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Pamphlet 27-9-2

Legal Services

Military Judges' Benchbook For Provost Courts

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SUMMARY of CHANGE

DA PAM 27-9-2
Military Judges' Benchbook for Provost Courts

This is a new Department of the Army Pamphlet specifically tailored for provost courts trying civilian internees. This Pamphlet incorporates the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (GC IV) into the substantive and procedural requirements found in DA Pam 27-9, Military Judges' Benchbook (15 Sep 2002 edition), and in the Manual for Courts-Martial (2002 edition). This Pamphlet also includes decisions of international, military, and higher courts; and comments and opinions of individual legal specialists on international and criminal law. Below are some of the highlights of this Benchbook:

- o Adds the substantive and procedural provisions of GC IV:

- Provides instruction on the use of an interpreter, if necessary, in the accused's preliminary investigation and at the trial.

- Provides procedural guides for the waiver of an assistance of an interpreter or a request for replacement of an interpreter.

- Provides instruction on the notification and service requirements under GC IV in both a case not referred capital and in a case referred capital.

- Provides instruction on the accused's rights to a qualified advocate or counsel IAW the GC IV.

- Provides instruction on the types of punishments applicable to civilian internees.

- Provides instruction on post-trial and appellate rights advice.

Legal Services

Military Judges' Benchbook for Provost Courts

By order of the Secretary of the Army:

PETER J. SCHOOMAKER
*General, United States Army
Chief of Staff*

Official:


JOEL B. HUDSON
*Administrative Assistant to the
Secretary of the Army*

History. This publication is a new Department of the Army Pamphlet.

Summary. This pamphlet sets forth pattern instructions and suggested procedures applicable to provost courts by general and special court-martial. It has been prepared primarily to meet the needs of military judges. It is also intended as a practical guide for counsel, staff judge

advocates, commanders, legal specialists, and others engaged in the administration of military justice.

Applicability. This pamphlet applies to the Active Army, the Army National Guard of the United States, and the U.S. Army Reserve.

Proponent and exception authority. The proponent of this pamphlet is The Judge Advocate General. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or a direct reporting unit or field operating agency of the proponent agency in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include

formal review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and forwarded through their higher headquarters to the policy proponent. Refer to Army Regulation 25-30 for specific guidance.

Suggested improvements. Users are invited to send comments and suggested improvements to this pamphlet on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to the Office of the Chief Trial Judge, U.S. Army Legal Services Agency, ATTN: JALS-TJ, 901 N. Stuart St., Arlington, VA 22203.

Distribution. This publication is intended for the Active Army, the Army National Guard of the United States, and the U.S. Army Reserve.

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Chapter 1

INTRODUCTION

1–1. Purpose and scope.

A. ***Purpose.*** This Military Judges’ Benchbook sets forth certain procedural steps required in a provost court trying civilian internees (CI).¹ A CI is a person protected by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (GC IV) who is interned in occupied enemy territory of the United States. See Art. 4, GC IV. It may be adapted by military commissions for trial of detained persons not qualifying for enemy prisoner of war (EPW) status for violations of the laws and customs of war. This Benchbook does not purport to discuss or resolve the substantive questions which may arise in a provost court of CI protected by the GC IV nor does it purport to exhaust all of the procedural issues which may arise in such a proceeding. Pertinent provisions of the GC IV and authoritative precedents should be consulted before trying CI by provost court.

B. ***Application of the GC IV.*** Article 71, GC IV, provides that “No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.” Specifically, “Accused persons shall have the right to present evidence necessary to their defense and may, in particular, call witnesses.” Art. 72, GC IV.

(1) ***Substantive offenses.*** Article 64, GC IV, provides that “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power (OP) in cases where they constitute a threat to its security or

¹ For purposes of this Benchbook, the accused is a civilian interned during armed conflict or occupation for security reasons, for protection, or because he or she has committed an offense against the detaining power. “Civilian Internee” is a term used to refer to persons interned and protected in accordance with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, p. 88 (12 April 2001, as amended through 5 June 2003).

an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.” Further, Article 65, GC IV, provides that “The penal laws enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.”

Chapter 3 is reserved for substantive offenses that would be applicable in a provost court conducted in occupied territory. The substantive offenses prescribed by the OP should be incorporated into Chapter 3 as directed by the OP. The military judge should be mindful of any specific guidance such agency may issue regarding substantive offenses and proceed accordingly.

(2) Procedures. Article 66, GC IV, provides that for violations of the penal provisions enacted by the OP, “the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied territory.” When referring such cases to provost courts, they “shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial. Part I, para. 2(b)(2), Manual for Courts-Martial, United States, 2002 Edition (MCM). In this context, a provost court has jurisdiction “to try any person who by the law of war is subject to trial by military tribunal for any crime or offense against...the law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or in part by 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.” RCM 201(f)(1)(B)(i)(b).

1-2 Military Judges.

A. *Obligations, duties, and essential characteristics of military judges.* Although the primary purpose of this Benchbook is to assist military judges in the preparation of trial instructions in a provost court of civilian internees, military judges must constantly be mindful of their judicial responsibilities in and out of the courtroom. In this regard, additional guidance may be found in publications of such organizations as the American Bar Association, American Judicature Society, and National Conference of State Trial Judges. Particular attention should be given to the Code of Judicial Conduct and Standards for the Administration of Criminal Justice pertaining to the Special Functions of the Trial Judge as promulgated by The American Bar Association. The Code of Judicial Conduct for Army Trial and Appellate Judges applies to military judges presiding over a provost court of civilian internees.

A military judge must maintain a thorough knowledge of military law, including all its latest developments, by careful analysis of the decisions of military appellate tribunals, the United States Court of Appeals for the Armed Forces, and pertinent decisions of other federal courts. The military judge should also be familiar with the LOW and, in particular, the GC IV.

B. *Primary objective.* This Benchbook is primarily designed to assist military judges of a provost court of civilian internees in the drafting of necessary instructions to courts. Because instructional requirements vary in each case, the pattern instructions are intended only as guides from which the actual instructions are to be drafted. In addition, this publication is designed to suggest workable solutions for many specific problems which may arise at a trial and to guide the military judge past certain pitfalls which might otherwise result in error. Specific examples of situations with which the military judge may have to deal are set forth, and in many instances actual language which may be employed in meeting these situations is suggested.

1–3. Necessity for tailoring.

No standardized set of instructions can cover every situation arising in a provost court of civilian internees. Special circumstances will invariably be presented, requiring instructions not dealt with in this Benchbook, or adaptation of one or more of these instructions to the facts of a case. These instructions are not intended to be a substitute for the ingenuity, resourcefulness, and research skill of the military judge. They will be of maximum value when used as a guide to carefully tailored instructions to be given to court members. The tailoring of instructions to the particular facts of a case contemplates the affirmative submission of the respective theories, both of the Government and of the accused, to the members of courts, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them.

1–4. Elements of offenses.

A. For most punitive offenses, if there are two or more methods by which the punitive article can be violated, the instructions will be set forth separately, and numbered with a –2, –3, –4, and so forth. Each instruction should include the maximum punishment; the form specification; the elements of the offense; definitions of terms; and required or desirable supplementary instructions. In a provost court, the court is not bound to apply the specified maximum punishment, and the military judge must instruct the court accordingly. Article 68, GC IV. If an instruction includes a term having a special legal connotation (term of art), the term should be defined for the benefit of the court, and ordinarily appears in the “DEFINITIONS AND OTHER INSTRUCTIONS” section of each instruction. Each pattern instruction set out in Chapter 3 should be prefaced by the language found in Chapters 2 (2–5–9) or 8 (8–3–8), PREFATORY INSTRUCTIONS ON FINDINGS. In the body of the instructions, that is, the elements and definitions sections, language found in parentheses is ordinarily not required in each case, but may be in a particular case, depending on the pleadings, the facts, and the contentions of the parties. Language set forth in brackets denotes elements which are alternative means of committing an offense, or aggravating factors which are not required to be instructed upon in each case, unless pled in the specification.

B. Notes may be used extensively throughout the instructions in Chapter 3. When an instruction follows a note in the “DEFINITIONS AND OTHER INSTRUCTIONS” section, that instruction should be given only if the subject matter of the note applies to the facts and circumstances of that case. Notes in other portions of Chapter 3 are intended to explain the applicability of the

instruction generally, or to alert the trial judge to optional elements or unusual applications of the instruction.

1–5. Other Instructions.

A. When court members are to determine findings in a case involving a plea of not guilty, the military judge should instruct as to the elements of each offense charged and all lesser included offenses, any special or other defense in issue, and other supplementary matters, bearing in mind the need for tailoring such instructions to the facts of the case. These instructions should conclude with mandatory advice concerning the burden of proof, reasonable doubt, and presumption of innocence, and guidance concerning procedures to follow in deliberations and voting in closed session found in Chapter 2. When court members are to determine a sentence, instructions must be tailored to the law and evidence just as in the case of pre-findings advice.

B. Chapters 4 (Confessions Instructions), 5 (Special and Other Defenses), 6 (Mental Capacity and Responsibility), and 7 (Evidentiary Instructions) are reserved for instructions as prescribed by the OP that would be applicable in a provost court conducted in occupied territory. The military judge should be mindful of any specific guidance such authority may issue regarding these matters. Instructions in DA Pam 27-9, Military Judges' Benchbook, and in DA Pam 27-9-1, Military Judges' Benchbook for Trials and Enemy Prisoners of War, may be helpful as a guide to tailor such instructions.

1–6. References.

A. GC IV citations, if applicable, are included at paragraph e, “Reference.” Absent other citations, paragraph e is omitted.

B. References:

1. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *reprinted in* DEP’T OF THE ARMY PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (1956) [hereinafter DA PAM 27-1]. *See* <http://www.unhcr.ch/html/menu3/b/92.htm>.
2. Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, p. 422 (12 April 2001, as amended through 5 June 2003).

Chapter 2

TRIAL PROCEDURE AND INSTRUCTIONS

This procedural guide modifies the Guide for General Courts-Martial in Appendix 8, MCM. This guide is intended for use in any provost court to which a military judge (MJ) has been detailed in accordance with Article 26, UCMJ. In addition to serving as a procedural guide for contested and uncontested trials, this chapter provides the majority of standard, non-evidentiary instructions on findings and sentencing. The order in which the guide and instructions appear generally corresponds with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate.

Section I

Initial Session Through Arraignment

2-1. PROCEDURAL GUIDE FOR ARTICLE 39(a) SESSION.

MJ: Please be seated. This Article 39(a) session is called to order.

NOTE: Use of an interpreter. The accused shall be assisted by an interpreter during the preliminary investigation and at trial. Art. 72, GC IV. The military judge should proceed at a pace that allows the interpreter to translate the proceedings to the accused and to translate the accused's responses back to the court. Frequent pauses for translation will thus be necessary. If the accused requires a translator in order to communicate with counsel, an interpreter must be designated a member of the defense team. The accused, however, may waive such assistance. Art. 72, GC IV. If the accused waives the assistance of an interpreter, GO TO INSTRUCTION 2-7-28, WAIVER OF ASSISTANCE OF AN INTERPRETER. Further, the accused shall have the right at any time to object to the interpreter and to ask for a replacement. Art. 72, GC IV. If the

accused requests a replacement interpreter, GO TO INSTRUCTION 2-7-29, REQUEST FOR REPLACEMENT OF INTERPRETER.

NOTE: The GC IV and UCMJ do not indicate who selects the interpreter. Presumably, the prosecution assigns an interpreter, and the interpreter may be regarded as a member of the accused's defense team. Cf. Yamashita transcript, Vol. I, at 4 (The prosecution assigned an interpreter, but the accused requested his own personal interpreter because he did not understand the assigned interpreter. The tribunal kept the assigned interpreter, but also allowed the accused's translator to be a part of the accused's defense team to provide a personal translation to the accused.).

(ASSISTANCE OF AN INTERPRETER: TC: The accused in this proceeding is entitled to the services of an interpreter. The prosecution requests that the proceedings be translated from English to _____ (state accused's native language) by _____ (state the name of the interpreter(s)).

MJ: The proceedings will be so translated. The interpreter(s) will now be sworn.

TC: Do you (swear) (affirm) that you will faithfully perform all the duties of interpreter in the case now in hearing (so help you God)?”

INT(S): (Respond.)

TC: This court-martial is convened by Court-Martial Convening Order Number _____, Headquarters _____, dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) copies of which have been furnished the military judge, counsel, and the accused, (which is in a language that (he)(she) understands,) and which will be inserted at this point in the record.

NOTE: The military judge should examine the convening order(s) and any amendments for accuracy. IF A CAPITAL CASE, GO TO CHAPTER 8, TRIAL PROCEDURE AND INSTRUCTIONS FOR A CAPITAL CASE.

NOTE: Article 71, GC IV, entitles the accused to a copy of documents in the language which he understands.

NOTE: Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order.

(TC: The following corrections are noted in the convening orders: _____.)

NOTE: Protecting Power (PP). Generally, the PP would be designated pursuant to Articles 9 and 11, GC IV. Under certain circumstances, however, a substitute organization such as a humanitarian organization (e.g., International Committee of the Red Cross) may be used. See Art. 11, GC IV. The military judge should be mindful of any specific guidance that the OP or governing agency (i.e., Coalition Provisional Authority (CPA)) may issue regarding the PP and proceed accordingly.

NOTE: Occupying Power (OP). Under the GC IV, the OP is responsible for satisfying various procedural functions. However, the GC IV does not indicate whether such functions may be delegated to the prosecution. The military judge should be mindful of

any specific guidance that the OP or governing agency (i.e., CPA) may issue regarding the delegation of the OP's functions and proceed accordingly.

NOTE: Charge sheet. Trials of civilian internees should use the same Charge Sheet (DD Form 458) used in trials of members of the U.S. armed forces. RCM 307. See Major Charles J. Baldree, War Crimes Trials: Procedural Due Process 29 (April 1967) (unpublished graduate course thesis, The Judge Advocate General's School, U.S. Army) (on file with U.S. Army Trial Judiciary).

TC: The charges have been properly referred to this court for trial and were served on the accused (on _____ (*enter the date of service*)), and (on) _____ (*enter the name of the Protecting Power*) on _____ (*enter the date of service*). The prosecution is ready to proceed (with the arraignment) in the case of United States v. _____ (*state accused's name*).

NOTE: Article 117, GC IV, states that "If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary [i.e., nonjudicial punishment] punishments only."

NOTE: Date of service. The military judge must pay attention to the date of service. (When computing the days, do not count the day of service or day of trial).

a. Unlike the MCM, the GC IV does not explicitly provide for a CI accused's waiver of the service requirement. Cf. US v Garcia, 10 MJ 631, 633 (ACMR 1980) (date of

service is not a bar to trial within the specified period, but merely provides a ground for accused to secure a continuance); US v Callahan, 1990 CMR Lexis 1216.

b. Article 71, GC IV, provides that the OP shall promptly inform the accused of the charges.

NOTE: The GC IV does not specify the time period for which the OP must notify the accused. The military judge should be mindful of any specific guidance that the OP or governing agency (i.e., CPA) may issue regarding the date of service on the accused and proceed accordingly.

c. The PP is entitled, on request, to be “properly notified” of any proceedings against the accused at least THREE weeks before the date of the first hearing. Art. 71, GC IV. If the charge(s) involve the death penalty or imprisonment for two years or more, however, the OP must “properly notify” the PP at least THREE weeks before the date of the first hearing. Art. 71, GC IV. The required notification must contain the following information:

(1) Description of the accused;

(2) Place of residence or detention;

(3) Specification of the charge or charges (with mention of the penal provisions under which it is brought);

(4) Designation of the court which will hear the case;

(5) Place and date of the first hearing.

A copy of the Staff Judge Advocate’s (SJA) pre-trial advice (as required by Article 34, UCMJ) (i.e., a written and signed statement advising: (1) whether each specification on the charge sheet alleges an offense under the UCMJ; (2) whether

each allegation is warranted by the evidence indicated in the report of investigation, if any;(3) whether a court-martial would have jurisdiction over the accused and the offense(s); and (4) what action to be taken by the convening authority) may satisfy the notice requirement.

d. Unless, at the opening of the trial, the prosecution presents satisfactory evidence of timely receipt of the required notice by the accused and the Protecting Power, the military judge shall adjourn the trial (Art. 71, GC IV).

TC: The accused and the following persons detailed to this court are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) ((and) _____, Defense Counsel) ((and) _____, Assistant Defense Counsel) ((and) _____, Civilian Defense Counsel) ((and) _____ (state name of selected advocate), Defense Advocate). The members (and the following person(s) detailed to this court are absent: _____.

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

NOTE: Court reporter responsibilities. When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a

record of the hour and date of the opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

NOTE: Oath for reporter. If the reporter was not previously sworn, the following oath, as appropriate, will be administered by the trial counsel:

“Do you (swear) (affirm) that you will faithfully perform all the duties of court reporter in the case now in hearing (so help you God)?”

TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____. (I am) (All members of the prosecution are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

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

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

2-1-1. RIGHTS TO COUNSEL

MJ: (*addressing the accused*) You have certain rights that are afforded to you under Article 72 of the Geneva Convention Relative to the Protection of Civilians in Time of War. For example, Article 72 provides you with certain rights regarding representation by counsel. Has (*state name of occupying power*) advised you of these rights prior to this proceeding?

ACC: (Responds.)

NOTE: *Article 72, GC IV, however, does not address the consequences if the OP fails to notify the accused of these rights, which are summarized in the following notes. The MJ may wish to consider granting a continuance if the accused was not aware of these rights.*

MJ: I will (again) discuss these rights with you now.

NOTE: *Rights to counsel.* *The accused shall be assisted by a qualified advocate or counsel of his own choice. Art. 72, GC IV.*

a. Procedurally, the accused first selects a “qualified advocate or counsel” of his own choice.

b. If the accused fails to select a qualified advocate or counsel, then the Protecting Power may provide him with an “advocate or counsel” to represent the accused.

c. When the accused is facing (a) serious charge(s) and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel to represent the accused.

NOTE: “Qualified” advocate or counsel. The designated advocate or counsel must be “qualified;” however, the GC IV does not further define this term. In a court-martial, Article 38(b), UCMJ, permits the accused to be represented by civilian or military counsel. A civilian counsel must be “(A) a member of the bar of a Federal court or of the bar of the highest court of a State; or (B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.” RCM 502(d)(3). See Soriano v. Hosken, 9 MJ 221, 222 (1980) (citing to US v. Nichols, 8 USCMA 119, 125 (1957), the Court acknowledged that a member of a local bar in a foreign country may be qualified to represent a military accused depending on his ability to demonstrate a fair standard of professional competence). On the other hand, RCM 506(e) provides that a “nonlawyer” may be present at the defense table for purpose of consultation subject to MJ discretion. There are no specific guidelines, however, for “nonlawyers” other than MRE 615. Cf. Yamashita (Commission permitted accused to have one of his subordinate officers, who was a government witness, present at defense table because he was essential to presenting the accused’s defense). Thus, if an “advocate” does not qualify to argue before the court under RCM 502(d)(3), the advocate may be permitted as a nonlawyer for consultation only. By analogy then, to satisfy both Article 72, GC IV, and RCM 502(d)(3) in a provost court, the accused may still be entitled to select another qualified counsel to represent him. See US v. Kraskouskas, 9 USCMA 607, 610 (1958) (“It is inconceivable that Congress would, on the one hand, prescribe exacting legal qualifications for appointed counsel, while on the other, permit an accused by his own selection to be represented by a

nonlawyer this does not in any manner infringe upon his right to consult with a nonlawyer, or to even have a nonlawyer present at trial and seated at the counsel table.”). Apart from failing to define “qualified,” the GC IV likewise does not address who would determine whether the advocate or counsel is qualified in the first instance. Finally, it should be noted that security grounds may justify not allowing a “selected” advocate/counsel to participate if other qualified advocate/counsel are available to assist the accused.

NOTE: Pro se representation. Unlike the MCM, the GC IV does not contemplate pro se representation. Cf. US v. Moussaoui, 2002 US Dist. LEXIS 11135 (14 June 2002) (defendant’s motion to proceed pro se granted).

