(2) *Civilian Witnesses.*

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

(B) If the government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

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

(3) *Other evidence.*

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

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government a list of evidence under the control of the government the accused requests the government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests

must be received. Counsel for the government shall respond that either (1) the government agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and shall make reasonable efforts to obtain the evidence; or (2) the government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(ii) If the government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If the preliminary hearing officer determines that the evidence shall be produced, counsel for the government shall make reasonable efforts to obtain the evidence.

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

(i) Evidence not under the control of the government may be obtained through noncompulsory means or by *subpoenas duces tecum* issued by counsel for the government in accordance with the process established by R.C.M. 703.

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government a list of evidence not under the control of the government that the accused requests the government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the government shall respond that either (1) the government agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and shall issue *subpoenas duces tecum* for the evidence; or (2) the government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(iii) If the government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing and that the issuance of *subpoenas duces tecum* would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the government to issue *subpoenas duces tecum* for the defense-requested evidence. Failure on the part of counsel for the government to issue *subpoenas duces tecum* directed by the preliminary hearing officer shall be noted by the preliminary hearing officer in the report of preliminary hearing.

(h) *Military Rules of Evidence.* The Military Rules of Evidence do not apply in preliminary hearings under this rule except as follows:

(1) Mil. R. Evid. 301–303 and 305 shall apply in their entirety.

(2) Mil. R. Evid. 412 shall apply in any case that includes a charge defined as a sexual offense in Mil. R. Evid. 412(d), except that Mil. R. Evid. 412(b)(1)(C) shall not apply.

(3) Mil. R. Evid., Section V, Privileges, shall apply, except that Mil. R. Evid. 505(f)–(h) and (j); 506(f)–(h), (j), (k), and (m); 513(d)(8); and 514(d)(6) shall not apply.

(4) In applying these rules to a preliminary hearing, the term ''military judge,'' as used in these rules shall mean the preliminary hearing officer, who shall assume the military judge's authority to exclude evidence from the preliminary hearing, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in subsections (h)(1)–(3) of this rule.

(5) Failure to meet the procedural requirements of the applicable rules of evidence shall result in exclusion of that evidence from the preliminary hearing, unless good cause is shown.

(i) *Procedure.*

(1) *Generally.* The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under subsection (f) of this rule. Counsel for the government will then present evidence. Upon the conclusion of counsel for the government's presentation of evidence, defense counsel may present matters in defense and mitigation consistent with subsection (f) of this rule. For the purposes of this rule, ''matters in mitigation'' are defined as matters that may serve to explain the circumstances surrounding a charged offense. Both counsel for the government and defense shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary to satisfy the requirements of subsection (e) above, the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence relevant to the limited scope and purpose of the preliminary hearing. The preliminary hearing officer shall not consider evidence not presented at the preliminary hearing. The preliminary hearing officer shall not call witnesses *sua sponte.*

(2) *Notice to and presence of the victim(s).*

(A) The victim(s) of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense. For the purposes of this rule, a ''victim'' is a person who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration.

(B) A victim of an offense under consideration at the preliminary hearing is not required to testify at the preliminary hearing.

(C) A victim has the right not to be excluded from any portion of a preliminary hearing related to the alleged offense, unless the preliminary hearing officer, after receiving clear and convincing evidence, determines the testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.

(D) A victim shall be excluded if a privilege set forth in Mil. R. Evid. 505 or 506 is invoked or if evidence is offered under Mil. R. Evid. 412, 513, or 514, for charges other than those in which the victim is named.

(3) *Presentation of evidence.*

(A) *Testimony.* Witness testimony may be provided in person, by videoteleconference, by telephone, or similar means of remote testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the limited scope and purpose of the preliminary hearing.

(B) *Other evidence.* If relevant to the limited scope and purpose of the preliminary hearing, and not cumulative, a preliminary hearing officer may consider other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, offered by either side, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(4) *Access by spectators.* Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the convening authority who directed the

preliminary hearing or the preliminary hearing officer. Preliminary hearings are public proceedings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open preliminary hearing, the preliminary hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Convening authorities or preliminary hearing officers must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. Convening authorities or preliminary hearing officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a convening authority or preliminary hearing officer believes closing the preliminary hearing is necessary, the convening authority or preliminary hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the report of preliminary hearing. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.

(5) *Presence of accused.* The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present whenever the accused:

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

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

(6) *Recording of the preliminary hearing.* Counsel for the government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim, as defined by subsection (i)(2)(A) of this rule, may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the government shall provide the requested access to, or a copy of, the recording to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of re-referral, or court-martial adjournment. A victim is not entitled to classified information or closed sessions in which the victim did not have the right to attend under subsections (i)(2)(C) or (i)(2)(D) of this rule.

(7) *Objections.* Any objection alleging failure to comply with this rule shall be made to the convening authority via the preliminary hearing officer.

(8) *Sealed exhibits and proceedings.* The preliminary hearing officer has the authority to order exhibits, proceedings, or other matters sealed as described in R.C.M. 1103A.

(j) *Report of preliminary hearing.*

(1) *In general.* The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority who directed the preliminary hearing.

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

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides;

(C) Any other statements, documents, or matters considered by the preliminary hearing officer, or recitals of the substance or nature of such evidence;

(D) A statement that an essential witness may not be available for trial;

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

(F) A notation if counsel for the government failed to issue a *subpoena duces tecum* that was directed by the preliminary hearing officer;

(G) The preliminary hearing officer's determination as to whether there is probable cause to believe the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing occurred;

(H) The preliminary hearing officer's determination as to whether there is probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing;

(I) The preliminary hearing officer's determination as to whether a court-martial has jurisdiction over the offense(s) and the accused;

(J) The preliminary hearing officer's determination as to whether the charge(s) and specification(s) are in proper form; and

(K) The recommendations of the preliminary hearing officer regarding disposition of the charge(s).

(3) *Sealed exhibits and proceedings.* If the report of preliminary hearing contains exhibits, proceedings, or other matters ordered sealed by the preliminary hearing officer in accordance with R.C.M. 1103A, counsel for the government shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

(4) *Distribution of the report.* The preliminary hearing officer shall cause the report to be delivered to the convening authority who directed the preliminary hearing. That convening authority shall promptly cause a copy of the report to be delivered to each accused.

(5) *Objections.* Any objection to the report shall be made to the convening authority who directed the preliminary hearing, via the preliminary hearing officer, within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charge(s) or taking other action within the 5-day period.

(k) *Waiver.* The accused may waive a preliminary hearing under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the convening authority who directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.''

(k) R.C.M. 601(g) is inserted to read as follows:

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

(l) R.C.M. 703(e)(2)(B) is amended to read as follows:

''(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, data, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties. A subpoena issued for a preliminary hearing pursuant to Article 32 shall not command any person to attend or give testimony at an Article 32 preliminary hearing.''

(m) R.C.M. 703(e)(2)(C) is amended to read as follows:

''(C) *Who may issue.*

(1) A subpoena to secure evidence may be issued by:

(a) The summary court-martial;

(b) Detailed counsel for the government at an Article 32 preliminary hearing;

(c) After referral to a court-martial, detailed trial counsel;

(d) The president of a court of inquiry; or

(e) An officer detailed to take a deposition.''

(n) R.C.M. 703(f)(4)(B) is amended to read as follows:

(B) *Evidence not under the control of the government.* Evidence not under the control of the government may be obtained by a subpoena issued in accordance with subsection (e)(2) of this rule. A *subpoena duces tecum* to produce books, papers, documents, data, or other objects or electronically stored information for a preliminary hearing pursuant to Article 32 may be issued, following the convening authority's order directing such preliminary hearing, by counsel for the government. A person in receipt of a *subpoena duces tecum* for an Article 32 hearing need not personally appear in order to comply with the subpoena.''

(o) R.C.M. 801(a)(g) is inserted to read as follows:

''(6) In the case of a victim of an offense under the UCMJ who is under 18 years of age and not a member of the armed forces, or who is incompetent, incapacitated, or deceased, designate in writing, a family member, a representative of the estate of the victim, or another suitable individual to assume the victim's rights under the UCMJ.

(A) For the purposes of this rule, the individual is designated for the sole purpose of assuming the legal rights of the victim as they pertain to the victim's status as a victim of any offense(s) properly before the court.

(B) *Procedure to determine appointment of designee.*

(i) As soon as practicable, trial counsel shall notify the military judge, counsel for the accused and the victim(s) of any offense(s) properly before the court when there is an apparent requirement to appoint a designee under this rule.

(ii) The military judge will determine if the appointment of a designee is required under this rule.

(iii) At the discretion of the military judge, victim(s), trial counsel, and the accused may be given the opportunity to recommend to the military judge individual(s) for appointment.

(iv) The military judge is not required to hold a hearing before determining whether a designation is required or making such an appointment under this rule.

(v) If the military judge determines a hearing pursuant to Article 39(a), UCMJ, is necessary, the following shall be notified of the hearing and afforded the right to be present at the hearing: trial counsel, accused, and the victim(s).