NOTE: Change in representation. The GC IV does not address whether the accused may change representation during the trial, e.g., accused changes his mind later that he wants the assistance/representation of his own prisoner comrade, advocate, or counsel; accused does not want the advocate/counsel selected/appointed by the Protecting Power or the Occupying Power. Because the accused may not proceed pro se, it appears that he must accept the selected/appointed advocate/counsel. However, the accused may be able to request a replacement advocate/counsel for good cause. The assumption is that this issue should be resolved by the Occupying Power before trial, or if this occurs at trial and for good cause, the court may grant a delay for the accused to obtain new representation.

MJ: _____, you have the right to select a qualified advocate or counsel of your choice to represent you. (He or she would be provided to you at no expense to you.)

NOTE: The GC IV does not discuss costs of “representation”. Because CIs have the same procedural rights under a GCM as do service members, CIs receive free military representation and incur their own costs for civilian (or non-military) representation. However, the GC IV appears to place the financial burden on the OP for the costs of representation, arguably a greater entitlement than that afforded service members. Cf. 10 USC § 1037 (U.S. may pay counsel costs of U.S. military before foreign tribunals).

MJ: If you do not select a qualified advocate or counsel of your choice, _____ (enter the name of the Protecting Power) may provide you with an advocate or counsel to represent you at no expense to you.

However, (because of the seriousness of the charge(s) against you,) (because _____ (enter the name of the Protecting Power) is not functioning,) _____ (enter the name of the Occupying Power) shall detail a military defense counsel to represent you, subject to your consent, at no expense to you.

(_____ (state name of the appointed advocate or counsel) has been appointed to represent you.)

NOTE: The MCM affords the accused the right to select a different military lawyer. The GC IV, however, does not address whether a CI accused is able to request a different advocate or counsel who was appointed by the PP or OP. Arguably, the accused should be able to request a different advocate or counsel for good cause. Presumably, this issue should be resolved by the OP before trial begins, or if this

occurs at trial and the accused presents good cause, the court may grant a delay for the accused to obtain a different advocate or counsel. The military judge should be mindful of any specific guidance that the governing agency may issue regarding a request for a different advocate or counsel and proceed accordingly.

MJ: You also have the right to request a different military lawyer to represent you. If the person you request is reasonably available, he or she would be appointed to represent you free of charge.

If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled only to one military lawyer. You may ask his or her superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you (at no expense to _____ (enter the name of the Occupying Power)). If you are represented by a civilian lawyer, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer.

Do you understand your rights to counsel?

ACC: (Responds.)

MJ: Do you have any questions about your rights to counsel?

ACC: (Responds.)

MJ: In addition, the qualified advocate or counsel selected to represent you shall be able to visit you freely and shall have available the necessary facilities to prepare your defense.

NOTE: Article 72, GC IV, provides that the accused's advocate or counsel is entitled to freely visit the accused and to the necessary facilities to prepare the accused's defense. Cf. Zacarias Moussaoui case, U.S. District Court for the Eastern District of Virginia, Alexandria Division, Criminal Case No. 01-455-A (involving several pro se motions regarding defendant's rights to adequately prepare his defense, e.g., defendant's motion requesting access to witnesses held at Guantanamo Bay granted, but the government refused to follow the Court's order); Cf. Military Commission Order No. 1 (provides limited trial procedures to the accused).

MJ: You are also entitled to the services of an interpreter during the preliminary investigation and in preparation for trial and at the trial.

Lastly, representatives of _____ (enter the name of the Protecting Power) have the right attend the trial unless, in the interest of security, the sessions are to be closed. In the latter case, _____ (enter the name of the Occupying Power) shall notify _____ (enter the name of the Protecting Power) accordingly that the sessions are to be held in camera.

NOTE: Article 74, GC IV. See Instruction 7-23, "Closed Trial Session", Impermissible Inference of Guilt, and RCM 804 and MRE 505 and 506.

MJ: Do you understand these rights?

ACC: (Responds.)

MJ: By whom will you be represented?

ACC: (Responds.)

MJ: Do you wish to be represented by (him/her) (them) alone?

ACC: (Responds.)

NOTE: Conflict of interest. The military judge must be aware of any possible conflict of interest by counsel and, if a conflict exists, the military judge must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at INSTRUCTION 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

MJ: Defense counsel will announce by whom (he/she) (they) (was) (were) detailed and (his/her) (their) qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

Civilian DC: I am an attorney and licensed to practice law in the (state(s)) (country) of _____. (I am a member in good standing of the (_____) bar(s).) I have not acted in any manner which might tend to disqualify me in this court-martial.

(OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

CDC: (Responds.)

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this court-martial. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn. Trial counsel will announce the general nature of the charge(s).

NOTE: Charges should allege nationality of accused, victim, accused's position, and that accused "violated the Law of Armed Conflict" or other codal provisions, if applicable. RCM 307(c)(2), Discussion, and 307(d).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____, (and) forwarded with recommendations as to disposition by _____; (and investigated by _____). (The Article 32 investigation was waived.)

NOTE: If the accused waived the Article 32 investigation, the military judge should inquire to ensure that it was a knowing and voluntary waiver. The script at INSTRUCTION 2-7-6, PRETRIAL AGREEMENT: ARTICLE 32 WAIVER, may be used, but, if the waiver was not IAW a pretrial agreement the first sentence of the first question should be omitted. If the waiver was part of a pre-trial agreement, the military

*judge can defer this inquiry until discussion of the pretrial agreement, INSTRUCTION
2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE).*

TC: Your Honor, are you aware of any matter which might be a ground for challenge against you?

MJ: (I am not.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Responds.)

2-1-2. FORUM RIGHTS.

MJ: _____, you have a right to be tried by a court consisting of at least five officer members (that is, a court composed of commissioned and/or warrant officers).

Now, if you are tried by court members, the members will vote by secret, written ballot and two-thirds of the members must agree before you could be found guilty of any offense. If you were found guilty, then two-thirds must also agree in voting on a sentence (and if that sentence included confinement for more than 10 years, then three-fourths would have to agree).

NOTE: IF CAPITAL CASE, use procedural guide in Chapter 8, TRIAL PROCEDURE AND INSTRUCTIONS FOR A CAPITAL CASE. In a capital case, there is no right to request trial by judge alone.

(IN NON-CAPITAL CASES:) MJ: You also have the right to request a trial by military judge alone, and if approved there will be no court members and the judge alone will decide whether you are guilty or not guilty, and if found guilty, the judge alone will determine your sentence. Do

you understand the difference between trial before members and trial before military judge alone?

ACC: (Responds.)

MJ: Do you understand the choices that you have?

ACC: (Responds.)

MJ: By what type of court do you wish to be tried?

ACC: (Responds.)

NOTE: If accused elects enlisted court members and the request is written, mark it as an appellate exhibit and GO TO INSTRUCTION 2-1-3, ARRAIGNMENT. If accused elects officer members, GO TO INSTRUCTION 2-1-3, ARRAIGNMENT. If accused elects trial by judge alone, continue below:

MJ: Is there a written request for trial by military judge alone?

DC: There is (not).

MJ: Does the accused have a copy in front of (him)(her)?

DC: (Responds.)

MJ: _____, Appellate Exhibit ____, is a request for trial by military judge alone. Is this your signature on this exhibit?

ACC: (Responds.)

MJ: At the time you signed this request, did you know I would be the military judge in your case?

ACC: (Responds.)

MJ: Is your request a voluntary one? By that, I mean are you making this request of your own free will?

ACC: (Responds.)

MJ: If I approve your request for trial by me alone, you give up your right to be tried by a court composed of members. Do you understand that?

ACC: (Responds.)

MJ: Do you still wish to be tried by me alone?

ACC: (Responds.)

MJ: Your request is approved.

NOTE: If the military judge approves the request, the military judge should indicate so by signing and dating the written request, if one exists. If the military judge disapproves the request, the military judge should develop the facts surrounding the denial, require argument from counsel, and state reasons for denying the request.

MJ: The court is assembled.

2-1-3. ARRAIGNMENT.

MJ: The accused will now be arraigned.

TC: All parties to the trial have been furnished with a copy of the charge(s). Does the accused want (it) (them) read?

NOTE: Article 71, GC IV, entitles accused to a copy of documents in the language which he understands.

DC: The accused (waives the reading of the charge(s)) (wants the charge(s) read).

MJ: (The reading may be omitted.) (Trial counsel will read the charge(s).)

TC: The charge(s) (is) (are) signed by _____, a person subject to the code, as accuser; (is) (are) properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and (is) (are) properly referred to this court for trial by _____, the Convening Authority.

MJ: Accused and Defense Counsel please rise.

ACC/DC: (Complies)

MJ: _____, how do you plead? Before receiving your plea, I advise you that any motions to dismiss or to grant other appropriate relief should be made at this time. Your defense counsel will speak for you.

DC: The defense (has (no) (the following) motions.) (requests to defer motions at this time.)

NOTE: Whenever factual issues are involved in ruling on a motion, the military judge shall state essential findings of fact. If the trial counsel gives notice that the government desires a continuance to file an appeal under Article 62 (see RCM 908), the military judge should note the time on the record so that the 72-hour period may be accurately calculated.

NOTE: The military judge must ensure that pleas are entered after all motions are litigated.

DC: The accused, _____, pleads as follows:

NOTE: IF GUILTY PLEA, GO TO INSTRUCTION 2-2-1, GUILTY PLEA INTRODUCTION. IF NOT GUILTY (JUDGE ALONE), GO TO SECTION III, JUDGE ALONE (CONTESTED FINDINGS). IF NOT GUILTY (MEMBERS), mark the Flyer as an Appellate Exhibit; ensure each court member packet contains copies of the flyer, convening orders, note paper, and witness question forms; then GO TO SECTION V, COURT MEMBERS (CONTESTED).

Section II

Guilty Plea Inquiry

2-2-1. GUILTY PLEA INTRODUCTION.

MJ: _____, your counsel has entered a plea of guilty for you to ((the) (all) (several) charge(s) and specification(s)) (_____). Your plea of guilty will not be accepted unless you understand its meaning and effect. I am going to discuss your plea of guilty with you. You may wish to consult with your defense counsel prior to answering any of my questions. If at any time you have questions, feel free to ask them.

A plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law. On your plea alone, and without receiving any evidence, this court can find you guilty of the offense(s) to which you have pled guilty. Your plea will not be accepted unless you realize that, by your plea, you admit every act or omission, and element of the offense(s) to which you have pled guilty, and that you are pleading guilty because you actually are, in fact, guilty. If you do not believe that you are guilty, then you should not for any reason plead guilty. Do you understand what I have said so far?

ACC: (Responds.)

MJ: By your plea of guilty, you give up three important rights, but you give up these rights solely with respect to the offenses to which you have pled guilty.

First, the right against self-incrimination; that is, the right to say nothing at all.

Second, the right to a trial of the facts by this court; that is, your right to have this court-martial decide whether or not you are guilty based upon evidence the prosecution would present, and on any evidence you may introduce.

Third, the right to be confronted by and to cross-examine any witness called against you.

Do you have any questions about any of these rights?

ACC: (Responds.)

MJ: Do you understand that by pleading guilty you no longer have these rights?

ACC: (Responds.)

MJ: If you continue with your guilty plea, you will be placed under oath and I will question you to determine whether you are, in fact, guilty. Anything you tell me may be used against you in the sentencing portion of the trial. Do you understand this?

ACC: (Responds.)

MJ: If you tell me anything that is untrue, your statements may be used against you later for charges of perjury or making false statements. Do you understand this?

ACC: (Responds.)

(MJ: Your plea of guilty to a lesser included offense may also be used to establish certain elements of the charged offense, if the government decides to proceed on the charged offense. Do you understand this?)

ACC: (Responds.))

MJ: Trial Counsel, please place the accused under oath.

TC: _____, please stand and face me.

ACC: (Complies)

TC: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: (Responds.)

MJ: Is there a stipulation of fact?

TC: (Yes) (No), Your Honor.

NOTE: If no stipulation exists, GO TO INSTRUCTION 2-2-3, GUILTY PLEA FACTUAL BASIS. If a stipulation exists, continue below.

2-2-2. STIPULATION OF FACT INQUIRY.

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

“TC: (Complies.)”

MJ: _____ (state name of accused), I have before me Prosecution Exhibit ____ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

MJ: Did you read this document thoroughly before you signed it?

ACC: (Responds.)

NOTE: If the rules permit an “advocate” to present the defense, the military judge may use an alternative phrase such as “Do both sides....”

MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?

TC/DC: (Responds.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, your defense counsel, and you that the contents of the stipulation are true, and, if entered into evidence, are uncontradicted facts in this case. No one can be forced to enter into a stipulation, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

MJ: Are you voluntarily entering into this stipulation because you believe it is in your best interest to do so?

ACC: (Responds.)

MJ: If I admit this stipulation into evidence it will be used in two ways.

First, I will use it to determine if you are, in fact, guilty of the offense(s) to which you have pled guilty.

(IF JUDGE ALONE TRIAL): Second, I will use it to determine an appropriate sentence for you.

(IF MEMBERS TRIAL): Second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.

Do you understand and agree to these uses of the stipulation?

ACC: (Responds.)

MJ: Do counsel also agree to these uses?

TC/DC: (Responds.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. If it should be contradicted after I have accepted your guilty plea, I will reopen this inquiry. You should,

therefore, let me know if there is anything whatsoever in this stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.

NOTE: The military judge should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused says during the providence inquiry.

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation true?

ACC: (Responds.)

MJ: Is there anything in the stipulation that you do not wish to admit is true?

ACC: (Responds.)

MJ: Do you agree under oath that the matters contained in the stipulation are true and correct to the best of your knowledge and belief?

ACC: (Responds.)

MJ: Defense Counsel, do you have any objections to Prosecution Exhibit ____ for Identification?

DC: (Responds.)

MJ: Prosecution Exhibit ___ for Identification is admitted into evidence subject to my acceptance of the accused's guilty plea.

2-2-3. GUILTY PLEA FACTUAL BASIS.

MJ: _____, I am going to explain the elements of the offense(s) to which you have pled guilty. By "elements," I mean those facts which the prosecution would have to prove beyond a reasonable doubt before you could be found guilty if you had pled not guilty. When I state each element, ask yourself two things: First, is the element true, and, second, whether you wish to admit that it is true. After I list the elements for you, be prepared to talk to me about the facts regarding the offense(s). Do you have a copy of the charge sheet(s) in front of you?

ACC: (Responds.)

NOTE: For each specification to which the accused pled guilty, proceed as follows:

MJ: Please look at (the) Specification (___) of (the) Charge (___), in violation of _____ (state the applicable codal provision). The elements of the offense of _____ (state the offense) are:

NOTE: List elements and explain appropriate definitions using applicable language from Chapter 3.

MJ: Do you understand the elements (and definitions) as I have read them to you?

ACC: (Responds.)

MJ: Do you have any questions about any of them?

ACC: (Responds.)

MJ: Do you understand that your plea of guilty admits that these elements accurately describe what you did?

ACC: (Responds.)

MJ: Do you believe and admit that the elements (and definitions, taken together,) correctly describe what you did?

ACC: (Responds.)

MJ: At this time, I want you to tell me why you are guilty of the offense listed in (the) specification (___) of (the) charge (___). Tell me what happened.

ACC: (Responds.)

NOTE: The military judge must elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s). The military judge must do more than elicit legal conclusions. The military judge's questions should be aimed at developing the accused's version of what happened in the accused's own words, and determining if the acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates. The military judge must be alert to the existence of any inconsistencies or possible defenses raised by the stipulation or the accused's testimony and, if they arise, the

military judge must discuss them thoroughly with the accused. The military judge must resolve them or declare the plea improvident to the applicable specification(s).

NOTE: After obtaining the factual basis from the accused, the military judge should secure the accused's specific admission as to each element of the offense, e.g., as follows:

MJ: Do you admit that you (killed _____) (_____)?

ACC: (Responds.)

MJ: Do you admit that you (intended to kill _____) (_____)?

ACC: (Responds.)

MJ: Do you admit that you (knew or should have known that _____ was a person protected under the law of armed conflict) (_____)?

ACC: (Responds.)

MJ: Do you admit that (the killing took place in the context of and was associated with armed conflict) (_____)?

ACC: (Responds.)

NOTE: After covering all offenses to which the accused pled guilty, the military judge continues as follows:

MJ: Do counsel believe any further inquiry is required?

TC/DC: (Respond.)

2-2-4. MAXIMUM PUNISHMENT INQUIRY.

NOTE: Sentencing Limitations. Article 68, GC IV, provides that offenses “solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offenses, be the only measure adopted for depriving protected persons of liberty.”

MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized in this case based solely on the accused’s guilty plea?

TC: (Responds.)

MJ: Defense Counsel, do you agree?

DC: (Responds.)

MJ: _____, the maximum punishment authorized in this case based solely on your guilty plea is _____.

MJ: On your plea of guilty alone, this court could sentence you to the maximum punishment which I just stated. Do you understand that?

ACC: (Responds.)

NOTE: Sentencing instruction. Under Articles 67 and 118, GC IV, the court shall take into account the fact that the accused is not a national of the Occupying Power.

In determining a legal, appropriate, and adequate punishment, this court will bear in mind that you, not being a national of the United States, are not bound to the United States by any duty of allegiance and that you are in the power of the United States as a result of circumstances independent of your own will. As such, under Articles 67 and 118 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, this court is not bound to apply any punishment prescribed for an offense and it is at liberty to arrive at any lesser sentence, to include no punishment. Do you understand that?

ACC: (Responds.)

NOTE: Although Article 118, GC IV, states that the court “shall not be obliged, to this end, to apply the minimum sentence prescribed,” the sentence above should cover any prescribed minimum punishment.

MJ: Do you have any questions as to the sentence that could be imposed as a result of your guilty plea?

ACC: (Responds.)

MJ: Trial Counsel, is there a pretrial agreement in this case?

TC: (Responds.)

NOTE: If no pretrial agreement exists, continue below. If a pretrial agreement exists and trial is by Judge Alone, GO TO INSTRUCTION 2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE). If a pretrial agreement exists and trial is with court members, GO TO INSTRUCTION 2-2-7, PRETRIAL AGREEMENT (MEMBERS).

2-2-5. IF NO PRETRIAL AGREEMENT EXISTS.

MJ: Counsel, even though there is no formal pretrial agreement, are there any unwritten agreements or understandings in this case?

TC/DC: (Respond.)

MJ: _____, has anyone made any agreements with you or promises to you to get you to plead guilty?

ACC: (Responds.)

NOTE: GO TO INSTRUCTION 2-2-8, ACCEPTANCE OF GUILTY PLEA

2-2-6. PRETRIAL AGREEMENT (JUDGE ALONE).

MJ: Trial Counsel, have both the offer portion and the quantum portion marked as separate appellate exhibits and then hand me only the offer portion. Also, ensure that the accused has a copy of the entire agreement in front of (him)(her).

TC: (Complies.)

NOTE: Article 71, GC IV, entitles accused to a copy of documents in the language which he understands.

MJ: _____, I have before me what has been marked as Appellate Exhibit ____, which is the offer portion of your pretrial agreement, and your defense counsel is showing to you Appellate Exhibit ____, the quantum portion of your pretrial agreement. Did you sign this pretrial agreement?

ACC: (Responds.)

MJ: Did you read it thoroughly before you signed it?

ACC: (Responds.)

MJ: Do you understand the contents of your pretrial agreement?

ACC: (Responds.)

MJ: _____, did anyone force you in any way to enter into this agreement?

ACC: (Responds.)

MJ: _____, does this agreement contain all the understandings or agreements that you have in this case?

ACC: (Responds.)

MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?

ACC: (Responds.)

MJ: Counsel, are Appellate Exhibits ___ and ___ the full and complete agreement in this case and are you satisfied that there are no other agreements?

TC/DC: (Responds.)

MJ: Basically, a pretrial agreement means you agree to plead guilty and in return, the convening authority agrees to take some favorable action in your case, usually in the form of limiting the sentence that he or she will approve. Do you understand that?

ACC: (Responds.)

MJ: The law requires that I discuss the conditions of your agreement with you. Let's look at Appellate Exhibit ___, the offer portion of your agreement.

NOTE: Pretrial Agreement Terms. The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. The GC IV may be more restrictive on waivers than the MCM. R.C.M. 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions, or to

waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See SECTION VII, MISCELLANEOUS PROCEDURAL GUIDE, for scripts for the following clauses that may appear in pretrial agreements:

Dismissal of charge: INSTRUCTION 2-7-4

Testify truthfully in another case: INSTRUCTION 2-7-5

Waiver of Article 32 investigation: INSTRUCTION 2-7-6

Waiver of members: INSTRUCTION 2-7-7

Waiver of certain motions: INSTRUCTIONS 2-7-8 and 2-7-9

NOTE: Article 73, GC IV, entitles accused to the “right of appeal provided for by the laws applied by the court.” The military judge should be mindful of any specific guidance that the OP or governing agency may issue regarding appeals and proceed accordingly.

MJ: I am not going to look at Appellate Exhibit ____, the quantum portion, until after I announce the sentence in your case. But, I want you to now look at the quantum portion and read it to yourself. Does that document correctly state what you and the convening authority agreed to?

ACC: (Responds.)

MJ: Counsel, are there any conditions or terms in the quantum portion other than a limitation on sentence?

TC/DC: (Responds.)

NOTE: If other conditions exist, the military judge should cover the conditions without discussing the sentence limitation.

MJ: _____, you get the benefit of whichever is less, each element of the sentence of the court or that contained in your pretrial agreement. If the sentence adjudged by this court is greater than the one provided in the pretrial agreement, the convening authority must reduce the sentence to one no more severe than the one in your pretrial agreement. On the other hand, if the sentence of this court is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC: (Responds.)

MJ: _____, have you had enough time to discuss this agreement with your defense counsel?

ACC: (Responds.)

MJ: Are you satisfied with your defense counsel's advice concerning this pretrial agreement?

ACC: (Responds.)

MJ: Did you enter the agreement of your own free will?

ACC: (Responds.)

MJ: Has anyone tried to force you to make this pretrial agreement?

ACC: (Responds.)

MJ: Do you have any questions about your pretrial agreement?

ACC: (Responds.)

MJ: Do you fully understand all the terms of the pretrial agreement and how they affect your case?

ACC: (Responds.)

MJ: _____, are you pleading guilty not only because you hope to receive a lighter sentence, but also because you are convinced that you are, in fact, guilty?

ACC: (Responds.)

MJ: Do counsel for both sides agree with the court's interpretation of the pretrial agreement?

TC/DC: (Respond.)

NOTE: GO TO INSTRUCTION 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2-2-7. PRETRIAL AGREEMENT (MEMBERS).

MJ: Trial Counsel, have both the offer portion and the quantum portion of the pretrial agreement marked as separate appellate exhibits, ensure that the accused has a copy in front of (him)(her), and then hand them to me.

TC: (Complies.)

NOTE: Article 71, GC IV, entitles accused to a copy of documents in the language which he understands.

MJ: _____, I have before me Appellate Exhibit __, the offer portion, and Appellate Exhibit __, the quantum portion, of your pretrial agreement. Did you sign these documents?

ACC: (Responds.)

MJ: Did you read them thoroughly before you signed them?

ACC: (Responds.)

MJ: Do you understand the contents of your pretrial agreement?

ACC: (Responds.)

MJ: _____, did anyone force you in any way to enter into this agreement?

ACC: (Responds.)

MJ: _____, does this agreement contain all the understandings or agreements that you have in this case?

ACC: (Responds.)

MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?

ACC: (Responds.)

MJ: Counsel, are Appellate Exhibits ___ the full and complete agreement in this case and are you satisfied that there are no other agreements?

TC/DC: (Respond.)

MJ: Basically, a pretrial agreement means you agree to plead guilty and in return the convening authority agrees to take some favorable action in your case, usually in the form of limiting the sentence that he or she will approve. Do you understand that?

ACC: (Responds.)

MJ: The law requires that I discuss the conditions of your agreement with you. Let's look at the offer portion of your agreement.

NOTE: Pretrial Agreement Terms. The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. R.C.M. 705(c) prohibits any term in a pretrial agreement to which the accused did not

freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions, or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See SECTION VII, MISCELLANEOUS PROCEDURAL GUIDE, for scripts for the following clauses that may appear in pretrial agreements:

Dismissal of charge: INSTRUCTION 2-7-4

Testify truthfully in another case: INSTRUCTION 2-7-5

Waiver of Article 32 investigation: INSTRUCTION 2-7-6

Waiver of members: INSTRUCTION 2-7-7

Waiver of certain motions: INSTRUCTIONS 2-7-8 and 2-7-9

MJ: Appellate Exhibit ____, the quantum portion of your pretrial agreement states: _____.

Is that a correct statement of what you and the convening authority agreed to?

ACC: (Responds.)

MJ: _____, you get the benefit of whichever is less, each element of the sentence of the court or that contained in your pretrial agreement. If the sentence adjudged by this court is greater than the one provided in the pretrial agreement, the convening authority must reduce the

sentence to one no more severe than the one in your pretrial agreement. On the other hand, if the sentence of this court is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC: (Responds.)

MJ: _____, have you had enough time to discuss this agreement with your defense counsel?

ACC: (Responds.)

MJ: Are you satisfied with your defense counsel's advice concerning this pretrial agreement?

ACC: (Responds.)

MJ: Did you enter the agreement of your own free will?

ACC: (Responds.)

MJ: Has anyone tried to force you to make this pretrial agreement?

ACC: (Responds.)

MJ: Do you have any questions about your pretrial agreement?

ACC: (Responds.)

MJ: Do you fully understand all the terms of the pretrial agreement and how they affect your case?

ACC: (Responds.)

MJ: _____, are you pleading guilty not only because you hope to receive a lighter sentence, but because you are convinced that you are, in fact, guilty?

ACC: (Responds.)

MJ: Do counsel for both sides agree with the court's interpretation of the pretrial agreement?

TC/DC: (Respond.)

NOTE: GO TO INSTRUCTION 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2-2-8. ACCEPTANCE OF GUILTY PLEA.

MJ: Defense Counsel, have you had enough time and opportunity to discuss this case with (_____)?

DC: (Responds.)

MJ: _____, have you had enough time and opportunity to discuss this case with your defense counsel?

ACC: (Responds.)

MJ: _____, have you, in fact, consulted fully with your defense counsel and received the full benefit of his/her/their advice?

ACC: (Responds.)

MJ: Are you satisfied that your defense counsel's advice is in your best interest?

ACC: (Responds.)

MJ: And are you satisfied with your defense counsel?

ACC: (Responds.)

MJ: Are you pleading guilty voluntarily and of your own free will?

ACC: (Responds.)

MJ: Has anyone made any threat or tried in any way to force you to plead guilty?

ACC: (Responds.)

MJ: Do you have any questions as to the meaning and effect of a plea of guilty?

ACC: (Responds.)

MJ: Do you fully understand the meaning and effect of your plea of guilty?

ACC: (Responds.)

MJ: Do you understand that even though you believe you are guilty, you have the legal and moral right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?

ACC: (Responds.)

MJ: Take a moment now and consult again with your defense counsel, and then tell me whether you still want to plead guilty?

(Pause.) MJ: Do you still want to plead guilty?

ACC: (Responds.)

MJ: _____, I find that your plea of guilty is made voluntarily and with full knowledge of its meaning and effect. I further find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, your plea of guilty is provident and is accepted. However, I advise you that you may request to withdraw your guilty plea at any time before the sentence is announced and, if you have a good reason for your request, I will grant it.

NOTE: If the accused has pled guilty to only some of the charges and specifications, or, has pled guilty to lesser included offenses (LIO), ask the trial counsel if the government is going forward on the offenses to which the accused has pled not guilty. If the government is going forward on any offense, do not enter findings, except to those offenses to which the accused pled guilty as charged in a members' trial (i.e., if the plea was to a LIO or by exceptions and substitutions, and the government is going forward as charged, do not enter findings).

NOTE: If issues of guilt remain, in a judge alone (contest), GO TO SECTION III JUDGE ALONE (CONTESTED FINDINGS) and in a court members (contest), GO TO SECTION V, COURT MEMBERS (CONTESTED). The military judge should not inform the court members of plea and findings of guilty prior to presentation of the evidence on another specification to which the accused pled not guilty, unless the accused requests it or the guilty plea was to a LIO and the prosecution intends to prove the greater offense. Unless one of these two exceptions exists, the flyer should not have

any specifications/charges which reflect provident guilty pleas if other offenses are being contested.

NOTE: If no issues of guilt remain, continue below:

MJ: Accused and counsel please rise.

DC/ACC: (Comply.)

MJ: _____, in accordance with your plea of guilty, this court finds you: _____.

NOTE: For judge alone (sentencing), GO TO SECTION IV, JUDGE ALONE (SENTENCING) and for court members (sentencing only), after marking the flyer, GO TO SECTION VI, COURT MEMBERS (SENTENCING ONLY).

Section III

Judge Alone (Contested Findings)

MJ: Does the government have an opening statement?

TC: (Responds.)

MJ: Does the defense have an opening statement or do you wish to reserve?

DC: (Responds.)

MJ: Trial Counsel, you may call your first witness.

2–3–1. TRIAL PROCEEDS WITH GOVERNMENT CASE.

NOTE: The trial counsel administers the oath/affirmation to all witnesses. After a witness testifies, the military judge should instruct the witness along the following lines:

MJ: You are excused (permanently) (temporarily). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (return to your activities) (be available (by telephone) to return within ____ minutes) (_____).

TC: The Government rests.

NOTE: This is the time that the defense may make motions for a finding of not guilty. The military judge's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

2-3-2. TRIAL RESUMES WITH THE DEFENSE CASE, IF ANY.

MJ: Defense Counsel, you may proceed.

DC: (Responds.)

NOTE: If the defense reserved opening statement, the military judge should ask if the defense counsel wishes now to make an opening statement.

DC: The defense rests.

2-3-3. REBUTTAL AND SURREBUTTAL, IF ANY.

MJ: Trial Counsel, you may present argument.

TC: (Argument)

MJ: Defense, you may present argument.

DC: (Argument)

MJ: Trial Counsel, rebuttal argument?

TC: (Responds.)

MJ: The court is closed.

2–3–4. ANNOUNCEMENT OF FINDINGS.

MJ: _____, this court finds you: _____.

NOTE: If accused is found guilty of any offense, GO TO SECTION IV, JUDGE ALONE (SENTENCING). If accused is found guilty of any offense and sentencing is by court members, GO TO SECTION VI, COURT MEMBERS (SENTENCING ONLY). If completely acquitted, adjourn the court.

Section IV

Judge Alone (Sentencing)

MJ: _____, we now enter the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself, which you want me to consider in deciding your sentence. In addition to testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case I will not draw any adverse inference from your silence. On the other hand, if you desire, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it; however, the Government may offer evidence to rebut any statement of fact contained in an unsworn statement. An unsworn statement may be made orally, in writing, or both. It may be made by you, by your counsel on your behalf, or by both. Do you understand these rights?

ACC: (Responds.)

MJ: Is the personal data on the front page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

NOTE: Illegal pretrial punishment. A punishment or penalty imposed on a civilian internee while being held for trial that exceeds the limitations specified in the GC IV may constitute Article 13 punishment. By analogy, a punishment or penalty imposed

on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note 2, infra.)) that exceeds the limitations for “disciplinary sanctions” under Article 119, GC IV, may also constitute Article 13 punishment. The applicable disciplinary punishments, which may not exceed 30 days for any single punishment, are the following:

- (1) Fine: 50 percent of wages (see Article 95, GC IV);*
- (2) Discontinuance of privileges granted over and above the treatment provided by the GC IV;*
- (3) Fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment; and*
- (4) Confinement.*

(See Arts. 71-76 and 117-126, GC IV.)

The accused’s time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 117, GC IV, provides that “No internee may be punished more than once for the same act, or on the same count.” Disciplinary sanctions imposed IAW Article 117-126, GC IV, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment or a penalty for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the specification or portion of the specification involved.

MJ: _____, is that correct?

ACC: (Responds.)

NOTE: Pretrial confinement credit. If the accused was confined while awaiting trial, Articles 69 and 122, GC IV, require that such time “shall be deducted from any period of imprisonment awarded.” The accused’s time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under Articles 69 and 112 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, any period of time spent by you in confinement while you were awaiting trial shall be deducted from any sentence of confinement. However, the period during which you were interned under Articles 42 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War will not be considered when deliberating your sentence. Do you understand that?

ACC: (Responds.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with ____ days of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Trial Counsel, do you have other evidence to present at this time?

TC: (Responds.)

MJ: Defense Counsel, do you have any evidence to present at this time?

DC: (Responds.)

MJ: Trial Counsel, do you have rebuttal evidence to offer?

TC: (Responds.)

MJ: Trial Counsel, you may present argument.

TC: (Argues.)

MJ: Defense Counsel, you may present argument.

DC: (Argues.)

MJ: The court is closed.

2-4-1. ANNOUNCEMENT OF SENTENCE.

MJ: The court is called to order.

TC: All parties present when the court closed are again present.

MJ: Accused and defense counsel please rise. _____, this court sentences you to: _____. (The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.)

NOTE: If a pretrial agreement exists, continue below. If a pretrial agreement does NOT exist GO TO INSTRUCTION 2-4-2, POST-TRIAL AND APPELLATE RIGHTS.

MJ: Please hand me Appellate Exhibit ____, the quantum portion of the agreement. Appellate Exhibit ____ states that the convening authority agrees to _____. _____, have I correctly stated the sentence agreement that you have with the convening authority?

ACC: (Responds.)

MJ: Counsel, do you agree?

TC/DC: (Respond.)

MJ: My understanding of the effect of the pretrial agreement on the sentence is that the convening authority may approve _____. Do counsel agree with my interpretation?

TC/DC: (Responds.)

MJ: _____, is that also your understanding?

ACC: (Responds.)

NOTE: The military judge must ensure that all parties have the same understanding concerning the operation of the quantum portion on the sentence of the court; otherwise the plea may be improvident.

2-4-2. POST-TRIAL AND APPELLATE RIGHTS ADVICE.

NOTE: Right of appeal. Article 73, GC IV, provides: "A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do

so.” This appears to require an inquiry on the record that the accused is “fully informed” of his appellate rights.

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the convening authority for action. The convening authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he or she may disapprove the findings or the sentence in whole or in part. The convening authority may reduce the sentence adjudged by the court-martial, but he or she cannot increase it. The convening authority can disapprove a finding of guilty, but cannot change a finding of not guilty. Although the convening authority is not required to review the case for legal errors, he or she may take action to correct legal errors.

[(SENTENCE ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the staff judge advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the convening authority takes action on your case.]

Before the convening authority takes action, you have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case (including a response to the staff judge advocate’s post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the staff judge advocate) (is) (are) served on you or your counsel. You may request up to an additional 20 days and, for good cause, the convening authority may approve the request.

[(IF APPROVED SENTENCE IS DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:)] If the convening authority approves (death) (confinement for one year or more), your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

NOTE: The GC IV does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.

MJ: After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:)] If the convening authority approves a sentence that does not include death or confinement for one year or more, your case will be examined in the Office of the Judge Advocate General for legal sufficiency and to determine if the sentence is appropriate. The Judge Advocate General may take corrective action

as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH:) You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case and send it to the convening authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

MJ: Do you have any questions?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the staff judge advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section V

Court Members (Contested)

2-5. PRELIMINARY INSTRUCTIONS.

MJ: Bailiff, call the court members.

NOTE: Whenever the members enter the courtroom, all persons except the military judge and the reporter shall rise. The members are seated alternately to the right and left of the president according to rank.

MJ: You may be seated. The court is called to order.

TC: The court is convened by Court-Martial Convening Order Number _____, Headquarters _____ dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) copies of which have been furnished to each member of the court.

The accused and the following persons detailed to this court-martial are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel); ((and) _____, Defense Counsel) ((and) _____, Assistant Defense Counsel) ((and) _____, Civilian Defense Counsel) ((and) _____, (*state name of selected advocate*), Defense Advocate); and _____, _____, _____, and _____, court members. (The following person(s) detailed to this court (is) (are) absent: _____.)

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

NOTE: Members who have been relieved (viced) by orders need not be mentioned.

The prosecution is ready to proceed with trial in the case of the United States v. (state accused's name).

MJ: The members of the court will now be sworn. All persons in the courtroom please rise.

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

MBRS: (Respond.)

MJ: Please be seated. The court is assembled.

Members of the court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence.

This rule applies throughout the trial, including closed sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.

As court members, it is your duty to hear the evidence and to determine whether the accused is guilty or not guilty and, if you find (him)(her) guilty, to adjudge an appropriate sentence.

Under the law, the accused is presumed to be innocent of the offense(s). The government has the burden of proving the accused's guilt by legal and competent evidence beyond a reasonable doubt. A reasonable doubt is an honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt. The fact that charges have been preferred against this accused and referred to this court for trial does not permit any inference of guilt. You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In so doing, I may repeat some of the instructions which I will give now or, possibly, during the trial. Bear in mind that all of these instructions are designed to help you perform your duties as court members.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In performing this duty, you must consider each witness' intelligence and ability to observe and

accurately remember, in addition to the witness' sincerity and conduct in court, friendships, prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. The believability of each witness' testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other panel members who hear the statement.

Some of the grounds for challenge would be if you were the accuser in the case, if you had investigated any offense charged, if you have formed or expressed an opinion as to the guilt or innocence of the accused, or any matter that may affect your impartiality. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but, in either event, you should indicate an

individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to whether the accused is guilty or not guilty, or as to an appropriate sentence if the accused is found guilty of (any) (this) offense. With regard to sentencing, should that become necessary, you may not have a preconceived idea or formula as to either the type or the amount of punishment that should be imposed if the accused were to be convicted.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so (at the close of evidence) (prior to any witness being permanently excused). The way we handle that is to require you to write out the question and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked because your questions, like the questions of counsel, are subject to objection. (There are forms provided to you for your use if you desire to question any witness.) I will conduct any needed examination. There are a couple of things you need to keep in mind concerning questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often, they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the panel members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess, but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearings out of your presence. Frequently, their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the court in announcing the results.

This general order of events can be expected at this court-martial: questioning of court members, challenges and excusals, opening statements by counsel, presentation of evidence, substantive instructions on the law to you, closing argument by counsel, procedural instructions on voting, your deliberations, and announcement of the findings. If the accused is convicted of any offense, there will also be sentencing proceedings.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or too cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you may (take your notes with you for safe keeping until the next session) (leave your notes in the courtroom).

One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.

Are there any questions?

MBRS: (Respond.)

MJ: (Apparently not.) Please take a moment to read the charge(s) on the flyer provided to you and to ensure that your name is correctly reflected on the convening order. If it is not, please let me know.

(Pause.) MJ: Trial Counsel, you may announce the general nature of the charge(s).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____; forwarded with recommendation as to disposition by _____(; and investigated by _____).

The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reason(s): _____).

If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MEMBER(S): (Respond.) or

TC: (Negative response from the court members.) (_____.)

2-5-1. VOIR DIRE.

MJ: Before counsel ask you any questions, I will ask a few preliminary questions. If any member has an affirmative response to any question, please raise your hand.

NOTE: The military judge should indicate for the record the members' response to the following questions, i.e., [Negative response from (all members) (state name(s) or if the names are not disclosed in open court, a number assigned to that member).] [Positive response from (all members) (state name of member(s)).]

1. Does anyone know the accused?

2. (If appropriate) Does anyone know any person named in any of the specifications?

3. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?

4. Does anyone have any prior knowledge of the facts or events in this case?

(5. Members of the court, this case has received attention in the (local) (and) (national) media. Is there any member who has seen or heard any mention of this case in the media?

NOTE: To the members who have seen or heard mention of this case in the media, continue with Questions 6-11; if none, go to Question 12.