(vi) The individual designated shall not be the accused.

(C) At any time after appointment, a designee shall be excused upon request by the designee or a finding of good cause by the military judge.

(D) If the individual appointed to assume the victim's rights is excused, the military judge shall appoint a successor consistent with this rule.''

(p) R.C.M. 806(b)(2) is insert following R.C.M. 806(b)(1) and before the Discussion section to read as follows:

''(2) *Right of victim to attend.* A victim of an alleged offense committed by the accused may not be excluded from a court-martial relating to the offense, unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding.''

(q) R.C.M. 806(b)(2) is renumbered as R.C.M. 806(b)(3).

(r) R.C.M. 906(b)(8) is amended to read as follows:

''(8) *Relief from pretrial confinement.* Upon a motion for release from pretrial confinement, a victim of an alleged offense committed by the accused has the right to reasonable, accurate, and timely notice of the motion and any hearing, the right to consult with trial counsel, and the right to be reasonably heard. Inability to reasonably afford a victim these rights shall not delay the proceedings. The right to be heard under this rule includes the right to be heard through counsel.''

(s) R.C.M. 912(i)(3) is amended to read as follows:

''(3) *Preliminary hearing officer.* For purposes of this rule, ''preliminary hearing officer'' includes any person who has examined charges under R.C.M. 405 and any person who was counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.''

(t) R.C.M. 1001(a)(1)(B) is amended to read as follows:

''(B) Victim's right to be reasonably heard. *See* R.C.M. 1001A.''

(u) R.C.M. 1001(a)(C)–(G) are re-lettered to read as follows:

''(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge.''

(v) A new rule, R.C.M.1001A is inserted to read as follows:

''A victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense. For the purposes of this rule, the right to be reasonably heard means the right to testify under oath. Trial counsel shall ensure the victim has the opportunity to exercise that right. As used in this rule a ''victim'' is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense. If the victim exercises the right to be reasonably heard, the victim shall be called by the court.''

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

''(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other matter ordered sealed by the military judge, counsel for the government or trial counsel shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure. Counsel for the government or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the military judge, and inserted at the appropriate place in the original record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that matters were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or original record of trial.''

(x) R.C.M. 1103A(b)(1) is amended to read as follows:

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

authority; and the general court-martial convening authority.''

(y) R.C.M. 1103A(b)(5) is inserted to read as follows:

''(5) *Examination of sealed matters.* For the purpose of this rule, ''examination'' includes reading, viewing, photocopying, photographing, disclosing, or manipulating the sealed matters in any way.''

(z) R.C.M. 1105 is amended to read as follows:

[**Note:** R.C.M. 1105(b)(1) and (b)(2) apply to offenses committed on or after 24 June 2014. The previous version of R.C.M. 1105(b)(1) and (b)(2) is located in Appendix 29.]

(aa) R.C.M. 1105(b)(1) is amended to read as follows:

''(1) 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, except as may be limited by R.C.M. 1107(b)(3)(C). The convening authority is only required to consider written submissions.''

(bb) R.C.M. 1105(b)(2)(C) is amended to read as follows:

''(C) Matters in mitigation which were not available for consideration at the court-martial, except as may be limited by R.C.M. 1107(b)(3)(B); and''

(cc) R.C.M. 1107 is amended to read as follows:

[**Note:** R.C.M. 1107(b)–(d) and (f) apply to offenses committed on or after 24 June 2014. The previous version of R.C.M. 1107(b) is located in Appendix 29.]

(dd) R.C.M. 1107(b)(1) is amended to read as follows:

''(1) *Discretion of convening authority.* Any action to be taken on the findings and sentence is within the sole discretion of the convening authority. The convening authority is not required to review the case for legal errors or factual sufficiency.''

(ee) R.C.M. 1107(b)(3)(A)(iii) is amended to read as follows:

''(iii) Any matters submitted by the accused under R.C.M. 1105 or, if applicable, R.C.M. 1106(f);

(ff) R.C.M. 1107(b)(3)(A)(iv) is inserted to read as follows:

''(iv) Any statement submitted by a crime victim pursuant to R.C.M. 1105A and subsection (C) below.''

(gg) R.C.M. 1107(b)(3)(B)(i) is amended to read as follows:

''(i) The record of trial, subject to the provisions of R.C.M. 1103A and subsection (C) below;''

(hh) R.C.M. 1107(c) is amended to read as follows:

''(c) *Action on findings.* Action on the findings is not required. However, the convening authority may take action subject to the following limitations:

(1) For offenses charged under subsection (a) or (b) of Article 120; offenses charged under Article 120b; and offenses charged under Article 125.

(A) The convening authority is prohibited from:

(i) Setting aside any finding of guilt or dismissing a specification; or

(ii) Changing 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.

(B) The convening authority may direct a rehearing in accordance with subsection (e) of this rule.

(2) For offenses other than those listed in subsection (c)(1), for which the maximum sentence of confinement that may be adjudged does not exceed two years without regard to the jurisdictional limits of the court; and the sentence adjudged does not include dismissal, a dishonorable discharge, bad-conduct discharge, or confinement for more than six months:

(A) The convening authority may change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(B) Set aside any finding of guilty and:

(i) Dismiss the specification and, if appropriate, the charge; or

(ii) Direct a rehearing in accordance with subsection (e) of this rule.

(3) If the convening authority acts to dismiss or change any charge or specification for an offense, the convening authority shall provide, at the same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of trial and action thereon.''

(ii) R.C.M. 1107(d)(1) is amended to read as follows:

''(1) *In general.*

(A) The convening authority may not disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence of confinement for more than six months.

(B) The convening authority may not disapprove, commute, or suspend that portion of an adjudged sentence that includes a dismissal, dishonorable discharge, or bad-conduct discharge.

(C) The convening authority may disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence not explicitly prohibited by this rule, to include reduction in pay grade, forfeitures of pay and allowances, fines, reprimands, restrictions, and hard labor without confinement.

(D) The convening authority shall not disapprove, commute, or suspend any mandatory minimum sentence except in accordance with subsection (E) below.

(E) *Exceptions.*

(i) *Trial counsel recommendation.* Upon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the convening authority or another person authorized to act under this section shall have the authority to disapprove, commute, or suspend the adjudged sentence, in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists.

(ii) *Pretrial agreement.* If a pretrial agreement has been entered into by the convening authority and the accused as authorized by R.C.M. 705, the convening authority shall have the authority to approve, disapprove, commute, or suspend a sentence, in whole or in part, pursuant to the terms of the pretrial agreement. The convening authority may commute a mandatory sentence of a dishonorable discharge to a bad-conduct discharge pursuant to the terms of the pretrial agreement.

(F) If the convening authority acts to disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial for an offense, the convening authority shall provide, at the same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of trial and action thereon.''

(jj) R.C.M. 1107(d)(2) is amended to read as follows:

''(2) *Determining what sentence should be approved.* The convening authority shall, subject to the limitations in subsection (d)(1) above, approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused.''

(kk) R.C.M. 1107(f)(2) is amended to read as follows:

''(2) *Modification of initial action.* Subject to the limitations in subsections (c) and (d) above, 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. The convening authority may also recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action. In addition, in any special court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any

time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Articles 64, 66, 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action. A written explanation is required for any modification of initial action which: 1) sets aside any finding of guilt or dismisses or changes any charge or specification for an offense; or 2) disapproves, commutes, or suspends, in whole or in part, the sentence. The written explanation shall be made a part of the record of trial and action thereon.''

(ll) R.C.M. 1107(g) is amended to read as follows:

''(g) *Incomplete, ambiguous, or erroneous action.* When the action of the convening authority or of a higher authority is incomplete, ambiguous, or contains error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by an authority acting under Articles 64, 66, 67, or 69 to withdraw the original action and substitute a corrected action.''

(mm) R.C.M. 1108 is amended to read as follows:

[**Note:** R.C.M. 1108(b) applies to offenses committed on or after 24 June 2014. The previous version of R.C.M. 1108(b) is located in Appendix 29.]

(nn) R.C.M. 1108(b) is amended to read as follows:

''(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 court-martial, except for a sentence of death or as prohibited under R.C.M. 1107. The general court-martial convening authority over the accused at the time of the court-martial may, when taking action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a sentence of confinement for life without eligibility for parole that has been ordered executed. The Secretary concerned may, however, suspend or remit the unexecuted part of a sentence of confinement for life without eligibility for parole only after the service of a period of confinement of not less than 20 years. The commander of the accused who has the authority to convene a court-martial of the kind that adjudged the sentence may suspend or remit any part of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial that does not include a bad-conduct discharge regardless of whether the person acting has previously approved the sentence. The ''unexecuted part of any sentence'' is that part that has been approved and ordered executed but that has not actually been carried out.''

(oo) R.C.M. 1301(c) is amended to read as follows:

[**Note:** R.C.M. 1301(c) applies to offenses committed on or after 24 June 2014. The previous version of R.C.M. 1301(c) is located in Appendix 29.]