6. Is there any member who has participated in a military operation that received press coverage?

7. To those who have been in operations that received press coverage: did any member find that the press coverage was 100 percent accurate and complete?

8. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

9. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

10. Is there, then, any member who believes that the reports that he (or she) received from the media about this case are completely accurate and truthful?

11. For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case, based solely upon the evidence you receive in this court and the law as I instruct you?)

12. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

13. (If appropriate) Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?

14. If so, will that experience influence the performance of your duties as a court member in this case in any way?

NOTE: If Question 14 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the presence of the other members.

15. How many of you have previously served as court members?

16. (As to those members) Can each of you put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and the instructions as to the applicable law?

17. The accused has pled not guilty to (all charges and specifications) (_____), and is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?

18. Can each of you apply this rule of law and vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?

19. You are all basically familiar with the military justice system, and you know that the accused has been charged and (his)(her) charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

20. On the other hand, can each of you vote for a finding of guilty if you are convinced that, under the law, the accused's guilt has been proved by legal and competent evidence beyond a reasonable doubt?

21. Does each member understand that the burden of proof to establish the accused's guilt rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's innocence?

22. Does each member understand, therefore, that the defense has no obligation to present any evidence or to disprove the elements of the offense(s)?

23. Has anyone had any legal training or experience other than that generally received by soldiers of your rank or position?

24. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, corrections officer, or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?

25. I have previously advised you that it is your duty as court members to weigh the evidence and to resolve controverted questions of fact. If the evidence is in conflict, you will necessarily be required to give more weight to some evidence than to other evidence. The weight, if any, to be given to all of the evidence in this case is solely within your discretion. However, you should use the same standards in weighing and evaluating all of the evidence, and the testimony of each witness, and that you should not give more or less weight to the testimony of a particular witness

merely because of that witness' status, position, or station in life. Will each of you use the same standards in weighing and evaluating the testimony of each witness?

26. Is any member of the court in the rating chain, supervisory chain, or chain of command of any other member?

NOTE: If Question 26 is answered in the affirmative, the military judge may want to ask questions 27 and 28 outside the presence of the other members.

27. (To junior members:) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

28. (To senior members:) Will you be embarrassed or restrained in any way in performing your duties as a court member if a member over whom you hold a position of authority should disagree with you?

29. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

30. Does anyone know of anything of either a personal or professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

31. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be

sentenced if found guilty. What that means, Members, is that you believe that the commission of “Crime X” must always result in “Punishment Y.” Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment, if the accused is found guilty, solely because of the nature of the charge(s)?

32. If sentencing proceedings are required, you will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments from no punishment up to the maximum punishment. You should consider all forms of punishment within that range. Consider does not necessarily mean that you would vote for that particular punishment. Consider means that you think about and choose an appropriate punishment within that range. Each member must keep an open mind and neither make a choice, nor foreclose from consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

33. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence, if called upon to do so in this case?

34. Can each of you reach a decision on sentence, if required to do so, on an individual basis in this particular case and not solely upon the nature of the offense(s) of which the accused may be convicted?

35. Is any member aware of any matter which might raise a substantial question concerning your participation in this trial as a court member?

MJ: Do counsel desire to question the court members?

TC/DC: (Respond.)

NOTE: Trial counsel and defense counsel will conduct voir dire if desired and individual voir dire will be conducted, if required.

2–5–2. INDIVIDUAL VOIR DIRE.

MJ: Members of the court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled, however, for individual questioning.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire and, if so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire and, if so, state the member and your reason(s).

DC: (Responds.)

2–5–3. CHALLENGES.

NOTE: Challenges are to be made outside the presence of the court members. This may occur at a side bar conference or at an Article 39(a) session. What follows is a suggested procedure for an Article 39(a) session.

MJ: Members of the court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

NOTE: The military judge will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that he/she has been excused, and the remaining members will be rearranged.

MJ: Call the members.

2-5-4. ANNOUNCEMENT OF PLEA.

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

NOTE: If the accused has pled not guilty to all charges and specifications, or if the accused has pled guilty to only some specifications, and has specifically requested members be advised of those guilty pleas, announce the following:

MJ: Court members, at an earlier session, the accused pled (not guilty to all charges and specifications) (not guilty to Charge __, Specification __, but guilty to charge __, Specification __).

NOTE: If the accused has pled guilty to lesser included offenses and the prosecution is going forward on the greater offense, continue below; if not, GO TO INSTRUCTION 2-5-5, TRIAL ON MERITS.

MJ: The accused has pled guilty to the lesser included offense of (_____), which constitutes a judicial admission of some of the elements of the offense charged in (_____). These elements have therefore been established by the accused's plea without the necessity of further proof. However, the plea of guilty to this lesser included offense provides no basis for a conviction of the offense alleged as there remains in issue the element(s) of: _____.

The court is instructed that no inference of guilt of such remaining element(s) arises from any admission involved in the accused's plea, and to permit a conviction of the alleged offense, the prosecution must successfully meet its burden of establishing such element(s) beyond a reasonable doubt by legal and competent evidence. Consequently, when you close to deliberate, unless you are satisfied beyond a reasonable doubt that the prosecution has satisfied this burden of proof, you must find the accused not guilty of _____, but the plea of guilty to the lesser included offense of _____ will require a finding of guilty of that lesser offense without further proof.

NOTE: If mixed pleas were entered and the accused requests that the members be informed of the accused's guilty pleas, the military judge should continue below; if not, GO TO INSTRUCTION 2-5-5, TRIAL ON MERITS.

MJ: The court is advised that findings by the court members will not be required regarding the charge(s) and specification(s) of which the accused has already been found guilty pursuant to (his)(her) plea. I inquired into the providence of the plea(s) of guilty, found (it) (them) to be provident, accepted (it) (them) and entered findings of guilty. Findings will be required, however, as to the charge(s) and specifications(s) to which the accused has pled not guilty.

2-5-5. TRIAL ON MERITS.

MJ: I advise you that opening statements are not evidence; rather, they are what counsel expect the evidence will show in the case. Does the government have an opening statement?

TC: (Responds.)

MJ: Does the defense have an opening statement or do you wish to reserve opening statement?

DC: (Responds.)

MJ: Trial Counsel, you may proceed.

NOTE: The trial counsel administers the oath/affirmation to all witnesses.

NOTE: When questioning is finished, the military judge should instruct the witness along the following lines:

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (return to your activities) (be available (by telephone) to return within ___ minutes) (_____).

TC: The government rests.

NOTE: This is the time that the defense may make motions for a finding of not guilty. (The motions should be made outside the presence of the court members.) The military judge's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. (If the motion is made before the court members and is denied, give INSTRUCTION 2-7-9, MOTION FOR FINDING OF NOT GUILTY.)

2-5-6. TRIAL RESUMES WITH DEFENSE CASE, IF ANY.

MJ: Defense Counsel, you may proceed.

NOTE: If the defense reserved opening statement, the military judge shall ask if the defense counsel wishes to make an opening statement at this time.

DC: The defense rests.

2-5-7. REBUTTAL AND SURREBUTTAL, IF ANY.

NOTE: If members have not previously been allowed to ask questions, the military judge should ask:

MJ: Does any court member have questions of any witness?

MBRS: (Respond.)

NOTE: If the members have questions, the trial counsel or bailiff will collect the written questions, have them marked as appellate exhibits, examine them, show them to the defense counsel, and present them to the military judge so that the military judge may ask the witness the questions.

MJ: Court members, you have now heard all of the evidence. At this time, we need to have a hearing outside of your presence to discuss the instructions. You are excused until approximately _____.

MBRS: (Comply.)

2-5-8. DISCUSSION OF FINDINGS INSTRUCTIONS.

MJ: All parties are present with the exception of the court members. Counsel, which exhibits go to the court members?

TC/DC: (Respond.)

MJ: Counsel, do you see any lesser included offenses that are in issue in this case?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

MJ: I intend to give the following instructions: _____.

Does either side have any objection to those instructions?

TC/DC: (Respond.)

MJ: What other instructions do the parties request?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Findings Worksheet as Appellate Exhibit ____, show it to the defense and present it to me.

TC: (Complies.)

MJ: Defense Counsel, do you have any objections to the Findings Worksheet?

DC: (Responds.)

MJ: Is there anything else that needs to be taken up before the members are called?

TC/DC: (Respond.)

MJ: Call the court members.

2–5–9. PREFATORY INSTRUCTIONS ON FINDINGS.

MJ: The court is called to order. All parties are again present as before to include the court members.

NOTE: RCM 920(b) provides that instructions on findings shall be given before or after arguments by counsel or at both times. What follows is the giving of preliminary instructions prior to argument with procedural instructions given after argument.

MJ: Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions that I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt

or innocence of the accused. The law presumes the accused to be innocent of the charge(s) against (him)(her).

You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During the trial, some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged. In (the) Specification (____) of (the) Charge (____), the accused is charged with the offense of (*specify the offense*). To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the offense(s) using Chapter 3 of the Benchbook.

NOTE: If lesser included offenses are in issue, continue below; if no lesser included offenses are in issue, GO TO INSTRUCTION 2-5-11, OTHER APPROPRIATE INSTRUCTIONS.

2-5-10. LESSER INCLUDED OFFENSE(S).

NOTE: After instructions on the elements of an offense alleged, the members of the court must be advised of all lesser included offenses raised by the evidence and within the scope of the pleadings. The members should be advised, in order of diminishing severity, of the elements of each lesser included offense, and its differences from the principal offense and other lesser offenses, if any. The members will not be instructed on lesser offenses that are barred by the statute of limitations unless the accused waives the bar. These instructions may be stated substantially as follows:

2-5-10a. LIO Introduction

MJ: The offense(s) of _____ (is) (are) (a) lesser included offense(s) of the offense set forth in (the) Specification (____) (of) (the) Charge _____. When you vote, if you find the accused not guilty of the offense charged, that is _____, then you should next consider the lesser included offense of _____, in violation of _____ (state codal provision). To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the LIO using Chapter 3 of the Benchbook.

2-5-10b. LIO Differences

MJ: The offense charged, _____, and the lesser included offense of _____ differ primarily (in that the offense charged requires, as (an) essential element(s), that you be convinced

beyond a reasonable doubt that (state the element(s) applicable only to the greater offense), whereas the lesser offense of _____ does not include such (an) element(s) (but it does require that you be satisfied beyond a reasonable doubt that (state any different element(s) applicable only to the lesser offense)).

2-5-10c. Other LIOs Within the Same Specification

MJ: Another lesser included offense of the offense alleged in (the) Specification _____ (of) (the) Charge ____, is the offense of _____ in violation of _____ (state codal provision). To find the accused guilty of this lesser offense, you must be convinced beyond a reasonable doubt of the following elements: (list the elements).

This lesser included offense differs from the lesser included offense I discussed with you previously in that this offense does not require, as (an) essential element(s), that the accused (state the element(s) applicable only to the greater offense) but it does require that you be satisfied beyond a reasonable doubt that (state any different element(s) applicable only to the lesser offense)).

NOTE: Repeat the above as necessary to cover all LIO's and then continue below.

2-5-11. OTHER APPROPRIATE INSTRUCTIONS.

NOTE: For other instructions which may be appropriate in a particular case, see Chapter 4, "Confessions and Admissions," Chapter 5, "Special and Other Defenses," Chapter 6, "Mental Responsibility," and Chapter 7, "Evidentiary Instructions." Generally, instructions on credibility of witnesses (see INSTRUCTION 7-7) and

circumstantial evidence (see INSTRUCTION 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.

2–5–12. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS.

MJ: You are further advised:

First, that the accused is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is a reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and (he)(she) must be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt as to which there is no reasonable doubt; and

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of (each) (the) offense.

By “reasonable doubt” is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence,

but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense(s), although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable doubt. However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind that you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment, statement, or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty because you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

2–5–13. FINDINGS ARGUMENT.

MJ: At this time, you will hear argument by counsel. As the government has the burden of proof, trial counsel may open and close. Trial Counsel, you may proceed.

TC: (Argument)

MJ: Defense, you may present findings argument.

DC: (Argument)

MJ: Trial Counsel, rebuttal argument?

TC: (Respond.)

MJ: Counsel have referred to instructions that I gave you and if there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

2–5–14. PROCEDURAL INSTRUCTIONS ON FINDINGS.

MJ: The following procedural rules will apply to your deliberations and must be observed:

The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all of the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

(The order in which the (several) charges and specifications are to be voted on should be determined by the President subject to objection by a majority of the members.) You vote on the specification(s) under the charge before you vote on the charge.

If you find the accused guilty of any specification under a charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the President, who will immediately announce the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Because we have ___ members, that means ___ members must concur in any finding of guilty.

**Table 2-1
Votes Needed for a Finding of Guilty**

No. of Members	Two-thirds
3	2
4	3
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

NOTE: The MJ must be alert to a charge under Article 106, UCMJ (Espionage), and the MJ may need to modify the instruction, e.g., the court may base findings on evidence introduced on issue of guilt, evidence introduced during sentencing proceeding, or all such evidence.

If you have at least ___ votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than ___ members vote for a finding of guilty, then your ballot resulted in a finding of not guilty (bearing in mind the instructions I just gave you about voting on the lesser included offense(s)).

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the President should announce only that reconsideration of a finding has been proposed. Do not state: (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-10, RECONSIDERATION INSTRUCTION (FINDINGS).

MJ: As soon as the court has reached its findings and I have examined the Findings Worksheet, the findings will be announced by the President in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit ____, the Findings Worksheet (which the (Trial Counsel) (Bailiff) will now hand to the President).

TC/BAILIFF: (Complies.)

NOTE: The military judge may explain how the Findings Worksheet should be used.

Appendix B contains sample Findings Worksheet. A suggested approach follows:

MJ: (COL) (___) _____, as indicated on Appellate Exhibit(s) ____, the first portion will be used if the accused is completely acquitted of (the) (all) charge(s) and specifications(s). The second part will be used if the accused is convicted, as charged, of (the) (all) charge(s) and specification(s); (and the third portion will be used if the accused is convicted of some but not all of the offenses).

(The next page of Appellate Exhibit ____ would be used if you find the accused guilty of the lesser included offense of _____ [by exceptions (and substitutions)]. This was (one of) (the) lesser included offense(s) I instructed you on.)

Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that, when I check your findings, I can ensure that they are in proper form.

You will note that the Findings Worksheet has been modified to reflect the words that would be deleted (as well as the words that would be substituted therefor) if you found the accused guilty of the lesser included offense(s). (These) (This) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or counsel concerning any degree of guilt of this accused. (They are) (This is) merely included to aid you in understanding what findings might be made in the case and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision.

Any questions about the Findings Worksheet?

MBRS: (Respond.)

MJ: If, during your deliberations, you have any questions, notify the Bailiff, we will open the court and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of the trial, you must all remain together in the deliberation room during deliberations. While in your closed session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached findings, you may notify the Bailiff, who will then notify me that you desire to return to open court to make your desires or findings known. Further, during

your deliberations, you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Protection of Civilians in Time of War of August 12, 1949, or any other publication or writing unless it has been admitted into evidence.

Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions concerning these instructions?

MBRS: (Respond.)

MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed session deliberations, you must notify us, we must come into the courtroom, formally convene and then recess the court; and, after the recess, we must reconvene the court and formally close again for your deliberations. So, with that in mind, (COL) (___) _____, do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?

PRES: (Respond.)

MJ: (Trial Counsel) (Bailiff) please hand to the President of the court Prosecution Exhibits(s) ___ and (Defense Exhibit(s) ___) for use during the court's deliberations.

TC/BAILIFF: (Complies.)

MJ: (COL) () _____, please do not mark on any of the exhibits, except the Findings Worksheet (and please bring all the exhibits with you when you return to announce your findings).

The court is closed.

2–5–15. PRESENTENCING SESSION.

NOTE: When the members close to deliberate, the military judge may convene an Article 39(a) session to cover pre-sentencing matters, or may wait until after findings.

MJ: This Article 39(a) session is called to order. All parties are present, except the court members.

_____ (***state name of accused***), when the members return from their deliberations, if you are acquitted of all charges and specifications, that will terminate the trial. On the other hand, if you are convicted of any offense, then the court will determine your sentence. During that part of the trial, you (will) have the opportunity to present evidence in extenuation and mitigation of the offenses of which you have been found guilty, that is, matters about the offense(s) or yourself, which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case the court will not draw any adverse inference from your silence. On the other hand, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it. However, the government may offer evidence to rebut any statement of fact contained in an unsworn statement. The unsworn

statement may be made orally or in writing, or both. It may be made by you or by your counsel on your behalf, or by both you and your counsel. Do you understand these rights that you have?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

NOTE: Illegal pretrial punishment. A punishment or penalty imposed on a civilian internee while being held for trial that exceeds the limitations specified in the GC IV may constitute Article 13 punishment. By analogy, a punishment or penalty imposed on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note 2, infra.)) that exceeds the limitations for “disciplinary sanctions” under Article 119, GC IV, may also constitute Article 13 punishment. The applicable disciplinary punishments, which may not exceed 30 days for any single punishment, are the following:

- (1) Fine: 50 percent of wages (see Article 95, GC IV);***
- (2) Discontinuance of privileges granted over and above the treatment provided by the GC IV;***
- (3) Fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment; and***
- (4) Confinement.***

(See Arts. 71-76 and 117-126, GC IV.)

The accused's time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 117, GC IV, provides that "No internee may be punished more than once for the same act, or on the same count." Disciplinary sanctions imposed IAW Article 117-126, GC IV, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment or a penalty for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the charge.

MJ: _____, is that correct?

ACC: (Responds.)

NOTE: Pretrial confinement credit. If the accused was confined while awaiting trial, Articles 69 and 122, GC IV, require that such time "shall be deducted from any period of imprisonment awarded." The accused's time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under Articles 69 and 112 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, any period of time spent by you in confinement while you were awaiting trial shall be deducted from any sentence of confinement. However, the period during which you

were interned under Articles 42 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War will not be considered when deliberating your sentence. Do you understand that?

ACC: (Responds.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with ____ day(s) of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Counsel, do you have any documentary evidence on sentencing which could be marked and offered at this time?

TC/DC: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

MJ: This Article 39(a) session is terminated to await the members' findings.

2-5-16. FINDINGS.

MJ: The court is called to order. All parties are again present as before to include the court members. (COL) (___) _____, has the court reached findings?

PRES: (Responds.)

MJ: Are the findings reflected on the Findings Worksheet?

PRES: (Responds.)

MJ: Please fold the worksheet and give it to the (Bailiff) (Trial Counsel) so that I may examine it.

TC/BAILIFF: (Complies)

NOTE: If a possible error exists on the Findings Worksheet, the military judge must take corrective action. All advice or suggestions to the court from the military judge must occur in open session. In a complex matter, it may be helpful to hold an Article 39(a) session to secure suggestions and agreement on the advice to be given to the court. Occasionally, corrective action by the court involves reconsideration of a finding and, in that situation, instructions on the reconsideration procedure are required (see INSTRUCTION 2-7-10, RECONSIDERATION INSTRUCTION (FINDINGS)).

MJ: I have reviewed the Findings Worksheet and (the findings appear to be in proper form)

(_____). (Bailiff) (Trial Counsel), please return the Findings Worksheet to the President.

TC/BAILIFF: (Complies.)

MJ: Defense Counsel and accused please rise.

ACC/DC: (Comply.)

MJ: (COL) (___) _____, please announce the findings of the court.

PRES: (Complies.)

MJ: Counsel and accused may be seated.

DC/ACC: (Comply.)

MJ: (Trial Counsel) (Bailiff) please retrieve all exhibits from the President.

TC/BAILIFF: (Complies.)

NOTE: If there are findings of guilty, GO TO INSTRUCTION 2-5-17, SENTENCING PROCEEDINGS; if acquitted, continue below.

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations of what happened in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service.

This court-martial is adjourned.

2-5-17. SENTENCING PROCEEDINGS.

NOTE: If the military judge has not previously advised the accused of his allocution rights at the beginning of Section IV, JUDGE ALONE (SENTENCING), the military judge must do so at this time outside the presence of the court members. If there were findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.