(pp) R.C.M. 1301(c) is amended to number the current paragraph as (1) and insert a new second paragraph after the current Discussion as follows:

''(2) Notwithstanding subsection (c)(1) above, summary courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), 120b(b), forcible sodomy under Article 125, and attempts thereof under Article 80, UCMJ. Such offenses shall not be referred to a summary court-martial.''

(qq) R.C.M. 406(b)(2) and R.C.M. 1103 are amended by changing ''report of investigation'' to ''report of preliminary hearing'' for offenses committed on or after 26 December 2014.

(rr) R.C.M. 603(b) and R.C.M. 912(f)(1)(F) are amended by changing ''an investigating officer'' to ''a preliminary hearing officer'' for offenses committed on or after 26 December 2014.

(ss) R.C.M. 705(c)(2)(E), R.C.M. 905(b)(1), and R.C.M. 906(b)(3) are amended by changing ''Article 32 investigation'' to ''Article 32 preliminary hearing'' for offenses committed on or after 26 December 2014.

(tt) R.C.M. 706(a), R.C.M. 706(c)(3)(A), R.C.M. 902(b)(2), R.C.M. 912(a)(1)(K), R.C.M. 1106(b), and R.C.M. 1112(c) are amended by changing ''investigating officer'' to ''preliminary hearing officer'' for offenses committed on or after 26 December 2014.

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

(a) Mil. R. Evid. 412(c)(2) is amended to read as follows:

''(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 relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. The right to be heard under this rule includes the right to be heard through counsel. In a case before a court-martial comprised of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and remain under seal unless the military judge or an appellate court orders otherwise.''

(b) Mil. R. Evid. 513(e)(2) is amended to read as follows:

''(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. The right to be heard under this rule includes the right to be heard through counsel. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial comprised of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.''

(c) The title of Mil. R. Evid. 514 is amended to read as follows:

''Victim advocate-victim and DoD Safe Helpline staff-victim privilege.''

(d) Mil. R. Evid. 514(a) is amended to read as follows:

''(a) *General Rule.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or between the alleged victim and DoD Safe Helpline staff, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim.''

(e) Mil. R. Evid. 514(b)(3)–(5) is amended to read as follows

''(3) ''DoD Safe Helpline staff'' is a person who is designated by competent

authority in writing as DoD Safe Helpline staff.

(4) A communication is ''confidential'' if made in the course of the victim advocate-victim relationship or DoD Safe Helpline staff-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(5) ''Evidence of a victim's records or communications'' means testimony of a victim advocate or DoD Safe Helpline staff, or records that pertain to communications by a victim to a victim advocate or DoD Safe Helpline staff, for the purposes of advising or providing assistance to the victim.''

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

''(c) *Who May Claim the Privilege.* The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a counsel representing the victim to claim the privilege on his or her behalf. The victim advocate or DoD Safe Helpline staff who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, DoD Safe Helpline staff, guardian, conservator, or a counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary.''

(h) Mil. R. Evid. 514(d)(2)–(4) is amended to read as follows:

''(2) When federal law, state law, Department of Defense regulation, or service regulation imposes a duty to report information contained in a communication;

(3) When a victim advocate or DoD Safe Helpline staff believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) If the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate or DoD Safe Helpline staff are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;''

(j) Mil. R. Evid. 514(e)(2) is amended to read as follows:

''(2) Before ordering the production or admission of evidence of a victim's records or communication, the military judge must 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 victim, and offer other relevant evidence. The victim must be afforded a reasonable opportunity to attend the hearing and be heard at the victim's own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing. The right to be heard under this rule includes the right to be heard through counsel. However, the proceedings may not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.''

(k) Mil. R. Evid. 615(e) is amended to read as follows:

''(e) A victim of an offense from the trial of an accused for that offense, unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding.''

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

(a) Paragraph 5, Article 81—Conspiracy, subsection a. is amended to read as follows:

''a. Text of statute.

(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.''

(b) Paragraph 5, Article 81—Conspiracy, subsection b. is amended to read as follows:

''b. *Elements.*

(1) *Conspiracy.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and

(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

(2) *Conspiracy when offense is an offense under the law of war resulting in the death of one or more victims.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the law of war;

(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused knowingly performed an overt act for the purpose of bringing about the object of the conspiracy; and

(c) That death resulted to one or more victims.''

(c) Paragraph 5, Article 81—Conspiracy, paragraph e. is amended by adding ''However, if the offense is also an offense under the law of war, the person knowingly performed an overt act for the purpose of bringing about the object of the conspiracy, and death results to one or more victims, the death penalty shall be an available punishment.'' to the end of the paragraph.

(d) Paragraph 5, Article 81—Conspiracy, paragraph f. is amended to read as follows:

''f. *Sample specifications.*

(1) *Conspiracy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ _____, conspired with __ _____ (and __ _____) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of __ _____, of a value of (about) $ __ _____, the property of __ _____), and in order to effect the object of the conspiracy the said __ _____ (and __ _____) did __ _____.

(2) *Conspiracy when offense is an offense under the law of war resulting in the death of one or more victims.*

In that __ _____ _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __ _____ 20 __ _____, conspired with __ _____ (and __ _____) to commit an offense under the law of war, to wit: (murder of __ _____), and in order to effect the object of the conspiracy the said __ _____ knowingly did __ _____ resulting in the death of __ _____ _____.''

(e) Paragraph 16, Article 92—Failure to obey order or regulation, is amended by inserting the following text after subparagraph b(3)(c) and adding a new subparagraph b(3)(d):

''(Note: In cases where the dereliction of duty resulted in death or grievous bodily harm, add the following as applicable)

(d) That such dereliction of duty resulted in death or grievous bodily harm to a person other than the accused.''

(f) Paragraph 16, Article 92—Failure to obey order or regulation, is amended by inserting new subparagraphs c(3)(e) and (f) as follows:

''(e) Grievous bodily harm. ''Grievous bodily harm'' means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(f) Where the dereliction of duty resulted in death or grievous bodily harm, an intent to cause death or grievous bodily harm is not required.''

(g) Paragraph 16, Article 92—Failure to obey order or regulation, is amended by inserting new subparagraph e(3)(B), re-lettering the existing subparagraph e(3)(B) as subparagraph e(3)(C) and inserting a new subparagraph e(3)(D) as follows:

''(B) *Through neglect or culpable inefficiency resulting in death or grievous bodily harm.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(C) *Willful.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(D) *Willful dereliction of duty resulting in death or grievous bodily harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.''

(h) Paragraph 16, Article 92—Failure to obey order or regulation, is amended by inserting new subparagraph f(4) as follows:

''(4) *Dereliction in the performance of duties.*

In that, __ _____ _____ (personal jurisdiction data), who (knew) (should have known) of his/her duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about __ 20 __) (from about __ _____ 20 __ __ to about __ _____20____), was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed __ _____, as it was his/her duty to do (, and that such dereliction of duty resulted in (grievous bodily harm, to wit: (broken leg) (deep cut) (fractured skull) to) (the death of) __ _____ _____.)

(Note: For (1) and (2) above, the punishment set forth does not apply in the following cases: if, in the absence of the order or regulation which was violated or not obeyed, the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or, if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.)''

(i) Paragraph 17, Article 93—Cruelty and maltreatment, paragraph e. is amended to read as follows:

'' e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.''

(j) Paragraph 57, Article 131—Perjury, paragraphs c. is amended by changing ''an investigation conducted under Article 32'' to ''a preliminary hearing conducted under Article 32'' and by changing ''an Article 32 investigation'' to ''an Article 32 preliminary hearing'' for offenses occurring on or after 26 December 2014.

(k) Paragraph 96, Article 134—Obstructing justice, paragraph f. is amended by changing ''an investigating officer'' to ''a preliminary hearing officer'' and by changing ''before such investigating officer'' to ''before such preliminary hearing officer'' for offenses occurring on or after 26 December 2014.

(l) Paragraph 96a, Article 134—Wrongful interference with an adverse administrative proceeding, paragraph f. is amended by changing ''an investigating officer'' to ''a preliminary hearing officer'' and by changing ''before such investigating officer'' to ''before such preliminary hearing officer'' for offenses occurring on or after 26 December 2014.

Sec. 4. Appendix 12, Maximum Punishment Chart is amended and reads as follows:

(a) Article 92, Failure to obey order, regulation, Dereliction in performance of duties is amended to read as follows:

''Through neglect or culpable inefficiency	None	3 mos.	2/3 3 mos.
Through neglect or culpable inefficiency resulting in death or grievous bodily harm.	BCD	18 mos.	Total
Willful	BCD	6 mos.	Total
Willful dereliction of duty resulting in death or grievous bodily harm	DD, BCD	3 yrs.	Total''

(b) Article 93, Cruelty & maltreatment of subordinates is amended to read as follows:

''Cruelty & maltreatment of subordinates	DD, BCD	2 yrs.	Total''

(c) Article 118, Murder is amended to delete the superscript ''[4]'' attached to ''Life'' under the heading ''*Confinement''* for ''article 118(1) or (4)''.