MJ: Members of the court, at this time, we will enter into the sentencing phase of the trial. (Before doing so, would the members like to take a recess?)

PRES/MBRS: (Respond.)

MJ: Trial Counsel, you may read the personal data concerning the accused as shown on the charge sheet.

TC: The first page of the charge sheet shows the following personal data concerning the accused: (*Reads the data*).

MJ: Members of the court, I have previously admitted into evidence (Prosecution Exhibit(s) ____, which (is) (are) _____) (and) (Defense Exhibit(s) ____, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations.

Trial Counsel do you have anything else to present at this time?

TC: (Responds and presents case on sentencing.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

2–5–18. REBUTTAL AND SURREBUTTAL, IF ANY.

MJ: Members of the court, you have now heard all of the evidence in this case. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again at _____.

MBRS: (The members withdraw from the courtroom.)

2–5–19. DISCUSSION OF SENTENCING INSTRUCTIONS.

MJ: All parties are present, except the court members who are absent.

Counsel, what do you calculate the maximum sentence to be based upon the findings of the court?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ____, show it to the defense, and present it to me.

TC: (Complies.)

NOTE. Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet.

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

NOTE: Unsworn statement instruction within discretion of military judge. See United States v. Breese, 11 M.J. 17 (C.M.A. 1981).

MJ: Call the members. (The members are called and reenter the courtroom.)

2–5–20. SENTENCING ARGUMENTS.

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Complies.)

MJ: Defense Counsel, you may present argument.

DC: (Complies.)

2–5–21. SENTENCING INSTRUCTIONS.

MJ: Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he)(she) has been found guilty.

(IF OFFENSES ARE ONE FOR SENTENCING PURPOSES:) MJ: The offenses charged in _____ and _____ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the Convening or higher Authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

NOTE: Sentencing instruction. Under Articles 67 and 118, GC IV, the court shall take into account the fact that the accused is not a national of the Occupying Power.

In determining a legal, appropriate, and adequate punishment, bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Articles 67 and 118 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, this court is not bound to apply any punishment

prescribed for an offense and it is at liberty to arrive at any lesser sentence to include no punishment.

NOTE: Although Article 118, GC IV, states that the court “shall not be obliged, to this end, to apply the minimum sentence prescribed,” the sentence above should cover any prescribed minimum punishment.

NOTE: Sentencing Limitations. Article 68, GC IV, provides that offenses “solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offenses, be the only measure adopted for depriving protected persons of liberty.”

(MAXIMUM PUNISHMENT:) MJ: The maximum punishment that may be adjudged in this case is confinement for _____. The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are a few matters which each member should consider in determining an appropriate sentence. First, bear in mind that there are several principal reasons for the sentence of those who violate the law. These reasons include: punishment of the

wrongdoer, protection of society from the wrongdoer, and deterrence of the wrongdoer and those who know of (his)(her) crime(s) and (his)(her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion. Next, you should be aware of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

2-5-22. TYPES OF PUNISHMENT.

NOTE: The following specific instructions on each type of punishment are optional but recommended. The instruction on the maximum punishment and the use by the members of a legally sufficient sentence worksheet listing the full range of punishments will suffice. However, the military judge must instruct on the effect of pretrial confinement credit, if applicable.

(RESTRICTION:) MJ: This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run.

(HARD LABOR WITHOUT CONFINEMENT:) MJ: This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days. Article 118, GC IV, prohibits imprisonment in premises without daylight.

(CONFINEMENT:) MJ: As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of _____ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) (A) sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(A sentence to “confinement for life without eligibility for parole” means that the accused will be confined for the remainder of (his)(her) life and will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to “confinement for life” or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from such confinement under such circumstances as are or may be provided by codal law or regulations for civilian internees. “Parole” is a form of conditional release of a prisoner from actual incarceration, before (his)(her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his)(her) sentence of confinement if the conditions of parole

are violated. In determining whether to adjudge, if either, “confinement for life without eligibility for parole” or “confinement for life” in the sentence, bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the Convening Authority or any other appropriate authority.)

NOTE: Pretrial confinement credit. If the accused was confined while awaiting trial, Articles 69 and 122, GC IV, require that such time “shall be deducted from any period of imprisonment awarded.” The accused’s time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) MJ: Under Articles 69 and 112 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, any period of time spent by the accused in confinement while awaiting trial shall be deducted from any sentence of confinement. However, the period during which the accused was interned under Articles 42 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War will not be considered when deliberating on (his)(her) sentence.

In determining an appropriate sentence in this case, you should consider the fact that the accused has spent ___ day(s) in pretrial confinement. If you adjudge confinement as part of your sentence, the day(s) the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his)(her) confinement, and will be given on a day-for-day basis.

(NO PUNISHMENT:) MJ: Finally, if you wish, this court may sentence the accused to no punishment.

2-5-23. OTHER INSTRUCTIONS.

MJ: In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, (whether introduced before or after your findings). (Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.)

(ACCUSED'S NOT TESTIFYING:) MJ: The court will not draw any adverse inference from the fact that the accused elected not to testify.

(ACCUSED'S NOT TESTIFYING UNDER OATH:) MJ: The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by the court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement was not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

NOTE: Scope of Accused's Unsworn Statement. The scope of an accused's unsworn statement is broad. If the accused addresses the treatment or sentence of others, command options, or other matters that would be inadmissible but for their being presented in an unsworn statement, the instruction below may be appropriate. In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.

(MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted.)

(For example, it is not your duty (to determine relative blame worthiness of) (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, (whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (_____).)

(Your duty is to adjudge an appropriate sentence for this accused that you regard as fair and just when it is imposed and not one whose fairness depends upon actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases).)

(PLEA OF GUILTY:) MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the

government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

(MENDACITY:) MJ: The evidence presented (and the sentencing argument of Trial Counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did testify falsely under oath to this court.

Second, such false testimony must have been, in your view, willful and material, meaning important, before it can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

(ARGUMENT FOR A SPECIFIC SENTENCE:) MJ: During argument, (Trial Counsel) (and) (Defense Counsel) recommended that you consider a specific sentence in this case. The arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

2-5-24. CONCLUDING SENTENCING INSTRUCTIONS.

MJ: When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. (A sentence which includes (confinement for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or _____ members.)

**Table 2-2
Votes Needed for Sentencing**

No. of Members	Two-thirds	Three-fourths
3	2	*
4	3	*
5	4	4
6	4	5
7	5	6
8	6	6
9	6	7
10	7	8
11	8	9
12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed rebalot concerns increasing or decreasing the sentence. I will give you specific instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-14, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, the court will have the use of the Sentence Worksheet marked Appellate Exhibit ____, which the (Trial Counsel) (Bailiff) will now hand to the president.

TC/BAILIFF: (Comply.)

MJ: Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Protection of Civilians in Time of War of August 12, 1949, or any other publication or writing not properly admitted or received during this trial.

These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of adherence to the laws and customs of war in general, punishment of the accused, and the protection of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet and the president will then announce the sentence.

Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBR: (Responds.)

MJ: (COL) (___) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please give the President Prosecution Exhibit(s) ___ (and Defense Exhibit(s) ___).

TC/BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all of the exhibits with you when you return to announce the sentence.

The court is closed.

2-5-25. ANNOUNCEMENT OF SENTENCE.

MJ: The court is called to order.

TC: All parties to include the court members are present as before.

MJ: (President), have you reached a sentence?

PRES: (Responds.)

NOTE: If the president indicates that the members are unable to agree on a sentence, the military judge should give INSTRUCTION 2-7-13, "HUNG JURY" INSTRUCTION.

MJ: (President), is the sentence reflected on the Sentence Worksheet?

PRES: (Respond.)

MJ: (President), please fold the Sentence Worksheet and give it to the (Trial Counsel) (Bailiff) so that I can examine it.

PRES/TC/BAILIFF: (Complies.)

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____). (Bailiff) (Trial Counsel), you may return it to the President.

TC/BAILIFF/PRES: (Complies.)

MJ: Defense Counsel and accused, please rise.

ACC/DC: (Comply.)

MJ: (President), please announce the sentence of the court.

PRES: (Complies.)

NOTE: If the adjudged sentence involves confinement for two years or more, Article 74, GC IV, requires the Occupying Power to immediately notify the Protecting Power of the accused's sentence. The notification shall contain a reference to the notification required under Article 71, GC IV, and, in the case of a sentence of confinement, the name of the place where the sentence is to be served. The record of judgment shall be

open for inspection by the Protecting Power. Any period allowed for appeal in the case of a sentence involving confinement of two years or more shall not run until notification of judgment has been received by the Protecting Power. Art. 74, GC IV.

MJ: Please be seated.

DC/ACC: (Comply.)

MJ: (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the President.

TC/BAILIFF: (Complies.)

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations of what happened in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

MBRS: (Withdraw.)

MJ: The members have withdrawn from the courtroom. All other parties are present.

(PRETRIAL CONFINEMENT CREDIT:) MJ: The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.

NOTE: If there was no pretrial agreement, GO TO INSTRUCTION 2-6-14, POST-TRIAL AND APPELLATE RIGHTS ADVICE; if there was a pretrial agreement continue below:

MJ: _____, we are now going to discuss the operation of your pretrial agreement on the sentence of the court.

It is my understanding that the effect of the pretrial agreement on the sentence is that the Convening Authority may approve _____. Do you agree with that interpretation?

ACC: (Responds.)

MJ: Do counsel also agree with that interpretation?

TC/DC: (Respond.)

2-5-26. POST-TRIAL AND APPELLATE RIGHTS ADVICE.

NOTE: Right of appeal. Article 73, GC IV, provides: “A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.” This appears to require an inquiry on the record that the accused is “fully informed” of his appellate rights.

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the convening authority for action. The convening authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he or she may disapprove the findings or the sentence in whole or in part. The convening authority may reduce the sentence adjudged by the court-martial, but he or she cannot increase it. The convening authority can disapprove a finding of guilty, but cannot change a finding of not guilty. Although the convening authority is not required to review the case for legal errors, he or she may take action to correct legal errors.

[(SENTENCE ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the staff judge advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the convening authority takes action on your case.]

Before the convening authority takes action, you have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case (including a response to the staff judge advocate's post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the staff judge advocate) (is) (are) served on you or your counsel. You may request up to an additional 20 days and, for good cause, the convening authority may approve the request.

[(IF APPROVED SENTENCE IS DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves (death) (confinement for one year or more), your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you

may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

NOTE: The GC IV does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.

MJ: After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves a sentence that does not include death or confinement for one year or more, your case will be examined in the Office of the Judge Advocate General for legal sufficiency and to determine if the sentence is appropriate. The Judge Advocate General may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH:) You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case

and send it to the convening authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

Do you have any questions?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the Staff Judge Advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section VI

Court Members (Sentencing Only)

MJ: _____, we now enter into the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself, which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case the court members may not draw any adverse inference from your silence. On the other hand, if you desire, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it; however, the Government may offer evidence to rebut any statement of fact contained in any unsworn statement. An unsworn statement may be made orally, in writing, or both. It may be made by you, by your counsel on your behalf, or by both. Do you understand these rights?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

NOTE: Illegal pretrial punishment. A punishment or penalty imposed on a civilian internee while being held for trial that exceeds the limitations specified in the GC IV may constitute Article 13 punishment. By analogy, a punishment or penalty imposed

on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note 2, infra.)) that exceeds the limitations for “disciplinary sanctions” under Article 119, GC IV, may also constitute Article 13 punishment. The applicable disciplinary punishments, which may not exceed 30 days for any single punishment, are the following:

- (1) Fine: 50 percent of wages (see Article 95, GC IV);*
- (2) Discontinuance of privileges granted over and above the treatment provided by the GC IV;*
- (3) Fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment; and*
- (4) Confinement.*

(See Arts. 71-76 and 117-126, GC IV.)

The accused’s time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 117, GC IV, provides that “No internee may be punished more than once for the same act, or on the same count.” Disciplinary sanctions imposed IAW Article 117-126, GC IV, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment or a penalty for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the charge.

MJ: _____, is that correct?

ACC: (Responds.)

MJ: Based upon the findings, I calculate the maximum punishment to be _____.

TC/DC: (Respond.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with _____ days of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ____, show it to the defense and present it to me.

TC: (Complies.)

NOTE. Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet.

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, do you have any documentary evidence on sentencing which could be marked and offered at this time?

TC/DC: (Respond.)

MJ: Is there anything else by either side before we call the members?

TC/DC: (Responds.)

MJ: Bailiff, call the court members.

NOTE: Whenever the members enter the courtroom, all persons except the military judge and reporter shall rise. The members are seated alternately to the right and left of the president according to rank.

MJ: You may be seated. The court is called to order.

TC: The court is convened by Court Martial Convening Order Number _____, Headquarters _____ dated _____ (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____), copies of which have been furnished to each member of the court.

The accused and the following persons detailed to this court-martial are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) ((and) _____, Defense Counsel) ((and) _____, Assistant Defense Counsel) ((and) _____, Civilian Defense Counsel;) ((and) _____ (*state name of selected advocate*), Defense Advocate) and _____, _____, _____, and _____, court members. The following persons detailed to this court are absent: _____, _____, and _____).

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

NOTE: Members who have been relieved (viced) by orders need not be mentioned.

TC: The prosecution is ready to proceed with trial in the case of the United States v. (state name of accused).

MJ: The members of the court will now be sworn. All persons in the courtroom please rise.

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

MBRS: (Comply.)

MJ: Please be seated. The court is assembled.

2-6-1. PRELIMINARY INSTRUCTIONS.

MJ: Members of the court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial including closed sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.

At a session held earlier, the accused pled guilty to the charge(s) and specification(s) which you have before you. I accepted that plea and entered findings of guilty. Therefore, you will not have to determine whether the accused is guilty or not guilty as that has been established by (his)(her) plea. Your duty is to determine an appropriate sentence. That duty is a grave responsibility requiring the exercise of wise discretion. Your determination must be based upon all the evidence presented and the instructions I will give you as to the applicable law. Since you cannot properly reach your determination until all the evidence has been presented and you have been instructed, it is of vital importance that you keep an open mind until all the evidence and instructions have been presented to you.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Some of the grounds for challenge would be if you were the accuser in the case, if you have investigated any offense charged, if you have formed a fixed opinion as to what an appropriate punishment would be for this accused, or any matter that may affect your impartiality regarding an appropriate sentence for the accused. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to an appropriate sentence, after considering all the alternative punishments of which I will later advise you. You may not have a preconceived idea or formula as to either the type or the amount of punishment which should be imposed, if any.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so. The way we handle that is to require you to write out the question and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked since your questions, like questions of counsel, are subject to objection. (There are forms provided to you for your use if you desire to question any witness.) I will conduct any needed examination. There are a couple of things you need to keep in mind with regard to questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearings out of your presence. Frequently their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations. Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will

act as your presiding officer during your closed session deliberations, and will speak for the court in announcing the results.

This general order of events can be expected at this court-martial: Questioning of court members, challenges and excusals, presentation of evidence, closing argument by counsel, instructions on the law, your deliberations, and announcement of the sentence.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too (hot) (cold) in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. (At the time of any recess or adjournment, you should (take your notes with you for safe keeping until the next session) (leave your notes in the courtroom).)

(One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.)

Are there any questions?

MBRS: (Respond.)

MJ: (Apparently not.) Please take a moment to read the charges on the flyer provided to you and to ensure that your name is correctly reflected on the convening order. If it is not, please let me know.

MBRS: (Comply.)

MJ: Trial Counsel, you may announce the general nature of the charge(s).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____; forwarded with recommendations as to disposition by _____ (and investigated by _____).

The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reasons).

If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MBRS: (Respond.)

2-6-2. VOIR DIRE.

MJ: Before counsel ask you any questions, I will ask a few preliminary questions. If any member has an affirmative response to any question, please raise your hand.

NOTE: The military judge should indicate for the record the members' response to the following questions, i.e., [Negative response from (all members) (state name(s) or if the

names are not disclosed in open court, a number assigned to that member). *[Positive response from (all members) (state name of member(s)).]*

- 1. Does anyone know the accused?**

- 2. Does anyone know any person named in any of the specifications?**

- 3. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?**

- 4. Does anyone have any prior knowledge of the facts or events in this case?**

- (5. Members of the court, this case has received attention in the (local) (and) (national) media. Is there any member who has seen or heard any mention of this case in the media?**

NOTE: To the members who have seen or heard mention of this case in the media, continue with Questions 6-11; if none, go to Question 12.

- 6. Is there any member who has participated in a military operation that received press coverage?**

- 7. To those who have been in operations that received press coverage: did any member find that the press coverage was 100 percent accurate and complete?**

- 8. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?**

9. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

10. Is there, then, any member who believes that the reports that he (or she) received from the media about this case are completely accurate and truthful?

11. For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case, based solely upon the evidence you receive in this court and the law as I instruct you?)

12. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

13. Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?

14. If so, will that experience influence your performance of duty as a court member in this case in any way?

NOTE: If Question 14 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.

15. How many of you have previously served as court members?

16. (As to those members) Can each of you put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and my instructions as to the applicable law?

17. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, corrections officer, or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?

18. Is any member of the court in the rating chain, supervisory chain, or chain of command, of any other member?

NOTE: If question 18 is answered in the affirmative, the military judge may want to ask questions 19 and 20 outside the presence of the other members.

19. (To junior members:) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

20. (To senior members:) Will you be embarrassed or restrained in any way in the performance of your duties as a court member if a member over whom you hold a position of authority should disagree with you?

21. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

22. Does anyone know of anything of either a personal or professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

23. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be sentenced. Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment solely because of the nature of the charge(s)?

24. You will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments (from no punishment) up to the maximum punishment. You should consider all forms of punishment within that range. Consider does not necessarily mean that you would vote for that particular punishment. Consider means that you think about and make a choice in your mind, one way or the other, as to what is an appropriate punishment within that range. Each member must keep an open mind and not make a choice, nor foreclose from consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

25. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence in this case?

26. Can each of you reach a decision on a sentence on an individual basis in this particular case and not solely upon the nature of the offense (or offenses) of which the accused has been convicted?

27. Is any member aware of any matter which might raise a substantial question concerning your participation in this trial as a court member?

Do counsel for either side desire to question the court members?

NOTE: Trial counsel and defense counsel will conduct voir dire if desired, and individual voir dire will be conducted, if required.

2-6-3. INDIVIDUAL VOIR DIRE.

MJ: Members of the court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled, however, for individual questioning.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire and if so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire and if so, state the member and your reason(s).

DC: (Responds.)

2-6-4. CHALLENGES.

NOTE: Challenges are to be made outside the presence of the court members. This may occur at a sidebar conference or at an Article 39(a) session. What follows is a suggested procedure for an Article 39(a) session.

MJ: Members of the court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

MJ: All the members are absent, all other parties are present. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

NOTE: The military judge will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a

challenge, the military judge should instruct the bailiff to inform the member that he/she has been excused and the remaining members should rearrange themselves in the proper seating order before returning to the courtroom.

MJ: Call the members.

2-6-5. SENTENCING PROCEEDINGS.

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

MJ: Court members, at this time we will begin the sentencing phase of this court-martial. Trial Counsel, you may read the personal data concerning the accused as shown on the first page of the charge sheet.

TC: The first page of the charge sheet shows the following personal data concerning the accused:
_____.

MJ: Members of the court, I have previously admitted into evidence (Prosecution Exhibit(s) ____, which (is) (are) _____) (and) (Defense Exhibit(s) ____, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations. (Trial Counsel, you may read the stipulation of fact into evidence.) Trial Counsel, do you have anything else to present at this time?

TC: (Responds and presents case on sentencing.)

NOTE: The trial counsel administers the oath/affirmation for all witnesses. After a witness testifies, the military judge should allow the members to ask questions.

MJ: Does any court member have questions of this witness?

MBRS: (Respond.)

NOTE: If the members have questions, the trial counsel will collect the written questions, have them marked as appellate exhibits, examine them, show them to the defense counsel, and present them to the military judge so that the military judge may ask the witness the questions. When questioning is finished, the military judge should instruct the witness along the following lines:

MJ: _____, you are excused (permanently) (temporarily). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (return to your duties) (go about your business) (be available (by telephone) to return within ____ minutes) (_____).