(d) Article 134 is amended by inserting a new section ''Stolen property: knowingly receiving, buying, concealing'' before the entry for Article 134 ''Straggling'' as follows:

''Stolen property: knowingly receiving, buying, concealing			
Of a value of $500.00 or less	BCD	6 mos.	Total
Of a value of more than $500.00	DD	3 yrs.	Total''

Sec. 5. Appendix 21, Analysis of Rules for Courts-Martial is amended as follows:

(a) Rule 201 is amended to insert the following at the end:

''*2014 Amendment.* The discussion was amended in light of *Solorio v. United States,* 483 U.S. 435 (1987). *O'Callahan v. Parker,* 395 U.S. 258 (1969), held that an offense under the Code could not be tried by court-martial unless the offense was ''service connected.'' *Solorio* overruled *O'Callahan.* The struck language was inadvertently left in prior revisions of the Manual.''

(b) Rule 201(f) is amended to insert the following at the end:

''*2014 Amendment:* R.C.M. 201(f)(2)(D) was created to implement Section 1705 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014. Sec. 1705(c), P.L. 113–66.''

(c) Rule 305(i) is amended to insert the following at the end:

''*2014 Amendment:* R.C.M. 305(i)(2) was revised to implement Articles 6b(a)(2)(E) and 6b(a)(4)(A), UCMJ, as created by Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.''

(d) Rule 305 is amended to insert the following at the end:

''(n) *2014 Amendment:* R.C.M. 305(n) was created to implement Article 6b(a)(2)(E), UCMJ, as created by Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.''

(e) A new Analysis section is inserted for Rule 404A and reads as follows:

''*2014 Amendment.* This is a new rule created to implement Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 26 December 2014. Sec. 1702(d)(1), P.L. 113–66.

(f) The existing analysis to Rule 405 is removed and new analysis is inserted to read as follows:

''*2014 Amendment.* This rule was substantially revised by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013. This new rule takes effect on 26 December 2014. Sec. 1702(d)(1), P.L. 113–66. For offenses occurring prior to 26 December 2014, refer to prior versions of R.C.M. 405. For Article 32 hearings covering offenses occurring both before and on or after 26 December 2014, rules contained within prior versions of R.C.M. 405 should be used for offenses before 26 December 2014, and this rule should be used for offenses occurring on or after 26 December 2014.'' The analysis related to the prior version of R.C.M. 405 is located in Appendix 30.

(g) Rule 601(f) is amended by removing the word ''new'' before ''provision''

(h) Rule 601 is amended by inserting the following at the end:

''(g) *Parallel convening authorities.* The intent of this new provision is to allow a successor convening authority to exercise full authority over charges, without having to effectuate re-referral or potentially a new trial. The subsection incorporates a recommendation of the May 2013 report of the Defense Legal Policy Board (DLPB), Report of the Subcommittee on Military Justice in Combat Zones. The DLPB is a Federal Advisory Committee established to provide independent advice to the Secretary of Defense. The DLPB found that an inhibition to retaining cases in an area of operations is the inability of a convening authority to transmit a case to another convening authority after referral of charges without having to withdraw the charges.''

(i) Rule 801(a) is amended to insert the following at the end:

''*2014 Amendment:* R.C.M. 801(a)(6) was created to implement Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.''

(j) Rule 806(b) is amended by inserting the following at the end:

''*2014 Amendment:* R.C.M. 806(b)(2) was revised to implement Article 6b(a)(3), UCMJ, as created by Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.''

(k) Rule 906(b) is amended to insert the following at the end:

''*2014 Amendment:* R.C.M. 906(b)(8) was revised to implement Articles 6b(a)(2)(E) and 6b(a)(4)(A), UCMJ, as created by Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.''

(l) Rule 1001(a) is amended by inserting the following at the end:

''*2014 Amendment:* R.C.M. 1001(a)(1) was revised to implement Article 6b(a)(4)(B), UCMJ, as created by Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.''

(m) A new Analysis section is inserted for Rule 1001A and reads as follows:

''*2014 Amendment.* R.C.M. 1001A was added to implement Article 6b(a)(4)(B), UCMJ, as created by Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.

(n) Rule 1103A is amended to insert the following:

''This rule shall be implemented in a manner consistent with Executive Order 12958, as amended, concerning classified national security information.''

(o) Rule 1105(b) is amended to insert the following at the end:

''*2014 Amendment:* R.C.M. 1105(b) was revised to implement Section 1706 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014.''

(p) Rule 1107(b) is amended to insert the following at the end:

''*2014 Amendment:* This subsection was revised to implement Article 60(c), UCMJ, as amended by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, as well as Section 1706 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014. For offenses occurring prior to 24 June 2014, refer to prior versions of R.C.M. 1107(b).''

(q) The existing analysis to Rule 1107(c) is removed and new analysis is inserted as follows:

''*2014 Amendment:* This subsection was substantially revised to implement Article 60(c), UCMJ, as amended by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014. For offenses occurring prior to 24 June 2014, refer to prior versions of R.C.M. 1107(c).''

(r) The existing analysis to Rule 1107(d) is removed and new analysis is inserted as follows:

''*2014 Amendment:* This subsection was substantially revised to implement Article 60(c), UCMJ, as amended by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014. For offenses occurring prior to 24 June 2014, refer to prior versions of R.C.M. 1107(d).''

(s) Rule 1107(f) is amended by inserting the following at the end:

''*2014 Amendment:* This subsection was revised to implement Article 60(c), UCMJ, as amended by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014. For offenses occurring prior to 24 June 2014,

refer to prior versions of R.C.M. 1107(f).''

(t) Rule 1108(b) is amended by inserting the following at the end:

''*2014 Amendment:* This subsection was revised to implement Article 60(c), UCMJ, as amended by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014. For offenses occurring prior to 24 June 2014, refer to prior versions of R.C.M. 1108(b).''

(u) Rule 1301(c) is amended by inserting the following at the end:

''*2014 Amendment:* This subsection was revised to implement Section 1705 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, and applies to offenses occurring on or after 24 June 2014. Sec. 1705(c), P.L. 113–66.''

Sec. 6. Appendix 22, Analysis of the Military Rules of Evidence is amended as follows:

(a) Rule 412 is amended by inserting the following at the end:

''*2014 Amendment.* Rule 412(c)(2) was revised in accordance with *L.R.M. v. Kastenberg,* 72 M.J. 364 (C.A.A.F. 2013).''

(b) Rule 513 is amended by inserting the following at the end:

''*2014 Amendment.* Rule 513(e)(2) was revised in accordance with *L.R.M. v. Kastenberg,* 72 M.J. 364 (C.A.A.F. 2013).''

(c) Rule 514 is amended by inserting the following at the end:

''*2014 Amendment.* Rule 514(e)(2) was revised in accordance with *L.R.M. v. Kastenberg,* 72 M.J. 364 (C.A.A.F. 2013). Rule 514 was also revised to protect communications made to the DoD Safe Helpline, which is a crisis support service for victims of sexual assault in the Department of Defense. The DoD Safe Helpline was established in 2011 under a contract with the Rape, Abuse & Incest National Network.''

(d) Rule 615 is amended by inserting the following at the end:

''*2014 Amendment:* Rule 615(e) was revised to implement Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013.''

Sec. 7. Appendix 23, Analysis of Punitive Articles is amended as follows:

Paragraph 16, Article 92—Failure to obey order or regulation, is amended by inserting the following at the end:

''*2014 Amendment.* Subsection b(3) was amended to increase the punishment for dereliction of duty when such dereliction results in grievous bodily harm or death. Subsection b(3)(d) incorporates a recommendation of the May 2013 report of the Defense Legal Policy Board (DLPB), Report of the Subcommittee on Military Justice in Combat Zones. The DLPB is a Federal Advisory Committee established to provide independent advice to the Secretary of Defense. The DLPB subcommittee primarily focused on civilian casualties in a deployed environment, and the DLPB found that the maximum punishment for dereliction of duty was not commensurate with the potential consequences of dereliction resulting in civilian casualties. The DLPB also found that the available punishment did not make alternative dispositions to court-martial a practical option because there was little incentive for an accused to accept these alternatives. This rule expands on the recommendation of the DLPB and includes elevated maximum punishment for dereliction of duty that results in death or grievous bodily harm suffered by any person.''

Sec. 8. The Discussion to Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion following R.C.M. 201(a)(2) is amended to read as follows:

''Except insofar as required by the Constitution, the Code, or the Manual, such as persons listed under Article 2(a)(10), jurisdiction of courts-martial does not depend on where the offense was committed.''

(b) A new Discussion section is added immediately following R.C.M. 201(f)(2)(D):

''Pursuant to the National Defense Authorization Act for Fiscal Year 2014, only a general court-martial has jurisdiction over penetrative sex offenses under Articles 120, 120b, and 125, UCMJ.''