TC: The government rests.

MJ: Defense Counsel, you may proceed.

DC: (Responds.)

DC: The defense rests.

2-6-6. REBUTTAL AND SURREBUTTAL, IF ANY.

MJ: Court members, you have now heard all the evidence. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again in about _____.

MBRS: (Comply.)

2-6-7. DISCUSSION OF SENTENCING INSTRUCTIONS.

MJ: All parties are present as before, except the court members who are absent. Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

NOTE: Unsworn statement instruction: within discretion of military judge.

MJ: Call the members.

2-6-8. SENTENCING ARGUMENTS.

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Argues.)

MJ: Defense Counsel, you may present argument.

DC: (Argues.)

2–6–9. SENTENCING INSTRUCTIONS.

MJ: Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he)(she) has been found guilty.

(IF OFFENSES ARE ONE FOR SENTENCING PURPOSES:) MJ: The offenses charged in _____ and _____ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

NOTE: Sentencing instruction. Under Articles 67 and 118, GC IV, the court shall take into account the fact that the accused is not a national of the Occupying Power.

In determining a legal, appropriate, and adequate punishment, bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Articles 67 and 118 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, this court is not bound to apply the any punishment prescribed for an offense and it is at liberty to arrive at a lesser sentence to include no punishment.

NOTE: Although Article 118, GC IV, states that the court “shall not be obliged, to this end, to apply the minimum sentence prescribed,” the sentence above should cover any prescribed minimum punishment.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

NOTE: Sentencing Limitations. Article 68, GC IV, provides that offenses “solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offenses, be the only measure adopted for depriving protected persons of liberty.”

(MAXIMUM PUNISHMENT:) MJ: The maximum punishment that may be adjudged in this case is confinement for _____

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are a few matters which each member should consider in determining an appropriate sentence. First, bear in mind that there are several principal reasons for the sentence of those who violate the law. These reasons include: punishment of the wrongdoer, protection of society from the wrongdoer, and deterrence of the wrongdoer and those who know of (his)(her) crime(s) and (his)(her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion. Next, you should be aware of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

2-6-10. TYPES OF PUNISHMENT.

NOTE: The following specific instructions on each type of punishment are optional but recommended. The instruction on the maximum punishment and the use by the members of a legally sufficient Sentence Worksheet listing the full range of punishments will suffice. However, the military judge must instruct on the effect of pretrial confinement credit, if applicable.

(RESTRICTION:) MJ: This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run.

(HARD LABOR WITHOUT CONFINEMENT:) MJ: This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days. Article 118, GC IV, prohibits imprisonment in premises without daylight.

(CONFINEMENT:) MJ: As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of ____ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) (A) sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(You are advised that a sentence to “confinement for life without eligibility for parole” means that the accused will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to “confinement for life” or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from confinement under such circumstances as are or may be provided by law or regulations. “Parole” is a form of conditional release of a prisoner from actual incarceration before (his)(her) sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete (his)(her) sentence to confinement if the conditions of parole are violated. In determining whether to adjudge “confinement for life without eligibility for parole” or “confinement for life” (if either), you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the convening authority or any other authority.)

NOTE: Pretrial confinement credit. If the accused was confined while awaiting trial, Articles 69 and 122, GC IV, require that such time “shall be deducted from any period of imprisonment awarded.” The accused’s time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) MJ: Under Articles 69 and 112 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, any period of time spent by the accused in confinement while awaiting trial shall be deducted from any sentence of confinement. However, the period during which (he)(she) was interned under Articles

42 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War will not be considered when deliberating on (his)(her) sentence.

In determining an appropriate sentence in this case, you should consider that the accused has spent _____ days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his)(her) confinement, and will be given on a day-for-day basis.

(NO PUNISHMENT:) MJ: Finally, if you wish, this court may sentence the accused to no punishment.

In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, (whether introduced before or after your findings). (Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.)

2-6-11. OTHER INSTRUCTIONS.

(ACCUSED'S NOT TESTIFYING:) MJ: The court will not draw any adverse inference from the fact that the accused did not elect to testify.

(ACCUSED'S NOT TESTIFYING UNDER OATH:) MJ: The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention

of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

NOTE: Scope of Accused's Unsworn Statement. The scope of an accused's unsworn statement is broad. If the accused addresses the treatment or sentence of others, command options, or other matters that would be inadmissible but for their being presented in an unsworn statement, the instruction below may be appropriate. In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.

MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted.

(For example, it is not your duty (to determine relative blame worthiness of) (and whether appropriate disciplinary action has been taken against) others who might have committed an

offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities)(_____).)

(Your duty is to adjudge an appropriate sentence for this accused that you regard as fair and just when it is imposed and not one whose fairness depends upon actions that others (have taken)(or)(may or may not take)(in this case)(or)(in other cases).)

(PLEA OF GUILTY:) MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

(MENDACITY:) MJ: The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

(ARGUMENT FOR A SPECIFIC SENTENCE:) MJ: During argument, (trial counsel) (and) (defense counsel) recommended that you consider a specific sentence in this case. You are advised that the arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

2-6-12. CONCLUDING SENTENCING INSTRUCTIONS.

MJ: When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. A sentence which includes (confinement for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or ___ members.)

**Table 2-3
Votes Needed for Sentencing**

No. of Members	Two-thirds	Three-fourths
3	2	*
4	3	*
5	4	4
6	4	5
7	5	6
8	6	6
9	6	7
10	7	8
11	8	9
12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed rebalot concerns increasing or decreasing the sentence. I will then give you specific instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-14, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet marked Appellate Exhibit ___ which the (Trial Counsel) (Bailiff) may now hand to the president.

TC/BAILIFF: (Complies.)

MJ: Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of adherence to the laws and customs of war in general, punishment of the accused, and the protection of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

MJ: Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBRS: (Respond.)

MJ: (COL) (___) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please give the president Prosecution Exhibit(s) ___ (and Defense Exhibit(s) ___).

TC/BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all the exhibits with you when you return to announce the sentence.

MJ: The court is closed.

2-6-13. ANNOUNCEMENT OF SENTENCE.

MJ: The court is called to order.

TC: All parties to include the court members are present as before.

MJ: _____, have you reached a sentence?

PRES: (Responds.)

NOTE: If the president indicates that the members are unable to agree on a sentence, the military judge should give INSTRUCTION 2-7-13, "HUNG JURY" INSTRUCTION.

MJ: _____, is the sentence reflected on the Sentence Worksheet?

PRES: (Responds.)

MJ: _____, please fold the Sentence Worksheet and give it to the (Trial Counsel) (Bailiff) so that I can examine it.

TC/BAILIFF: (Complies.)

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____). (Trial Counsel) (Bailiff), you may return it to the president.

TC/BAILIFF: (Complies.)

MJ: Defense counsel and accused, please rise.

ACC/DC: (Comply.)

MJ: (COL) (____) _____, please announce the sentence.

PRES: (Complies.)

MJ: Please be seated. (Trial counsel) (Bailiff), please retrieve the exhibit(s) from the president.

TC/BAILIFF: (Complies.)

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

The members have withdrawn from the courtroom. All other parties are present.

(PRETRIAL CONFINEMENT CREDIT:) MJ: The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.

NOTE: If there was no pretrial agreement, GO TO INSTRUCTION 2-6-14, POST-TRIAL AND APPELLATE RIGHTS ADVICE; if there was a pretrial agreement continue below:

MJ: _____, we are now going to discuss the operation of your pretrial agreement on the sentence of the court.

It is my understanding of the effect of the pretrial agreement on the sentence is that the convening authority may approve _____. Do you agree with that interpretation?

ACC: (Responds.)

MJ: Do counsel also agree with that interpretation?

TC/DC: (Respond.)

2–6–14. POST-TRIAL AND APPELLATE RIGHTS ADVICE.

NOTE: Right of appeal. Article 73, GC IV, provides: “A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.” This appears to require an inquiry on the record that the accused is “fully informed” of his appellate rights.

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the convening authority for action. The convening authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he or she may disapprove the findings or the sentence in whole or in part. The convening authority may reduce the sentence adjudged by the court-martial, but he or she cannot increase it. The convening authority can disapprove a finding of guilty, but cannot change a finding of not guilty. Although the convening authority is not required to review the case for legal errors, he or she may take action to correct legal errors.

[(SENTENCE ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the staff judge advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the convening authority takes action on your case.]

Before the convening authority takes action, you have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case (including a response to the staff judge advocate's post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the staff judge advocate) (is) (are) served on you or your counsel. You may request up to an additional 20 days and, for good cause, the convening authority may approve the request.

[(IF APPROVED SENTENCE IS DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves (death) (confinement for one year or more), your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

NOTE: The GC IV does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.

MJ: After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:)] If the convening authority approves a sentence that does not include death or confinement for one year or more, your case will be examined in the Office of the Judge Advocate General for legal sufficiency and to determine if the sentence is appropriate. The Judge Advocate General may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH:)] You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case and send it to the convening authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

MJ: Do you have any questions?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the staff judge advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section VII

Miscellaneous Procedural Guides

2-7-3. WAIVER OF CONFLICT-FREE COUNSEL (DEFENSE COUNSEL REPRESENTING MULTIPLE ACCUSED).

MJ: _____, do you understand that you have a right to be represented by counsel who has undivided loyalty to you and your case?

ACC: (Responds.)

MJ: Do you understand that a lawyer ordinarily should not represent more than one client when the representation involves a matter arising out of the same incident?

ACC: (Responds.)

MJ: For a lawyer to represent more than one client concerning a matter arising out of the same incident, you have to consent to that representation. Do you understand that?

ACC: (Responds.)

MJ: Have you discussed this matter with your defense counsel?

ACC: (Responds.)

MJ: After discussing this matter with him/her, did you decide for yourself that you would like to have him/her still represent you?

ACC: (Responds.)

MJ: Do you understand that when a defense counsel represents two or more clients regarding a matter arising out of the same incident, then the lawyer may have divided loyalties, that is, for example, the defense counsel may be put in a position of arguing that one client is more at fault than another client?

ACC: (Responds.)

MJ: Understanding that even if an actual conflict of interest does not presently exist between your defense counsel representing you and his/her other client(s), but that one could possibly develop, do you still desire to be represented by _____?

ACC: (Responds.)

MJ: Do you understand that you are entitled to be represented by another lawyer where no potential conflict of interest would ever arise?

ACC: (Responds.)

MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by _____?

ACC: (Responds.)

MJ: Do you have any questions about your right to conflict-free counsel?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his)(her) right to conflict-free counsel and may be represented by _____ at this court-martial.

2-7-4. PRETRIAL AGREEMENT: DISMISSAL OF CHARGE CLAUSE

MJ: Your pretrial agreement indicates that the Convening Authority has directed the trial counsel to move to dismiss (the) charge(s) ___ and (its) (their) specification(s) after I accept your plea of guilty. In other words, if I accept your plea of guilty, the Government will not prosecute the remaining charge(s) provided your plea of guilty remains in effect until the imposition of sentence, at which time I would grant the motion. Do you understand that?

ACC: (Responds.)

MJ: However, if for some reason your plea of guilty at any time becomes unacceptable, the trial counsel would be free to proceed on (all) (the) charge(s) and (its) (their) specification(s). Do you understand that?

ACC: (Responds.)

2-7-5. PRETRIAL AGREEMENT: TESTIFY IN ANOTHER CASE

MJ: In your pretrial agreement, you have offered to testify truthfully as to the facts and circumstances of this case, as you know them, in the trial of United States v. (state name of case). If you are called as a witness in that case and either refuse to testify or testify untruthfully, the convening authority will no longer be bound by the sentence limitations contained in Appellate Exhibit _____. Do you understand that?

ACC: (Responds.)

2-7-8. PRETRIAL AGREEMENT: ARTICLE 32 WAIVER

MJ: Your pretrial agreement states that you agreed to waive the Article 32 investigation. Have you discussed what an Article 32 investigation is with your defense counsel?

ACC: (Responds.)

MJ: Do you understand that no charge against you may be tried at a general court-martial without first having an Article 32 investigation concerning that charge unless you agree otherwise?

ACC: (Responds.)

MJ: Do you understand that the primary purpose of the Article 32 investigation is to have a fair and impartial hearing officer inquire into the truth of the matters set forth in the charge(s) and to obtain information on which to recommend what disposition should be made of the case?

ACC: (Responds.)

MJ: Do you also understand that you have the right to be present at the Article 32 investigation and to be represented by counsel at the investigation?

ACC: (Responds.)

MJ: Do you understand that you could call witnesses, cross-examine Government witnesses, and present documents for the investigating officer to consider in arriving at his or her recommendations?

ACC: (Responds.)

MJ: Do you understand that you could have provided sworn or unsworn testimony at the Article 32 investigation?

ACC: (Responds.)

MJ: Do you also understand that one possible strategy for you and your counsel at the Article 32 investigation could have been an attempt to have the Article 32 officer recommend a disposition of the charge(s) other than trial by general court-martial?

ACC: (Responds.)

MJ: Did you know about all these rights that you would have at the Article 32 investigation at the time you elected to give up the right to have the Article 32 investigation?

ACC: (Responds.)

MJ: Do you freely and willingly agree to proceed to trial by general court-martial without an Article 32 investigation occurring in your case?

ACC: (Responds.)

MJ: Defense Counsel, if the accused's plea of guilty is determined to be improvident will the accused be afforded an Article 32 investigation or is it permanently waived?

DC: (Responds.)

MJ: Trial Counsel, what is the government's position?

TC: (Responds.)

2-7-9. PRETRIAL AGREEMENT: WAIVER OF MEMBERS

MJ: Your pretrial agreement states that you agree to waive, that is give up, trial by members and to select trial by military judge alone.

ACC: (Responds.)

MJ: Do you understand the difference between trial before members and trial before military judge alone, as I explained to you earlier?

ACC: (Responds.)

MJ: Did you understand the difference between the various types of trials when you signed your pretrial agreement?

ACC: (Responds.)

MJ: Did you understand that you were giving up trial with members when you signed your pretrial agreement?

ACC: (Responds.)

MJ: Was that waiver a free and voluntary act on your part?

ACC: (Responds.)

2-7-10. PRETRIAL AGREEMENT: WAIVER OF MOTIONS

NOTE: Waiver of motions in a pretrial agreement. RCM 705 prohibits any term in a pretrial agreement that is not voluntary or deprives the accused of the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. Thus, a term to 'waive all motions' is overbroad and cannot be enforced. However, if the pretrial agreement includes a term to waive a particular motion not precluded by R.C.M. 705 or a term to 'waive all waiveable motions' or words to that effect, proceed along the lines of the instruction below.

MJ: (To accused) Your pretrial agreement states that you waive, or give up, the right to make a motion regarding (state the specific motion(s) waived by the pretrial agreement). I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea. Some motions, however, such as motions to dismiss for a lack of jurisdiction or failure to state an offense, for example, can never be given up. Do you understand that this term of your pretrial agreement means that you give up the right to make (this) (any) motion which by law is given up when you plead guilty?

ACC: (Responds.)

MJ: In particular, do you understand that this term of your pretrial agreement precludes this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon (this) (these) motion(s).

ACC: (Responds.)

MJ: When you elected to give up the right to litigate (this) (these) motion(s), did your defense counsel explain this term of your pretrial agreement and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated the waiver of motion(s) provision?

DC: (Responds.)

NOTE: Unlawful Command Influence. The Government may not require waiver of an unlawful command influence motion to obtain a pretrial agreement. The accused, however, may offer to waive an unlawful command influence motion if the unlawful command influence involves issues occurring only during the accusatory phase of the court-martial (i.e., during preferral, forwarding, and referral of charges), as opposed to the adjudicative process (i.e., which includes interference with witnesses, judges, members, and counsel). See United States v. Weasler, 43 M.J. 15 (1995). If a waiver of an unlawful command influence motion originated with the prosecution, the judge should declare the term void as a matter of public policy. For other motions not falling within the prohibited terms of R.C.M. 705, regardless of their origination, and for unlawful command influence motions originated by the defense which involve issues only during the accusatory phase, continue as set forth below:

MJ: (To accused) (Although the government originated this term of your pretrial agreement,) Did you freely and voluntarily agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the pretrial agreement?

DC: (Responds.)

MJ: (To accused) Do you understand that if (this) (these) motion(s) were made and granted by me, then a possible ruling could have been that (all charges against you would be dismissed) (the statement you gave to (your command) (law enforcement authorities) (_____) could not be used as evidence against you at this court-martial) (_____)?

ACC: (Responds.)

MJ: (To accused) Knowing what your defense counsel and I have told you, do you want to give up making (this) (these) motion(s) in order to get the benefit of your pretrial agreement?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial agreement?

ACC: (Responds.)

**2-7-11. PRETRIAL AGREEMENT: WAIVER OF MOTION FOR ILLEGAL
PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT**

MJ: Your pretrial agreement indicates that you agree to waive, or give up, your right to make a motion about whether you have suffered from illegal pretrial punishment while being held for trial. Article 13 of the Uniform Code of Military Justice essentially prohibits anyone from imposing pretrial punishment upon you except for the minimum amount of restraint necessary to ensure your presence for trial. Do you understand what I have said?

ACC: (Responds.)

MJ: However, the time of your internment under Article 122 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War does not constitute illegal pretrial punishment. Do you understand?

ACC: (Responds.)

MJ: What was the nature of the pretrial restraint, if any, that you have undergone pending this trial?

ACC: (Responds.)

MJ: (If accused had been in pretrial restraint:) What is it about this pretrial restraint that you believe may have been illegal?

ACC: (Responds.)

MJ: Tell me about other illegal pretrial punishment, if any, you may have suffered.

ACC: (Responds.)

MJ: (If accused has been in pretrial confinement:) Do you understand that the law requires that I award you day for day credit against the sentence for any lawfully imposed pretrial confinement imposed in this case?

ACC: (Responds.)

MJ: Do you also understand that if you convinced me that more likely than not you suffered from illegal pretrial punishment, then you would be entitled to (additional) credit against any sentence which you may receive in this case?

ACC: (Responds.)

MJ: Do you understand that, by this term of your pretrial agreement, you are giving up the right for this court, or any court considering an appeal of your case, to determine if you actually suffered from illegal pretrial punishment to include a claim for (additional) credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: Defense Counsel, have you considered the amount of credit you would have asked for if this issue were to be litigated?

DC: (Responds.)

MJ: (To the accused) Do you understand that the amount of credit for illegal pretrial punishment, if any, would be subject to my discretion depending on the seriousness of the illegal pretrial punishment? If you succeeded on this issue, do you understand that you may have received the credit sought by your defense counsel, or possibly more or less than that amount?

ACC: (Responds.)

MJ: Do you understand that by not litigating this issue, you will never know what credit for illegal pretrial punishment, if any, that you would be entitled to, and that you will receive no credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate the illegal pretrial punishment issue, did your defense counsel explain this issue and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated this term of the pretrial agreement?

DC: (Responds.)

MJ: (Although the government originated this term of your pretrial agreement,) (D)id you freely and voluntarily decide to agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial agreement?

ACC: (Responds.)

MJ: Knowing what I have now told you, do you still desire to give up the right to litigate the issue of illegal pretrial punishment as long as your pretrial agreement continues to exist?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial agreement?

ACC: (Responds.)

MJ: As I have stated, if I accept your waiver of the Article 13 issue, I will not order any credit to be applied against your sentence for illegal pretrial punishment. You may, however, bring to the court's attention (the conditions of your pretrial restraint) (and) (your perceived pretrial punishment) in the sentencing phase of the trial so that the court can consider such matters in deciding upon an appropriate sentence for you. Do you understand that?

ACC: (Responds.)

2-7-12. STATUTE OF LIMITATIONS

NOTE: Unless it affirmatively appears in the record that the accused is aware of (his)(her) right to plead the statute of limitations when it is obviously applicable, the military judge has a duty to advise the accused of the right to assert the statute in bar of trial. This advice should be given before the accused is allowed to enter a plea except in the unusual case where the applicability of the statute first becomes known after evidence is presented or after findings. The advice may be substantially as follows:

MJ: _____, one of the offenses for which you are about to be tried is (specify the offense). This offense is alleged to have been committed more than (five) (___) years before the date upon which the sworn charges in this case were received by a summary court-martial convening authority. It therefore appears that the statute of limitations may properly be asserted by you in bar of trial for this offense. In other words, this specification (and charge) must be dismissed upon your request. Take time to consult with your counsel and then advise me whether you wish to assert the statute of limitations in bar of trial for the offense of (specify the offense).

NOTE: An election by the accused to assert the statute should be treated as a motion to dismiss. Where the motion to dismiss because of the statute of limitations raises a question of fact, the military judge should defer ruling until all evidence has been presented. When determination of such issue is essential to the question of guilt or innocence of an alleged offense, the issue of fact must be decided by the court pursuant to appropriate instructions. RCM 905 and 907.

2-7-13. MOTION FOR FINDING OF NOT GUILTY

NOTE: The defense counsel may make any motion for a finding of not guilty when the Government rests or after the defense has rested, or both. Such a motion should be made at a sidebar conference or out-of-court session. Before the motion is ruled upon, the defense counsel may properly be required to indicate specifically wherein the evidence is legally insufficient. Also, the ruling on the motion may be deferred to permit the trial counsel to reopen the case for the prosecution and produce any available evidence. The military judge rules finally on the motion for findings of not guilty. If there is any evidence which, together with all inferences which can properly be drawn therefrom and all applicable presumptions, could reasonably tend to establish every essential element of an offense charged, the motion will not be granted. If, using the same test, there is insufficient evidence to support the offense charged, but there is sufficient evidence to support a lesser included offense, the military judge may grant the motion as to the greater part and, if appropriate, the corresponding charge. See RCM 917. Normally, the motion should not be made before the court members. If the motion is mistakenly made before the members and is denied, the military judge should instruct the members as follows:

MJ: You are advised that my ruling(s) on the defense motion for a finding of not guilty must not influence you in any way when you consider whether the accused is guilty or not guilty. The ruling(s) (was) (were) governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be

determined by you without any references to my prior ruling(s) on the motion(s) for a finding of not guilty.

NOTE: If the motion is granted in part, so that the specification is reduced to a lesser offense, the military judge should instruct the members as follows:

MJ: You are advised that I have found the accused not guilty of the part of (the) Specification (___) of (the) Charge _____ which alleges the offense of _____. However, the accused remains charged in this specification with the lesser offense of _____. My ruling must not influence you in any way when you consider whether the accused is guilty or not guilty of the lesser offense. The ruling was governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty of the lesser offense. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without reference to my prior ruling on the motion for a finding of not guilty.

NOTE: Depending upon the complexity of the changes resulting from a partial finding of not guilty, the military judge should direct the members to amend their copies of the flyer or direct preparation of a new flyer.

2-7-14. RECONSIDERATION INSTRUCTION (FINDINGS)

NOTE: An instruction substantially as follows must be given when any court member proposes reconsideration:

MJ: Reconsideration is a process wherein you are allowed to re-vote on your finding(s) after you have reached a finding of either guilty or not guilty. The process for reconsideration is different depending on whether the proposal to reconsider relates to a finding of guilty or a finding of not guilty. After reaching your finding(s) by the required concurrence, any member may propose that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the finding(s). In order for you to reconsider and re-vote on a finding, the following rules apply:

Table 2-4
Votes Needed for Reconsideration of Findings

No. of Members	Not Guilty	Guilty
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5

MJ: If the proposal is to reconsider a not guilty finding, then a majority of the members must vote by secret written ballot in favor of reconsideration. Because we have _____ members, that means _____ members must vote in favor of reconsidering any finding of not guilty. If the proposal is to reconsider a guilty finding, then more than one-third of the members must vote by secret written

ballot in favor of reconsideration. Because we have _____ members, that means _____ members must vote in favor of reconsidering any finding of guilty. (If the proposal is to reconsider a guilty finding where the death penalty is mandatory for that finding, which means in this case, a guilty finding for the offense(s) of _____, then a proposal by any member for reconsideration regarding (that) (those) offense(s) requires you to reconsider that finding.) If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the findings as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for determining whether the accused is guilty or not guilty, to include the procedural rules pertaining to your voting on the findings and (the required two-thirds concurrence for a finding of guilty) (the unanimous vote requirement for a finding of guilty for a capital offense). (COL) (____) _____, when the findings are announced, do not indicate whether they are the original findings or the result of reconsideration.

2-7-16. CLEMENCY (RECOMMENDATION FOR SUSPENSION)

MJ: Although you have no authority to suspend either a part of or the entire sentence that you adjudge, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority. Therefore, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the Convening or higher Authority refuses to adopt your recommendation for suspension.

If fewer than all members of the court wish to recommend suspension of a portion of or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the President, after announcing the sentence, may announce the recommendation and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a portion of or the entire sentence is solely within the discretion of the court.

However, you should keep in mind that your responsibility is to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the Convening or higher Authority.

2-7-17. CLEMENCY (ADDITIONAL INSTRUCTIONS)

MJ: It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. Your responsibility is to adjudge a sentence which you regard as fair and just at the time it is imposed and not a sentence which will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation. You may make the court's recommendation expressly dependent upon such mitigating factors as (the) (attitude) (conduct) (of) (or restitution by) the accused after the trial and before the convening authority's action.

2-7-18. "HUNG JURY" INSTRUCTION

NOTE: Whenever any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory, or the military judge, after discussion with counsel for both sides and the accused, determines the jury has been deliberating for an inordinate length of time, the court may be advised substantially as follows:

MJ: As the sentence in this case is discretionary with you members, you each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence. Accordingly, opinions may properly be changed by a full and free discussion during your deliberations. You should pay proper respect to each other's opinions, and with an open mind you should conscientiously compare your views with the views of others. Discussion may follow as well as precede the voting. All members must have a full and fair opportunity to exchange their points of view and to persuade others to join them in their beliefs. It is generally desirable to have the theories for both the prosecution and the defense weighed and debated thoroughly before final judgment. You must not go into the deliberation room with a fixed determination that the sentence shall represent your opinion of the case at the moment, nor should you close your ears to the arguments of the other members who have heard the same evidence, with the same attention, with an equal desire for truth and justice, and under the sanction of the same oath. But you are not to yield your judgment simply because you may be outnumbered or outweighed.

If, after comparing views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.

NOTE: In capital cases, only one vote on the death penalty may be taken.

NOTE: If the president subsequently announces that the court is unable to agree upon a sentence, a mistrial as to sentence should be declared. The court should then be adjourned.

2-7-19. RECONSIDERATION INSTRUCTION (SENTENCE)

MJ: Reconsideration is a process wherein you are allowed to re-vote on a sentence after you have reached a sentence. The process for reconsideration is different depending on whether the proposal to reconsider relates to increasing or decreasing the sentence. After reaching a sentence by the required concurrence, any member may propose that the sentence be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the sentence. In order for you to reconsider and re-vote on the sentence, the following rules apply:

**Table 2-5
Votes Needed for Reconsideration of Sentence**

No. of Members	Increase Sentence	Decrease Sentence (10 years or less)	Decrease Sentence (Conf > 10 years)
3	2	2	
4	3	2	
5	3	2	2
6	4	3	2
7	4	3	2
8	5	3	3
9	5	4	3
10	6	4	3
11	6	4	3
12	7	5	4

If the proposal to reconsider is with a view to increasing the sentence, then a majority of the members must vote by secret written ballot in favor of reconsideration. Because we have _____ members, that means at least _____ members must vote in favor of reconsideration with a view to increase the sentence. If the proposal to reconsider is with a view to decrease the sentence, then more than one-third of the members must vote by secret written ballot in favor of reconsideration. Since we have _____ members, then _____ members must vote in favor of reconsideration with a view to decrease the sentence. (However, if the sentence you have reached includes confinement in excess of ten years (or confinement for life) (or confinement for life

without eligibility for parole), then only more than one-fourth of the members, or at least _____ members must vote in favor of reconsideration with a view to decrease the sentence.) (If the sentence you have reached is death, then a proposal by any member for reconsideration requires you to reconsider.) If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for proposing and determining an appropriate sentence to include the two-thirds (or three-fourths) (or unanimous) concurrence required for a sentence. (COL) (____) _____, when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

2-7-20. COMMENT ON RIGHTS TO SILENCE OR COUNSEL

NOTE: Comment on or question about an accused's exercise of a right to remain silent, to counsel, or both. Except in extraordinary cases, a question concerning, evidence of, or argument about, an accused's right to remain silent or to counsel is improper and inadmissible. If such information is presented before the fact finder, even absent objection, the military judge should: determine whether or not this evidence is admissible and, if inadmissible, evaluate any potential prejudice, make any appropriate findings, and fashion an appropriate remedy. In trials with members, this should be done in an Article 39(a) session. Cautions to counsel and witnesses are usually appropriate. If the matter was improperly raised before members, the military judge must ordinarily give a curative instruction like the following, unless the defense affirmatively requests one not be given to avoid highlighting the matter. Other remedies, including mistrial, might be necessary.

MJ: (You heard) (A question by counsel may have implied) that the accused may have exercised (his)(her) (right to remain silent) (and) (or) (right to request counsel). It is improper for this particular (question) (testimony) (statement) to have been brought before you. When suspected or accused of a criminal offense, the accused has (an absolute right to remain silent) (and) (or) (certain rights to counsel). That the accused may have exercised (his)(her) right(s) in this case must not be held against (him)(her) in any way. You must not draw any inference adverse to the accused because (he)(she) may have exercised such right(s), and the exercise of such right(s) must not enter into your deliberations in any way. You must disregard the (question) (testimony) (statement) that the accused may have invoked (his)(her) right(s). Will each of you follow this instruction?

MBRS: (Respond.)

2-7-22. VIEWS AND INSPECTIONS

NOTE: Guidance on views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. A view or inspection should be permitted only in extraordinary circumstances (See NOTE below). A view or inspection shall take place only in the presence of all parties, the members (if any), the military judge and the reporter. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made a part of the record. The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible. Before conducting the session described below in the presence of the members, the military judge should hold an Article 39(a) session to determine exactly what place or items will be viewed or inspected and that the below procedures and instructions are properly tailored to the circumstances.

NOTE: Considerations whether to permit a view.

a. The party requesting a view or inspection has the burden of proof both as to relevance and extraordinary circumstances. The military judge must be satisfied that a view or inspection is relevant to guilt or innocence as opposed to a collateral issue. The

relevance must be more than minimal and, even when relevance is established, the proponent must still establish extraordinary circumstances.

b. Extraordinary circumstances exist only when the military judge determines that other alternative evidence (testimony, sketches, diagrams, maps, photographs, videos, etc.) is inadequate to sufficiently describe the premises, place, article, or object. The military judge should also consider the orderliness of the trial, how time consuming a view or inspection would be, the logistics involved, safety concerns, and whether a view or inspection would mislead or confuse members.

c. A view is not intended as evidence, but simply to aid the trier of fact in understanding the evidence.

d. Counsel and the military judge should be attentive to alterations to, or differences in, the item or location to be viewed or inspected as compared to the time that the place or item is relevant to the proceedings. Differences in time of day, time of the year, lighting, and other factors should also be discussed. The military judge should be prepared, with assistance of counsel, to note these differences to the members.

MJ: The court will be permitted to view (the place in which the offense charged in this case is alleged to have been committed) (_____) as requested by (trial) (defense) counsel. Does the (trial) (defense) counsel desire that an escort accompany the court?

(TC) (DC): Yes, I suggest that _____ serve as the escort. (He/She has testified as to the (place) (_____) and I believe that it is desirable to have him/her as escort.)

MJ: Does (trial) (defense) counsel have any objection to _____ as escort?

(TC) (DC): (No objection) (_____).

MJ: Have _____ come into the courtroom. (The proposed escort enters the courtroom.)

TC: (To escort) State your full name, (grade, organization, station, and armed force) (occupation and (city and state) (country) of residence).

Escort: _____.

MJ: The court has been authorized to inspect (the place in which the offense charged in this case is alleged to have been committed) (_____) and desires you to act in the capacity of escort. Do you have any objections to serving as escort?

Escort: No, your Honor.

MJ: Trial counsel will administer the oath to the escort.

TC: Please raise your right hand. Do you (swear) (affirm) that you will escort the court and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed) (____); and that you will not speak to the court concerning (the alleged offense) (____), except to describe (the place aforesaid) (_____). (So help you God.)

Escort: I do.

MJ: This view is being undertaken to assist the court in understanding and applying the evidence admitted in the trial. The view itself is not evidence; it merely enables the court to consider and apply the evidence before it in the light of the knowledge obtained by the inspection. Likewise, nothing said at the inspection is to be considered as evidence. The court will not hear witnesses or take evidence at the view. Counsel and members of the court properly may ask the escort to point

out certain features, but they must otherwise refrain from conversation. Counsel, the members, and I will be provided with paper and a writing instrument to write out any questions of the escort and the questions will be marked as an appellate exhibit. The reporter is instructed to record all statements made at the view by counsel, the accused, the escort, the members, or me. Reenactments of the events involved or alleged to have been committed are not authorized. The escort, counsel, the accused, the reporter, and I will be present with the court at all times during the view. The court will now recess and remain in the vicinity of the courtroom to await necessary transportation. When the view has been completed, the court will reassemble and the regular proceedings will be resumed.

Are there any questions from the members about the procedure we are to follow?

MBRS: (Respond)

MJ: (Other than at the previous Article 39(a) session held earlier on this matter,) (D)o counsel have any objections to these instructions or any requests about how the viewing is to be conducted?

TC/DC: (Respond)

NOTE: The court should then proceed to the place to be inspected. After the court has assembled at the place to be viewed, the military judge should state in substance as follows:

MJ: Let the record show that it is now ___ hours on day ___ of ___ 20 ___; all parties to the trial who were present when the court recessed are present; and that ___ is also present.

NOTE: The military judge should then ask questions of the escort to identify the physical location of the court.

MJ: The members of the court are at liberty to look around. If you have questions to ask of the escort, please write them out so that I can ask them in the presence of all the parties to the trial. Remain together. Please bear in mind that everything said during the course of the view must be recorded by the court reporter. The members may not talk or otherwise communicate among themselves.

NOTE: The court should then be allowed sufficient time to inspect the place or item in question.

MJ: Does any member or counsel have any questions to ask the escort? (If so, please write them out on the forms provided.) If not, I suggest we recess until ____.

NOTE: Once the view is conducted, the military judge should conduct an Article 39(a) session substantially as follows:

MJ: Does any party have any objections to how the view was conducted or to anything that occurred during the view?

TC/DC: (Respond.)

NOTE: After the court is called to order and all parties to the trial are accounted for, the military judge should make the following announcement:

MJ: Let the record show that, during the recess, the members of the court, counsel, the accused, the escort, the military judge, and the reporter viewed (the place in which the offense charged in this case is alleged to have been committed) (which was identified by the escort as _____) (____). The transcript of the reporter's notes taken at the view will be inserted at the proper chronological point in the record of trial. The members are instructed to avoid, and not go to, the location we just visited until the trial has ended.

2-7-23. ABSENT ACCUSED INSTRUCTION: PRELIMINARY FINDINGS

MJ: Under the law applicable to trials by court-martial, various circumstances may exist whereby a court-martial can proceed to findings and sentence, if appropriate, without the accused being present in the courtroom. I have determined that one or more of these circumstances exist in this case. You are not permitted to speculate as to why the accused is not present in court today and that you must not draw any inference adverse to the accused because (he)(she) is not appearing personally before you. You may neither impute to the accused any wrongdoing generally, nor impute to (him)(her) any inference of guilt as respects (his)(her) nonappearance here today. Further, should the accused be found guilty of any offense presently before this court, you must not consider the accused's nonappearance before this court in any manner when you close to deliberate upon the sentence to be adjudged. Will each member follow this instruction?

**2-7-24. STIPULATIONS OF FACT AND EXPECTED TESTIMONY (NOT IAW
A PRETRIAL AGREEMENT)**

NOTE: Whenever the prosecution or defense offers a stipulation into evidence, the military judge should conduct an inquiry with the accused outside the presence of the court members along the following lines:

MJ: _____, before signing the stipulation, did you read it thoroughly?

ACC: (Responds.)

MJ: Do you understand the contents of the stipulation?

ACC: (Responds.)

MJ: Do you agree with the contents of the stipulation?

ACC: (Responds.)

MJ: Before signing the stipulation, did your defense counsel explain the stipulation to you?

ACC: (Responds.)

MJ: Do you understand that you have an absolute right to refuse to stipulate to the contents of this document?

ACC: (Responds.)

MJ: You should enter into this stipulation only if you believe it is in your best interest to do so. Do you understand that?

ACC: (Responds.)

MJ: _____, I want to ensure that you understand how this stipulation is to be used:

(IF STIPULATION OF FACT:) MJ: When counsel for both sides and you agree (to a fact) (the contents of a writing), the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered along with all the other evidence in the case. Do you understand that?

ACC: (Responds.)

(IF STIPULATION OF EXPECTED TESTIMONY:) MJ: When counsel for both sides and you agree to a stipulation of expected testimony, you are agreeing that if _____ were present in court and testifying under oath, he/she would testify substantially as set forth in this stipulation. The stipulation does not admit the truth of the person's testimony. The stipulation can be contradicted, attacked, or explained in the same way as if the person was testifying in person. Do you understand that?

ACC: (Responds.)

MJ: _____, knowing now what I have told you and what your defense counsel earlier told you about this stipulation, do you still desire to enter into the stipulation?

ACC: (Responds.)

MJ: Do counsel concur in the contents of the stipulation?

TC/DC: (Respond.)

MJ: The stipulation is admitted into evidence as _____.

NOTE: Stipulations of expected testimony are admitted into evidence, but only read to the court members. They are not to be given to them for use in deliberations.

2-7-25. CONFSSIONAL STIPULATION OF FACT INQUIRY

NOTE: The following inquiry is required by United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977), whenever a stipulation “practically amounts to a confession” as set forth in the discussion following RCM 811(c).

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

TC/DC: (Respond.)

MJ: _____, I have before me Prosecution Exhibit ____ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

MJ: Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, the defense counsel, and you that the contents of the stipulation are true, and if entered into evidence are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

MJ: Are you voluntarily entering into this stipulation because you believe it is in your own best interest to do so?

ACC: (Responds.)

MJ: _____, the government has the burden of proving beyond a reasonable doubt every element of the offense(s) with which you are charged. By stipulating to the material elements of the offense(s), as you are doing here, you alleviate that burden. That means that based upon the stipulation alone, and without receiving any other evidence, the count can find you guilty of the offense(s) to which the stipulation relates. Do you understand that?

ACC: (Responds.)

(IF JUDGE ALONE TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.

First, I will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates.

And second, I will use it in determining an appropriate sentence for you.

(IF MEMBERS TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.

First, members will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates.

And second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.

Do you understand and agree to these uses of the stipulation?

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. You should, therefore, let me know now if there is anything whatsoever in the stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.

NOTE: The military judge should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused will say during the inquiry establishing the factual basis for the stipulation.

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation the truth?

ACC: (Responds.)

MJ: Is there anything in the stipulation that you do not wish to admit that is true?

ACC: (Responds.)

MJ: _____, have you consulted fully with your counsel about the stipulation?

ACC: (Responds.)

MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?

ACC: (Responds.)

MJ: _____, at this time I want you to tell me what the factual basis is for this stipulation.

Tell me what happened.

NOTE: At this point the military judge must personally question the accused to develop information showing what the accused did or did not do and what he intended, where intent is pertinent. The aim is to make clear the factual basis for the recitations in the stipulation. The military judge must be alert to the existence of any inconsistencies between the stipulation and the explanations of the accused. If any arise they must be discussed thoroughly with the accused, and the military judge must resolve them or reject the stipulation.

MJ: Does either counsel believe that any further inquiry is required into the factual basis for the stipulation?