(c) A new Discussion section is added immediately after R.C.M. 305(i)(2)(A)(iv):

''Personal appearance by the victim is not required. A victim's right to be reasonably heard at a 7-day review may also be accomplished telephonically, by videoteleconference, or by written statement.''

(d) A new Discussion section is added immediately after R.C.M. 305(j)(1)(C):

''Upon a motion for release from pretrial confinement, a victim of an alleged offense committed by the prisoner has the right to reasonable, accurate, and timely notice of the motion and any hearing, the right to consult with counsel representing the government, and the right to be reasonably heard. Inability to reasonably afford a victim these rights shall not delay the proceedings.''

(e) A new Discussion section is added immediately after R.C.M. 305(n):

''For purposes of this rule, the term ''victim of an alleged offense'' means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.''

(f) The discussion section following R.C.M. 404(e) is amended to read as follows:

''A preliminary hearing should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If a preliminary hearing of the subject matter already has been conducted, see R.C.M. 405(b) and 405(e)(2).''

(g) A new Discussion section is added immediately following R.C.M. 404A(d):

''The purposes of this rule are to provide the accused with the documents used to make the determination to prefer charges and direct a preliminary hearing, and to allow the accused to prepare for the preliminary hearing. This rule is not intended to be a tool for discovery and does not impose the same discovery obligations found in R.C.M. 405 prior to amendments required by the National Defense Authorization Act for Fiscal Year 2014 or R.C.M. 701. Additional rules for disclosure of witnesses and other evidence in the preliminary hearing are provided in R.C.M. 405(g).''

(h) A new Discussion section is added immediately after R.C.M. 405(a):

''The function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing. The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial. Determinations and recommendations of the preliminary hearing officer are advisory.

Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. See R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the preliminary hearing.

The accused may waive the preliminary hearing. *See* subsection (k) of this rule. In such case, no preliminary hearing need be held. However, the convening authority authorized to direct the preliminary hearing may direct that it be conducted notwithstanding the waiver.''

(i) A new Discussion section is added immediately after R.C.M. 405(d)(1):

''The preliminary hearing officer, if not a judge advocate, should be an officer in the grade of O-4 or higher. The preliminary hearing officer may seek legal advice concerning the preliminary hearing officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party or counsel for a victim.''

(j) A new Discussion section is added immediately after R.C.M. 405(e)(2):

''Except as set forth in subsection (h) below, the Mil. R. Evid. do not apply at a preliminary hearing. Except as prohibited elsewhere in this rule, a preliminary hearing officer may consider evidence, including hearsay, which would not be admissible at trial.''

(k) A new Discussion section is added immediately after R.C.M. 405(f)(2)(G):

''Unsworn statements by the accused, unlike those made under R.C.M. 1001(c)(2), shall be limited to matters in defense and mitigation.''

(l) A new Discussion section is added immediately after R.C.M. 405(g)(1)(C):

''A commanding officer's determination of whether an individual is available, as well as the means by which the individual is available, is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to deny production of the witness. Based on operational necessity and mission requirements, the witness's commanding officer may authorize the witness to testify by video conference, telephone, or similar means of remote testimony. Factors to be considered in making this determination include the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by the production of the witness; and the likelihood of significant interference with operational deployment, mission accomplishment, or essential training.''

(m) A new Discussion section is added immediately after R.C.M. 405(g)(2)(C):

''Factors to be considered in making this determination include the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; and, for child witnesses, the traumatic effect of providing in-person testimony. Civilian witnesses may not be compelled to provide testimony at a preliminary hearing. Civilian witnesses may be paid for travel and associated expenses to testify at a preliminary hearing. *See* Department of Defense Joint Travel Regulations.''

(n) A new Discussion section is added immediately after R.C.M. 405(g)(3)(B)(iii):

''A *subpoena duces tecum* to produce books, papers, documents, data, electronically stored information, or other objects for a preliminary hearing pursuant to Article 32 may be issued by counsel for the government. The preliminary hearing officer has no authority to issue a *subpoena duces tecum.* However, the preliminary hearing officer may direct counsel for the government to issue a *subpoena duces tecum* for defense-requested evidence.''

(o) A new Discussion section is added immediately after R.C.M. 405(h)(5):

''Before considering evidence offered under subsection (h)(2), the preliminary hearing officer must determine that the evidence offered is relevant for the limited scope and purpose of the hearing, that the evidence is proper under subsection (h)(2), and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy. The preliminary hearing officer shall set forth any limitations on the scope of such evidence.

Evidence offered under subsection (h)(2) above must be protected pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a. Although Mil. R. Evid. 412(b)(1)(C) allows admission of evidence of the victim's sexual behavior or predisposition at trial when it is constitutionally required, there is no constitutional requirement at an Article 32 hearing. There is likewise no constitutional requirement for a pretrial hearing officer to consider evidence under Mil. R. Evid. 513(d)(8), and 514(d)(6) at an Article 32 hearing. Evidence deemed admissible by the preliminary hearing officer should be made a part of the report of preliminary hearing. *See* subsection (j)(2)(C), *infra.* Evidence not considered, and the testimony taken during a closed hearing, should not be included in the report of preliminary hearing but should be appropriately safeguarded or sealed. The preliminary hearing officer and counsel representing the government are responsible for careful handling of any such evidence to prevent unauthorized viewing or disclosure.''

(p) A new Discussion section is added immediately after R.C.M. 405(i)(1):

''A preliminary hearing officer may only consider evidence within the limited purpose of the preliminary hearing and shall ensure that the scope of the hearing is limited to that purpose. When the preliminary hearing officer finds that evidence offered by either party is not within the scope of the hearing, he shall inform the parties and halt the presentation of that information.''

(q) A new Discussion section is added immediately after R.C.M. 405(i)(3)(A):

''The following oath may be given to witnesses:

''Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?''

The preliminary hearing officer is required to include in the report of the preliminary hearing a summary of the substance of all testimony. *See* subsection (j)(2)(B) of this rule. After the hearing, the preliminary hearing officer should, whenever possible, reduce the substance of the testimony of each witness to writing.

All substantially verbatim notes of testimony and recordings of testimony should be preserved until the end of trial.

If during the preliminary hearing any witness subject to the Code is suspected of an offense under the Code, the preliminary hearing officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary (e).

Bearing in mind that counsel are responsible for preparing and presenting their cases, the preliminary hearing officer may ask a witness questions relevant to the limited scope and purpose of the hearing. When questioning a witness, the preliminary hearing officer may not depart from an impartial role and become an advocate for either side.''

(r) A new Discussion section is added immediately after R.C.M. 405(i)(6):

''Counsel for the government shall provide victims with access to, or a copy of, the recording of the proceedings in accordance with such regulations as the Secretary concerned may prescribe.''

(s) A new Discussion section is added immediately after R.C.M. 405(j)(1):

''If practicable, the charges and the report of preliminary hearing should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. *See* Article 33, UCMJ.''

(t) A new Discussion section is added immediately after R.C.M. 405(j)(2)(K):

''The preliminary hearing officer may include any additional matters useful to the convening authority in determining disposition. The preliminary hearing officer may recommend that the charges and specifications be amended or that additional charges be preferred. *See*

R.C.M. 306 and 401 concerning other possible dispositions.''

(u) A new Discussion section is added immediately after R.C.M. 405(k):

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

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

(v) A new Discussion section is added immediately after R.C.M. 601(g):

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

(w) A new Discussion section is added immediately after R.C.M. 801(a)(6)(A):

''The rights that a designee may exercise on behalf of a victim include the right to receive notice of public hearings in the case; the right to be reasonably heard at such hearings, if permitted by law; and the right to confer with counsel representing the government at such hearings. The designee may also be the custodial guardian of the child.

When determining whom to appoint under this rule, the military judge may consider the following: the age and maturity, relationship to the victim, and physical proximity of any proposed designee; the costs incurred in effecting the appointment; the willingness of the proposed designee to serve in such a role; the previous appointment of a guardian by another court of competent jurisdiction; the preference of the victim; any potential delay in any proceeding that may be caused by a specific appointment; and any other relevant information.''

(x) A new Discussion section is added immediately after R.C.M. 801(a)(6)(B)(i):

''In the event a case involves multiple victims who are entitled to notice under this rule, each victim is only entitled to notice relating to their own designated representative.''

(y) A new Discussion section is added immediately after R.C.M. 801(a)(6)(D):

''The term ''victim of an offense under the UCMJ'' means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. ''Good Cause'' means adequate or reasonable grounds to believe that the individual appointed to assume the victim's rights is not acting or does not intend to act in the best interest of the victim.''

(z) The Discussion section following R.C.M. 806(b)(1) is amended to read as follows:

''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.

Exclusion of specific persons, if unreasonable under the circumstances, may violate the accused's right to a public trial, even though other spectators remain. Whenever specific persons or some members of the public are excluded, exclusion must be limited in time and scope to the minimum extent necessary to achieve the purpose for which it is ordered. Prevention of overcrowding or noise may justify limiting access to the courtroom. Disruptive or distracting appearance or conduct may justify excluding specific persons. Specific persons may be excluded when necessary to protect witnesses from harm or intimidation. Access may be reduced when no other means is available to relieve a witness' inability to testify due to embarrassment or extreme nervousness. Witnesses will ordinarily be excluded from the courtroom so that they cannot hear the testimony of other witnesses. *See* Mil. R. Evid. 615.

For purposes of this rule, the term ''victim of an alleged offense'' means a person who has suffered direct, physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.''

(aa) The discussion section following R.C.M. 906(b)(9) is amended to read as follows:

''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 granted if good cause is shown. For example, a severance may be 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.C.M. 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.C.M. 307(c)(5); 601(e)(3); 604; 812.''

(bb) A new Discussion section is added immediately after R.C.M. 1103A(b)(3):

''A convening authority who has granted clemency based upon review of sealed materials in the record of trial is not permitted to disclose the contents of the sealed materials when providing a written explanation of the reason for such action, as directed under R.C.M. 1107.''

(cc) The Discussion section following R.C.M. 1106(d)(3) is amended to read as follows:

''The recommendation required by this rule need not include information regarding other recommendations for clemency. It may include a summary of clemency actions authorized under R.C.M. 1107. *See* R.C.M. 1105(b)(2)(D) (pertaining to clemency recommendations that may be submitted by the accused to the convening authority).''

(dd) The Discussion section immediately following R.C.M. 1107(c) is deleted.

(ee) A new Discussion section is added immediately after R.C.M. 1107(d)(1)(E)(i):

''The phrase ''investigation or prosecution of another person who has committed an offense'' includes offenses under the UCMJ or other Federal, State, local, or foreign criminal statutes.''

(ff) The Discussion section immediately following R.C.M. 1107(d)(1) is deleted.

(gg) A new Discussion section is added immediately after R.C.M. 1107(d)(1)(F):

''A sentence adjudged by a court-martial may be approved if it was within the jurisdiction of the court-martial to adjudge (*see* R.C.M. 201(f)) and did not exceed the maximum limits

prescribed in Part IV and Chapter X of this Part for the offense(s) of which the accused legally has been found guilty.

When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial. When mitigating confinement or hard labor without confinement, the convening authority should use the equivalencies at R.C.M. 1003(b)(5)–(6), as appropriate.

Unless prohibited by this rule, the convening authority may disapprove, mitigate or change to a less severe punishment any individual component of a sentence. For example, if an accused is found guilty of assault consummated by a battery and sentenced to a bad-conduct discharge, three months of confinement, and reduction to E–1, without a pre-trial agreement and without being able to apply the substantial assistance exception, the convening authority may disapprove or reduce any part of the sentence except the bad-conduct discharge.''

(hh) The Discussion section following R.C.M. 1107(d)(2) is amended to read as follows:

''In determining what sentence should be approved, the convening authority should consider all relevant and permissible factors including the possibility of rehabilitation, the deterrent effect of the sentence, and all matters relating to clemency, such as pretrial confinement. *See also* R.C.M. 1001–1004.

When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused. Since court-martial forfeitures constitute a loss of entitlement of the pay concerned, they take precedence over all debts.''

(ii) The Discussion section following R.C.M. 1107(d)(1)(E)(i) is amended to read as follows:

''The phrase ''investigation or prosecution of another person who has committed an offense'' includes offenses under the UCMJ or other Federal, State, local, or foreign criminal statutes.''

(jj) A new Discussion section is added immediately after R.C.M. 1301(c)(2):

''Pursuant to the National Defense Authorization Act for Fiscal Year 2014, only a general court-martial has jurisdiction to try penetrative sex offenses under Articles 120, 120b, and 125, UCMJ.''

(kk) The Discussion sections to R.C.M. 406(b)(4), R.C.M. 503(a)(1), and 707(c)(1) are amended by changing ''investigating officer'' to ''preliminary hearing officer'' for offenses occurring on or after 26 December 2014.

(ll) The Discussion section to R.C.M. 701(a)(6)(c) is amended by changing ''report of Article 32 investigation'' to ''report of Article 32 preliminary hearing'' for offenses occurring on or after 26 December 2014.

(mm) The Discussion section to R.C.M. 705(d)(2) and R.C.M. 919(b) are amended by changing ''Article 32 investigation'' to ''Article 32 preliminary hearing'' for offenses occurring on or after 26 December 2014.

Sec. 9. The Discussion to Part IV of the Manual for Courts-Martial, United States, is amended as follows:

A new Discussion section is added immediately following Paragraph 16, Article 92—Failure to obey order or regulation, subsection e(3)(d):

''If the dereliction of duty resulted in death, the accused may also be charged under Article 119 or Article 134 (negligent homicide), as applicable.''

Sec. 10. A new appendix, Appendix 29 is inserted to read as follows:

''Appendix 29

Rules for Courts-Martial Applicable to Offenses Committed Before 24 June 2014

The Rules for Courts-Martial in this appendix were revised to implement Sections 1705, and 1706 of the National Defense Authorization Act for Fiscal Year 2014, Public Law 113–66, 26 December 2013. For offenses committed before 24 June 2014, the relevant Rules for Courts-Martial are contained in this appendix and listed below.

Rule 201. Jurisdiction in General

(f) *Types of courts-martial.*

(1) *General courts-martial.*

(A) *Cases under the code.*

(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the code for any offense made punishable under the code. General courts-martial also may try any person for a violation of Article 83, 104, or 106.

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

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

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

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

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

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

(a) The law of war; or

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

Discussion

Subsection (f)(1)(B)(i)(b) is an exercise of the power of military government.

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

Discussion

Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. *See,* for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365.

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

(2) *Special courts-martial.*

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

(B) *Punishments.*

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

(ii) A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged by a special court-martial unless:

(a) Counsel qualified under Article 27(b) is detailed to represent the accused; and

(b) A military judge is detailed to the trial, except in a case in which a military judge could not be detailed because of physical conditions or military exigencies. Physical conditions or military exigencies, as the terms are here used, may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to detail a military judge. If a military judge cannot be detailed because of physical conditions or military exigencies, a bad-conduct discharge, confinement for more

than six months, or forfeiture of pay for more than six months, may be adjudged provided the other conditions have been met. In that event, however, the convening authority shall, prior to trial, make a written statement explaining why a military judge could not be obtained. This statement shall be appended to the record of trial and shall set forth in detail the reasons why a military judge could not be detailed, and why the trial had to be held at that time and place.

Discussion

See R.C.M. 503 concerning detailing the military judge and counsel.

The requirement for counsel is satisfied when counsel qualified under Article 27(b), and not otherwise disqualified, has been detailed and made available, even though the accused may not choose to cooperate with, or use the services of, such detailed counsel.

The physical condition or military exigency exception to the requirement for a military judge does not apply to the requirement for detailing counsel qualified under Article 27(b).

See also R.C.M. 1103(c) concerning the requirements for a record of trial in special courts-martial.

(C) *Capital offenses*

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

(ii) An officer exercising general court-martial jurisdiction over the command which includes the accused may permit any capital offense other than one described in subsection (f)(2)(C)(i) of this rule to be referred to a special court-martial for trial.

(iii) The Secretary concerned may authorize, by regulation, officers exercising special court-martial jurisdiction to refer capital offenses, other than those described in subsection (f)(2)(C)(i) of this rule, to trial by special court-martial without first obtaining the consent of the officer exercising general court-martial jurisdiction over the command.

Discussion

See R.C.M. 103(3) for a definition of capital offenses.

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

Rule 1105. Matters Submitted by the Accused

(b) *Matters which may be submitted.*

(1) 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.

(2) Submissions are not subject to the Military Rules of Evidence and may include:

* * * * *

(C) Matters in mitigation which were not available for consideration at the court-martial; and

Rule 1107. Action by Convening Authority

(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 court-martial is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.

Discussion

The action is taken in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons. If errors are noticed by the convening authority, the convening authority may take corrective action under this rule.

(2) *When action may be taken.* The convening authority may take action only after the applicable time periods under R.C.M. 1105(c) have expired or the accused has waived the right to present matters under R.C.M. 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;

Discussion

See R.C.M. 1101(a).

(ii) The recommendation of the staff judge advocate or legal officer under R.C.M. 1106, if applicable; and

(iii) Any matters submitted by the accused under R.C.M. 1105 or, if applicable, R.C.M. 1106(f).

(B) *Additional matters.* Before taking action the convening authority may consider:

(i) The record of trial;

(ii) The personnel records of 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, shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1102A.

Discussion

Commitment of the accused to the custody of the Attorney General for hospitalization is discretionary.

(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.C.M. 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 subsection (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* subsection (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 subsection (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 court-martial. The approval or disapproval shall be explicitly stated.

Discussion

A sentence adjudged by a court-martial may be approved if it was within the jurisdiction of the court-martial to adjudge (*see* R.C.M. 201(f)) and did not exceed the maximum limits prescribed in Part IV and Chapter X of this Part for the offense(s) of which the accused legally has been found guilty.

When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the

jurisdiction of the court-martial. When mitigating confinement or hard labor without confinement, the convening authority should use the equivalencies at R.C.M. 1003(b)(5) and (6), as appropriate. One form of punishment may be changed to a less severe punishment of a different nature, as long as the changed punishment is one that the court-martial could have adjudged. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for up to one year (but not vice versa). A pretrial agreement may also affect what punishments may be changed by the convening authority.

See also R.C.M. 810(d) concerning sentence limitations upon a rehearing or new or other trial.

(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 court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence.

Discussion

In determining what sentence should be approved the convening authority should consider all relevant factors including the possibility of rehabilitation, the deterrent effect of the sentence, and all matters relating to clemency, such as pretrial confinement. *See also* R.C.M. 1001 through 1004.

When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused. Since court-martial forfeitures constitute a loss of entitlement of the pay concerned, they take precedence over all debts.

(3) *Deferring service of a sentence to confinement.*

(A) In a case in which a court-martial sentences an accused referred to in subsection (B), below, to confinement, the convening authority may defer service of a sentence to confinement by a court-martial, without the consent of the accused, until after the accused has been permanently released to the armed forces by a state or foreign country.

(B) Subsection (A) applies to an accused who, while in custody of a state or foreign country, is temporarily returned by that state or foreign country to the armed forces for trial by court-martial; and after the court-martial, is returned to that state or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(C) As used in subsection (d)(3), the term ''state'' means a state of the United States, the District of Columbia, a territory, and a possession of the United States.

Discussion

The convening authority's decision to postpone service of a court-martial sentence to confinement normally should be reflected in the action.

(4) *Limitations on sentence based on record of trial.* If the record of trial does not meet the requirements of R.C.M. 1103(b)(2)(B) or (c)(1), the convening authority may not approve a sentence in excess of that which may be adjudged by a special court-martial, or one that includes a bad-conduct discharge, confinement for more than six months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than six months.

Discussion

See also R.C.M. 1103(f).

(5) *Limitations on sentence of a special court-martial where a fine has been adjudged.* A convening authority may not approve in its entirety a sentence adjudged at a special court-martial when, if approved, the cumulative impact of the fine and forfeitures, whether adjudged or by operation of Article 58b, would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged at that court-martial.

(e) *Ordering rehearing or other trial.*

(1) *Rehearing.*

(A) *In general.* Subject to subsections (e)(1)(B) through (e)(1)(E) of this rule, 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.

Discussion

A rehearing may be appropriate when an error substantially affecting the findings or sentence is noticed by the convening authority. The severity of the findings or the sentence of the original court-martial may not be increased at a rehearing unless the sentence prescribed for the offense is mandatory. *See* R.C.M. 810(d). If the accused is placed under restraint pending a rehearing, *see* R.C.M. 304; 305.

(B) *When the convening authority may order a rehearing.* The convening authority may order a rehearing:

(i) When taking action on the court-martial under this rule;

(ii) In cases subject to review by the Court of Criminal Appeals, before the case is forwarded under R.C.M. 1111(a)(1) or (b)(1), but only as to any sentence which was approved or findings of guilty which were not disapproved in any earlier action. In such a case, a supplemental action disapproving the sentence and some or all of the findings, as appropriate, shall be taken; or

(iii) *When authorized to do so by superior competent authority.* If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.

Discussion

A sentence rehearing, rather than a reassessment, may be more appropriate in cases where a significant part of the government's case has been dismissed. The convening authority may not take any actions inconsistent with directives of superior competent authority. Where that directive is unclear, appropriate clarification should be sought from the authority issuing the original directive.

(iv) *Sentence reassessment.* If a superior authority has approved some of the findings of guilty and has authorized a rehearing as to other offenses and the sentence, the convening authority may, unless otherwise directed, reassess the sentence based on the approved findings of guilty and dismiss the remaining charges. Reassessment is appropriate only where the convening authority determines that the accused's sentence would have been at least of a certain magnitude had the prejudicial error not been committed and the reassessed sentence is appropriate in relation to the affirmed findings of guilty.

(C) *Limitations.*

(i) *Sentence approved.* A rehearing shall not be ordered if, in the same action, a sentence is approved.

(ii) *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.

Discussion

For example, if proof of absence without leave was by improperly authenticated documentary evidence admitted over the objection of the defense, the convening authority may disapprove the findings of guilty and sentence and order a rehearing if there is reason to believe that properly authenticated documentary evidence or other admissible evidence of guilt will be available at the rehearing. On the other hand, if no proof of unauthorized absence was introduced at trial, a rehearing may not be ordered.

(iii) *Rehearing on sentence only.* A rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings. 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.

(D) *Additional charges.* Additional charges may be referred for trial together with charges as to which a rehearing has been directed.

(E) *Lesser included offenses.* If at a previous trial the accused was convicted of a lesser included offense, a rehearing may be ordered only as to that included offense or as to an offense included in that found. If, however, a rehearing is ordered improperly on the original offense charged and the accused is convicted of that offense at the rehearing, the finding as to the lesser included offense of which the accused was convicted at the original trial may nevertheless be approved.

(2) *''Other'' trial.* The convening or higher authority may order an ''other'' trial if the original proceedings were invalid because of lack of jurisdiction or failure of a

specification to state an offense. The authority ordering an ''other'' trial shall state in the action the basis for declaring the proceedings invalid.

(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. The convening authority's authority to sign shall appear below the signature.

Discussion

See Appendix 16 for forms.

(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. The convening authority may also recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action. In addition, in any special court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Article 64, 66, 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action.

Discussion

For purposes of this rule, a record is considered to have been forwarded for review when the convening authority has either delivered it in person or has entrusted it for delivery to a third party over whom the convening authority exercises no lawful control (*e.g.,* the United States Postal Service).

(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.

Discussion

If a rehearing or other trial is not directed, the reasons for disapproval need not be stated in the action, but they may be when appropriate. It may be appropriate to state them when the reasons may affect administrative disposition of the accused; for example, when the finding is disapproved because of the lack of mental responsibility of the accused or the running of the statute of limitations.

No express action is necessary to approve findings of guilty.

See subsection (c) of this rule.

(4) *Action on sentence.*

(A) *In general.* The action shall state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

Discussion

See Appendix 16 for forms.

See R.C.M. 1108 concerning suspension of sentences.

See R.C.M. 1113 concerning execution of sentences.

(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 concerned. If a sentence of confinement is ordered into execution after the initial action of the convening authority, the authority ordering the execution shall designate the place of confinement unless otherwise prescribed by the Secretary concerned.

Discussion

See R.C.M. 1113(e)(2)(C) concerning the place of confinement.

(D) *Custody or confinement pending appellate review; capital cases.* When a record of trial involves an approved sentence to death, the convening authority shall, unless any approved sentence of confinement has been ordered into execution and a place of confinement designated, provide in the action for the temporary custody or confinement of the accused pending final disposition of the case on appellate review.

(E) *Deferment of service of sentence to confinement.* Whenever the service of the sentence to confinement is deferred by the convening authority under R.C.M. 1101(c) before or concurrently with the initial action in the case, the action shall include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

(F) *Credit for illegal pretrial confinement.* When the military judge has directed that the accused receive credit under R.C.M. 305(k), the convening authority shall so direct in the action.

(G) *Reprimand.* The convening authority shall include in the action any reprimand which the convening authority has ordered executed.

Discussion

See R.C.M. 1003(b)(1) concerning reprimands.

(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.C.M. 810(d). Except when a rehearing or other trial is combined with a trial on additional offenses and except as otherwise provided in R.C.M. 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 court-martial 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 subsection (f)(5)(A) of this rule.

Discussion

See R.C.M. 810 for procedures at other trials.

In approving a sentence not in excess of or more severe than one previously approved (*see* R.C.M. 810(d)), a convening authority is prohibited from approving a punitive discharge more severe than one formerly approved, e.g., a convening authority is prohibited from approving a dishonorable discharge if a bad conduct discharge had formerly been approved. Otherwise, in approving a sentence not in excess of or more severe than one previously imposed, a convening authority is not limited to approving the same or lesser type of ''other punishments'' formerly approved.

Rule 1108. Suspension of Execution of Sentence; Remission

(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 court-martial, except for a sentence of death. The general court-martial convening authority over the accused at the time of the court-martial may, when taking the action under R.C.M. 1112(f),

suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a sentence of confinement for life without eligibility for parole that has been ordered executed. The Secretary concerned may, however, suspend or remit the unexecuted part of a sentence of confinement for life without eligibility for parole only after the service of a period of confinement of not less than 20 years. The commander of the accused who has the authority to convene a court-martial of the kind that adjudged the sentence may suspend or remit any part of the unexecuted part of any sentence by summary court-martial or of any sentence by special court- martial that does not include a bad-conduct discharge regardless of whether the person acting has previously approved the sentence. The ''unexecuted part of any sentence'' is that part that has been approved and ordered executed but that has not actually been carried out.

Discussion

See R.C.M. 1113 (execution of sentences); R.C.M. 1201 (action by the Judge Advocate General); R.C.M. 1206 (powers and responsibilities of the Secretary). The military judge and members of courts-martial may not suspend sentences.

Rule 1301. Summary courts-martial generally

(c) *Jurisdiction.* Subject to Chapter II, summary courts-martial have the power to try persons subject to the code, except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by the code.

Discussion

See R.C.M. 103(3) for a definition of capital offenses.''

Sec. 10. A new appendix, Appendix 30 is inserted and reads as follows:

''Appendix 30

Rules for Courts-Martial 405 Applicable to Offenses Committed Before 26 December 2014

Rule for Courts-Martial 405 in this appendix was revised to implement Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, Public Law 113–66, 26 December 2013.'' For offenses committed before 26 December 2014, the relevant R.C.M. 405 is contained in this appendix and listed below:

Rule 405. Pretrial investigation

(a) *In general.* Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

Discussion

The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to proper disposition of the case. The investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers. *See* subsection (e) of this rule. Recommendations of the investigating officer are advisory.

If at any time after an investigation under this rule the charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matters alleged.

Failure to comply substantially with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. *See* R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the pretrial investigation.

The accused may waive the pretrial investigation. *See* subsection (k) of this rule. In such case, no investigation need be held. The commander authorized to direct the investigation may direct that it be conducted notwithstanding the waiver.

(b) *Earlier investigation.* If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

Discussion

An earlier investigation includes courts of inquiry and similar investigations which meet the requirements of this subsection.

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

(d) *Personnel.*

(1) *Investigating officer.* The commander directing an investigation under this rule shall detail a commissioned officer not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

Discussion

The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training. The investigating officer may seek legal advice concerning the investigating officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party.

(2) *Defense counsel.*

(A) *Detailed counsel.* Except as provided in subsection (d)(2)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b). When the accused is represented by individual military counsel, counsel detailed to represent the accused shall ordinarily be excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed counsel. The investigating officer shall forward any request by the accused for individual military counsel to the commander who directed the investigation. That commander shall follow the procedures in R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(2)(A) and (B) of this rule.

Discussion

See R.C.M. 502(d)(6) concerning the duties of defense counsel.

(3) *Others.* The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) Counsel to represent the United States;

(B) A reporter; and

(C) An interpreter.

(e) *Scope of investigation.* The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges. If evidence adduced during the investigation indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense and make a recommendation as to its disposition, without the accused first having been charged with the offense. The accused's rights under subsection (f) are the same with regard to investigation of both charged and uncharged offenses.

Discussion

The investigation may properly include such inquiry into issues raised directly by the charges as is necessary to make an appropriate recommendation. For example, inquiry into the legality of a search or the

admissibility of a confession may be appropriate. However, the investigating officer is not required to rule on the admissibility of evidence and need not consider such matters except as the investigating officer deems necessary to an informed recommendation. When the investigating officer is aware that evidence may not be admissible, this should be noted in the report. *See also* subsection (i) of this rule.

In investigating uncharged misconduct identified during the pretrial investigation, the investigating officer will inform the accused of the general nature of each uncharged offense investigated, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the investigation of any charged offense.

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

(1) Be informed of the charges under investigation;

(2) Be informed of the identity of the accuser;

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

(4) Be represented by counsel;

(5) Be informed of the witnesses and other evidence then known to the investigating officer;

(6) Be informed of the purpose of the investigation;

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

(8) Cross-examine witnesses who are produced under subsection (g) of this rule;

(9) Have witnesses produced as provided for in subsection (g) of this rule;

(10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule;

(11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and

(12) Make a statement in any form.

(g) *Production of witnesses and evidence; alternatives.*

(1) *In general.*

(A) *Witnesses.* Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is ''reasonably available'' when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)–(6), is not ''reasonably available.''

Discussion

A witness located beyond the 100-mile limit is not *per se* unavailable. To determine if a witness beyond 100 miles is reasonably available, the significance of the witness' live testimony must be balanced against the relative difficulty and expense of obtaining the witness' presence at the hearing.

(B) *Evidence.* Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. As soon as practicable after receipt of a request by the accused for information which may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Discussion

In preparing for the investigation, the investigating officer should consider what evidence will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, as to potential witnesses, whether their personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness' testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness' personal appearance if the sole reason for the witness' testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subparagraph (g)(6), may be required to protect whatever information the government may decide to release to the accused.

(2) *Determination of reasonable availability.*

(A) *Military witnesses.* The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the immediate commander of the requested witness and with others. If the immediate commander determined that the witness is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(B) *Civilian witnesses.* The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

Discussion

The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend and when appropriate, informed that necessary expenses will be paid.

If the witness refuses to testify, the witness is not reasonably available because civilian witnesses may not be compelled to attend a pretrial investigation. Under subsection (g)(3) of this rule, civilian witnesses may be paid for travel and associated expenses to testify at a pretrial investigation. Except for use in support of the deposition of a witness under Article 49, UCMJ, and ordered pursuant to R.C.M. 702(b), the investigating officer and any government representative to an Article 32, UCMJ, proceeding does not possess authority to issue a subpoena to compel against his or her will a civilian witness to appear and provide testimony or documents.

(C) *Evidence.* The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal

by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(D) *Action when witness or evidence is not reasonably available.* If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) *Witness expenses.* Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

Discussion

See Department of Defense Joint Travel Regulations, Vol 2, paragraphs C3054, C6000.

(4) *Alternatives to testimony.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath;

(iv) Depositions;

(v) Stipulations of fact or expected testimony;

(vi) Unsworn statements; and

(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is a claimed;

(iii) Prior testimony under oath; and

(iv) Deposition of that witness; and

(v) In time of war, unsworn statements.

(5) *Alternatives to evidence.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

(6) *Protective order for release of privileged information.* If, prior to referral, the Government agrees to disclose to the accused information to which the protections afforded by Mil. R. Evid. 505 or 506 may apply, the convening authority, or other person designated by regulation of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(1)(B) through (F) or 506(g)(2) through (5).

(h) *Procedure.*

(1) *Presentation of evidence.*

(A) *Testimony.* All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

Discussion

The following oath may be given to witnesses:

''Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?''

The investigating officer is required to include in the report of the investigation a summary of the substance of all testimony. *See* subsection (j)(2)(B) of this rule. After the hearing, the investigating officer should, whenever possible, reduce the substance of the testimony of each witness to writing.

If the accused testifies, the investigating officer may invite but not require the accused to swear to the truth of a summary of that testimony. If substantially verbatim notes of a testimony or recordings of testimony were taken during the investigation, they should be preserved until the end of trial.

If it appears that material witnesses for either side will not be available at the time anticipated for trial, the investigating officer should notify the commander who directed the investigation so that depositions may be taken if necessary.

If during the investigation any witness subject to the code is suspected of an offense under the code, the investigating officer should comply with the warning requirements of Mil. R. Evid.305(c), (d), and, if necessary, (e).

(B) *Other evidence.* The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) *Defense evidence.* The defense shall have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) *Objections.* Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

Discussion

See also subsection (k) of this rule.

Although the investigating officer is not required to rule on objections, the investigating officer may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the investigating officer believes such action is appropriate.

If an objection raises a substantial question about a matter within the authority of the commander who directed the investigation (for example, whether the investigating officer was properly appointed) the investigating officer should promptly inform the commander who directed the investigation.

(3) *Access by spectators.* Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer. Article 32 investigations are public hearings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Commanders or investigating officers must conclude that no lesser methods short of closing the Article 32 investigation can be used to protect the overriding interest in the case. Commanders or investigating officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a commander or investigating officer believes closing the Article 32 investigation is necessary, the commander or investigating officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the Article 32 investigating officer's report. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.

(4) *Presence of accused.* The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present, whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present); or

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

(i) *Military Rules of Evidence.* The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412 and Section V—shall not apply in pretrial investigations under this rule.

Discussion

The investigating officer should exercise reasonable control over the scope of the inquiry. *See* subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, *see* subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented.

Certain rules relating to the form of testimony which may be considered by the investigating officer appear in subsection (g) of this rule.

(j) *Report of investigation.*

(1) *In general.* The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

Discussion

If practicable, the charges and the report of investigation should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. Article 33.

(2) *Contents.* The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

Discussion

See R.C.M. 909 (mental capacity); 916(k) (mental responsibility).

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer's conclusion whether the charges and specifications are in proper form;

(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

Discussion

For example, the investigating officer may recommend that the charges and specifications be amended or that additional charges be preferred. *See* R.C.M. 306 and 401 concerning other possible dispositions.

See Appendix 5 for a sample of the Investigating Officer's Report (DD Form 457).

(3) *Distribution of the report.* The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) *Objections.* Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges or taking other action within the 5-day period.

(k) *Waiver.* The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

Discussion

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

If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

Even if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.''

Dated: September 29, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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