TC/DC: (Respond.)

MJ: _____, has anybody made any promises or agreements with you in connection with this stipulation?

ACC: (Responds.)

MJ: Counsel, are there any written or unwritten agreements between the parties in connection with the stipulation?

NOTE: Should this inquiry reveal the existence of an agreement not to raise defenses or motions, the stipulation will be rejected as inconsistent with Article 45(a).

TC/DC: (Respond.)

MJ: Defense Counsel, do you have any objections to Prosecution Exhibit ___ for Identification?

DC: (Responds.)

MJ: Prosecution Exhibit ___ for Identification is admitted into evidence.

2-7-26. ADVICE ON CONSEQUENCES OF VOLUNTARY ABSENCE

NOTE: The following inquiry is suggested when the accused is arraigned but trial on the merits is postponed to a later date. See RCM 804(b)(1).

MJ: _____, what has just happened is called an arraignment. An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every stage of your trial. However, if you are voluntarily absent on the date this trial is scheduled to proceed, you may forfeit the right to be present. The trial could go forward on the date scheduled even if you were not present, up to and including sentencing, if necessary. Do you understand this?

ACC: (Responds.)

2-7-28. WAIVER OF ASSISTANCE OF AN INTERPRETER

MJ: _____, under Article 72 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, you have the right to the assistance of an interpreter during the preliminary investigation and at trial. You also have the right to waive your right to the assistance of an interpreter. Do you understand these rights?

ACC: (Responds.)

MJ: Do you have any questions about your right to the assistance of an interpreter?

ACC: (Responds.)

MJ: Have you discussed this with your defense counsel?

ACC: (Responds.)

MJ: Do you consent to the trial proceeding today without the assistance of an interpreter?

ACC: (Responds.)

MJ: Has anyone forced you to consent to proceeding today?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his)(her) right to the assistance of an interpreter at this court-martial.

Trial counsel, you may proceed.

2-7-29. REQUEST FOR REPLACEMENT OF INTERPRETER

MJ: _____, under Article 72 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, you have the right to the assistance of an interpreter during the preliminary investigation and at trial. You also have the right to object to the interpreter detailed to your case and to request a replacement. Do you understand these rights?

ACC: (Responds.)

MJ: Do you have any questions about these rights?

ACC: (Responds.)

MJ: Have you discussed this with your defense counsel?

ACC: (Responds.)

MJ: What is the basis of your objection to the interpreter detailed to your case?

ACC: (Responds.)

MJ: I find that the accused (has) (has not) shown good cause to request a new interpreter at this court-martial.

(MJ: Counsel, who is the new interpreter to be detailed to this court-martial?

TC/DC: (Responds.)

Trial counsel, you may proceed.

*Continue at INSTRUCTION 2-1, PROCEDURAL GUIDE FOR ARTICLE 39(a) SESSION,
at “Assistance of an interpreter.”*

Chapter 3

INSTRUCTIONS ON ELEMENTS OF

OFFENSES

GENERAL INFORMATION ABOUT THIS CHAPTER.

a. Substantive offenses. Article 64, GC IV, provides that “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.” Further, Article 65, GC IV, provides that “The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.”

Chapter 3 is reserved for substantive offenses that would be applicable in a provost court conducted in occupied territory. The substantive offenses prescribed by the Occupying Power should be incorporated into Chapter 3 as directed by the Occupying Power. The military judge should be mindful of any specific guidance such agency may issue regarding substantive offenses and proceed accordingly. Additionally, see DA Pamphlet 27-9-1, Chapter 5-A, for those offenses under the law of war with which a civilian internee might be charged.

b. In a provost court, the court is not bound to apply the specified maximum or minimum punishment, and the military judge must instruct the court accordingly. Article 68, GC

IV. If an instruction includes a term having a special legal connotation (term of art), the term should be defined for the benefit of the other commission members, and ordinarily appears in the “DEFINITIONS AND OTHER INSTRUCTIONS” section of each instruction. Each pattern instruction set out in Chapter 3 should be prefaced by the language found in Chapters 2 (2–5–9) or 8 (8–3–8), PREFATORY INSTRUCTIONS ON FINDINGS. In the elements and definitions sections, language found in parentheses is dependent on the facts of the case, and may not be required, depending on the pleadings, the facts, and the contentions of the parties. Language set forth in brackets denotes elements which are alternative means of committing an offense, or aggravating factors that are not required to be instructed upon unless pled.

c. Notes may be used extensively throughout the instructions in Chapter 3. When an instruction follows a note in the “DEFINITIONS AND OTHER INSTRUCTIONS” section, that instruction should be given only if the subject matter of the note applies to the facts and circumstances of that case. Notes in other portions of Chapter 3 are intended to explain the applicability of the instruction generally, or to alert the trial judge to optional elements or unusual applications of the instruction.

Chapter 4

CONFESSIONS INSTRUCTIONS

NOTE: Chapter 4 is reserved for instructions on confessions that would be applicable in a provost court conducted in occupied territory. The codal provisions on confessions prescribed by the Occupying Power should be incorporated into Chapter 4 as directed by the Occupying Power. The military judge should be mindful of any specific guidance such agency may issue regarding confessions and proceed accordingly. The confessions instructions retained in the Military Judges' Benchbook used in courts-martial and in the Military Judges' Benchbook for Trials of Enemy Prisoners of may be helpful as a guide to tailor confessions instructions for a provost court. See Chapter 4, Military Judges' Benchbook (DA Pam 27-9) and Chapter 4, Military Judges' Benchbook for Trials of Enemy Prisoners of War (DA Pam 27-9-1).

Chapter 5

SPECIAL AND OTHER DEFENSES

5-1. GENERAL INFORMATION ABOUT DEFENSES

Chapter 5 is reserved for defenses that would be applicable in a provost court conducted in occupied territory. The codal provisions on defenses prescribed by the Occupying Power should be incorporated into Chapter 5 as directed by the Occupying Power. The military judge should be mindful of any specific guidance such agency may issue regarding substantive offenses and proceed accordingly. The confessions instructions retained in the Military Judges' Benchbook used in courts-martial and in the Military Judges' Benchbook for Trials of Enemy Prisoners of War may be helpful as a guide to tailor confessions instructions for a provost court. See Chapter 5, Military Judges' Benchbook (DA Pam 27-9) and Chapter 5, Military Judges' Benchbook for Trials of Enemy Prisoners of War (DA Pam 27-9-1).

Chapter 6

MENTAL CAPACITY AND RESPONSIBILITY

6-1. SANITY INQUIRY.

NOTE: Chapter 6 is reserved for instructions on mental capacity and responsibility that would be applicable in a provost court conducted in occupied territory. The codal provisions on mental capacity and responsibility prescribed by the Occupying Power should be incorporated into Chapter 6 as directed by the Occupying Power. The military judge should be mindful of any specific guidance such agency may issue regarding substantive offenses and proceed accordingly. The sanity instruction retained in the Military Judges' Benchbook used in courts-martial and in the Military Judges' Benchbook for Trials of Enemy Prisoners of War may be helpful as a guide to tailor mental responsibility instructions for a provost court. See Chapter 6, Military Judges' Benchbook (DA Pam 27-9) and Chapter 6, Military Judges' Benchbook for Trials of Enemy Prisoners of War (DA Pam 27-9-1).

Chapter 7

EVIDENTIARY INSTRUCTIONS

NOTE: Chapter 7 is reserved for additional evidentiary instructions that would be applicable in a provost court conducted in occupied territory. Absent any guidance from the OP to the contrary, the evidentiary instructions in Chapter 7 of the Military Judges' Benchbook (DA Pam 27-9) should be tailored for use by Provost Courts.

Chapter 8

TRIAL PROCEDURE AND INSTRUCTIONS

FOR A CAPITAL CASE

This procedural guide outlines the sequence of events normally followed in any provost court, which has been referred capital. In addition to serving as a procedural guide in a capital case, it provides the majority of standard, non-evidentiary instructions on findings and sentencing in a capital case. The order in which the guide and instructions appear generally corresponds with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate.

NOTE: Capital case. Under Article 68, GC IV, “The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65, GC IV, may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in form before the occupation began.... In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.”

Section I

Initial Session Through Arraignment

8-1. PROCEDURAL GUIDE FOR ARTICLE 39(a) SESSION.

MJ: Please be seated. This Article 39(a) session is called to order.

NOTE: Use of an interpreter. The accused shall be assisted by an interpreter during the preliminary investigation and at trial. Art. 72, GC IV. The military judge should

proceed at a pace that allows the interpreter to translate the proceedings to the accused and to translate the accused's responses back to the court. Frequent pauses for translation will thus be necessary. If the accused requires a translator in order to communicate with counsel, an interpreter must be designated a member of the defense team. The accused, however, may waive such assistance. Art. 72, GC IV. If the accused waives the assistance of an interpreter, GO TO INSTRUCTION 2-7-28, WAIVER OF ASSISTANCE OF AN INTERPRETER. Further, the accused shall have the right at any time to object to the interpreter and to ask for a replacement. Art. 72, GC IV. If the accused requests a replacement interpreter, GO TO INSTRUCTION 2-7-29, REQUEST FOR REPLACEMENT OF INTERPRETER.

NOTE: The GC IV and UCMJ do not indicate who selects the interpreter. Presumably, the prosecution assigns an interpreter, and the interpreter may be regarded as a member of the accused's defense team. Cf. Yamashita transcript, Vol. I, at 4 (The prosecution assigned an interpreter, but the accused requested his own personal interpreter because he did not understand the assigned interpreter. The tribunal kept the assigned interpreter, but also allowed the accused's translator to be a part of the accused's defense team to provide a personal translation to the accused.)

(ASSISTANCE OF AN INTERPRETER: TC: The accused in this proceeding is entitled to the services of an interpreter. The prosecution requests that the proceedings be translated from English to _____ (state accused's native language) by _____ (state the name of the interpreter(s)).

MJ: The proceedings will be so translated. The interpreter(s) will now be sworn.

TC: Do you (swear) (affirm) that you will faithfully perform all the duties of interpreter in the case now in hearing (so help you God)?”

INT(S): (Respond.)

TC: This court-martial is convened by Court-Martial Convening Order Number _____, Headquarters _____, dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) and referred capital as reflected on the charge sheet; copies of which have been furnished the military judge, counsel, and the accused, (which is in a language that (he)(she) understands,) and which will be inserted at this point in the record.

NOTE: The military judge should examine the convening order(s) and any amendments for accuracy. If not a capital case, GO TO CHAPTER 2, TRIAL PROCEDURE AND INSTRUCTIONS.

NOTE: Article 71, GC IV, entitles the accused to a copy of documents in the language which he understands.

NOTE: Only minor changes may be made at trial to the convening orders. Any correction which affects the identity of the individual concerned must be made by an amending or correcting order.

(TC: The following corrections are noted in the convening orders:_____.)

NOTE: Protecting Power (PP). Generally, the PP would be designated pursuant to Articles 9 and 11, GC IV. Under certain circumstances, however, a substitute organization such as a humanitarian organization (e.g., International Committee of the Red Cross) may be used. See Art. 11, GC IV. The military judge should be mindful of any specific guidance that the OP or governing agency (i.e., Coalition Provisional Authority (CPA)) may issue regarding the PP and proceed accordingly.

NOTE: Occupying Power (OP). Under the GC IV, the OP is responsible for satisfying various procedural functions. However, the GC IV does not indicate whether such functions may be delegated to the prosecution. The military judge should be mindful of any specific guidance that the OP or governing agency (i.e., CPA) may issue regarding the delegation of the OP's functions and proceed accordingly.

*NOTE: Charge sheet. Trials of civilian internees should use the same Charge Sheet (DD Form 458) used in trials of members of the U.S. armed forces. RCM 307. See Major Charles J. Baldree, *War Crimes Trials: Procedural Due Process 29* (April 1967) (unpublished graduate course thesis, The Judge Advocate General's School, U.S. Army) (on file with U.S. Army Trial Judiciary).*

*NOTE: Capital case. Article 71, GC IV, requires that the accused and the PP be informed of any proceeding against civilian internees involving the death penalty or confinement for two years or more. The PP must receive the required notification at least **THREE** weeks before the date of the first hearing.*

TC: The charges have been properly referred to this court for trial and were served on the accused (on _____ (*enter the date of service*)), and (on) _____ (*enter the name of the Protecting Power*) on _____ (*enter the date of service*). The prosecution is ready to proceed (with the arraignment) in the case of United States v. _____ (*state accused's name*).

NOTE: Article 117, GC IV, states that “If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary [i.e., nonjudicial punishment] punishments only.”

NOTE: Date of service. The military judge must pay attention to the date of service. (When computing the days, do not count the day of service or day of trial).

a. Unlike the MCM, the GC IV does not explicitly provide for a CI accused's waiver of the service requirement. Cf. US v Garcia, 10 MJ 631, 633 (ACMR 1980) (date of service is not a bar to trial within the specified period, but merely provides a ground for accused to secure a continuance); US v Callahan, 1990 CMR Lexis 1216.

b. Article 71, GC IV, provides that the OP shall promptly inform the accused of the charges.

NOTE: The GC IV does not specify the time period in which the OP must notify the accused. The military judge should be mindful of any specific guidance that the OP or governing agency (i.e., CPA) may issue regarding the date of service on the accused and proceed accordingly.

c. The OP must “properly notify” the PP at least THREE weeks before the date of the first hearing. Art. 71, GC IV. The required notification must contain the following information:

(1) Description of the accused;

(2) Place of residence or detention;

(3) Specification of the charge or charges (with mention of the penal provisions under which it is brought);

(4) Designation of the court which will hear the case;

(5) Place and date of the first hearing.

A copy of the Staff Judge Advocate’s (SJA) pre-trial advice (as required by Article 34, UCMJ) (i.e., a written and signed statement advising: (1) whether each specification on the charge sheet alleges an offense under the UCMJ; (2) whether each allegation is warranted by the evidence indicated in the report of investigation, if any;(3) whether a court-martial would have jurisdiction over the accused and the offense(s); and (4) what action to be taken by the convening authority) may satisfy the notice requirement.

d. Unless, at the opening of the trial, the prosecution presents satisfactory evidence of timely receipt of the required notice by the accused and the Protecting Power, the military judge shall adjourn the trial (Art. 71, GC IV).

TC: The accused and the following persons detailed to this court are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) ((and) _____, Defense Counsel) ((and) _____, Assistant Defense Counsel) ((and) _____, Civilian Defense Counsel) ((and) _____ (*state name of selected advocate*), Defense Advocate) ((and) Advocate). The members (and the following person(s) detailed to this court) are absent: _____.

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

NOTE: Court reporter responsibilities. When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of the opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

NOTE: Oath for reporter. When the reporter was not previously sworn, the following oath, as appropriate, will be administered by the trial counsel:

“Do you (swear) (affirm) that you will faithfully perform all the duties of court reporter in the case now in hearing (so help you God)?”

TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____. (I am) (All members of the prosecution are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

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

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

8–1–1. RIGHTS TO COUNSEL.

MJ: *(addressing the accused)* You have certain rights that are afforded to you under Article 72 of the Geneva Convention Relative to the Protection of Civilians in Time of War. For example, Article 72 provides you with certain rights regarding representation by counsel. Has *(state name of detaining power)* advised you of these rights prior to this proceeding?

ACC: (Responds.)

NOTE: Article 72, GC IV, however, does not address the consequences if the OP fails to notify the accused of these rights, which are summarized in the following notes. The MJ may wish to consider granting a continuance if the accused was not aware of these rights.

MJ: I will (again) discuss these rights with you now.

NOTE: Rights to counsel. The accused shall be assisted by a qualified advocate or counsel of his own choice. Art. 72, GC IV..

- a. *Procedurally, the accused first selects a “qualified advocate or counsel” of his own choice.*
- b. *If the accused fails to select a qualified advocate or counsel, then the Protecting Power may provide him with an “advocate or counsel” to represent the accused.*
- c. *When the accused is facing (a) serious charge(s) and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel to represent the accused.*

NOTE: The designated advocate or counsel must be “qualified;” however, the GC IV does not further define this term. In a court-martial, Article 38(b), UCMJ, permits the accused to be represented by civilian or military counsel. A civilian counsel must be “(A) a member of the bar of a Federal court or of the bar of the highest court of a State; or (B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.” RCM 502(d)(3). See Soriano v. Hosken, 9 MJ 221, 222 (1980) (citing to US v. Nichols, 8 USCMA 119, 125 (1957), the Court acknowledged that a member of a local bar in a foreign country may be qualified to represent a military accused depending on his ability to demonstrate a fair standard of professional competence). On the other hand, RCM 506(e) provides that a “nonlawyer” may be present at the defense table for purpose of consultation subject to MJ discretion. There are no specific guidelines, however, for “nonlawyers” other than MRE 615. Cf. Yamashita (Commission permitted accused to have one of his subordinate officers, who was a government witness, present at defense table because

he was essential to presenting the accused's defense). Thus, if an "advocate" does not qualify to argue before the court under RCM 502(d)(3), the advocate may be permitted as a nonlawyer for consultation only. By analogy then, to satisfy both Article 72, GC IV, and RCM 502(d)(3) in a provost court, the accused may still be entitled to select another qualified counsel to represent him. See US v. Kraskouskas, 9 USCMA 607, 610 (1958) ("It is inconceivable that Congress would, on the one hand, prescribe exacting legal qualifications for appointed counsel, while on the other, permit an accused by his own selection to be represented by a nonlawyer this does not in any manner infringe upon his right to consult with a nonlawyer, or to even have a nonlawyer present at trial and seated at the counsel table."). Apart from failing to define "qualified," the GC IV likewise does not address who would determine whether the advocate or counsel is qualified in the first instance. Finally, it should be noted that security grounds may justify not allowing a "selected" advocate/counsel to participate if other qualified advocate/counsel are available to assist the accused.

NOTE: Pro se representation. Unlike the MCM, the GC IV does not contemplate pro se representation. Cf. US v. Moussaoui, 2002 US Dist. LEXIS 11135 (14 June 2002) (defendant's motion to proceed pro se granted).

NOTE: Change in representation. The GC IV does not address whether the accused may change representation during the trial, e.g., accused changes his mind later that he wants the assistance/representation of his own prisoner comrade, advocate, or counsel; accused does not want the advocate/counsel selected/appointed by the Protecting Power or the Occupying Power. Because the accused may not proceed pro se, it appears that he must accept the selected/appointed advocate/counsel. However,

the accused may be able to request a replacement advocate/counsel for good cause. The assumption is that this issue should be resolved by the Occupying Power before trial, or if this occurs at trial and for good cause, the court may grant a delay for the accused to obtain new representation.

MJ: _____, you have the right to select a qualified advocate or counsel of your choice to represent you. He/She is provided at no expense to you..

NOTE: The GC IV does not discuss costs of “representation”. Because CIs have the same procedural rights under a GCM as do service members, CIs receive free military representation and incur their own costs for civilian (or non-military) representation. However, the GC IV appears to place the financial burden on the OP for the costs of representation, arguably a greater entitlement than that afforded service members. Cf. 10 USC § 1037 (U.S. may pay counsel costs of U.S. military before foreign tribunals).

If you do not select a qualified advocate or counsel of your choice, _____ (enter the name of the Protecting Power) may provide you with an advocate or counsel to represent you at no expense to you.

However, (because of the seriousness of the charge(s) against you,) (because _____ (enter the name of the Protecting Power) is not functioning,) _____ (enter the name of the Occupying Power) shall detail a military defense counsel to represent you, subject to your consent, at no expense to you.

(_____ (state name of the appointed advocate or counsel) has been appointed to represent you.)

NOTE: The MCM affords the accused the right to select a different military lawyer. The GC IV, however, does not address whether a CI accused is able to request a different advocate or counsel who was appointed by the PP or OP. Arguably, the accused should be able to request a different advocate or counsel for good cause. Presumably, this issue should be resolved by the OP before trial begins, or if this occurs at trial and the accused presents good cause, the court may grant a delay for the accused to obtain a different advocate or counsel. The military judge should be mindful of any specific guidance that the governing agency may issue regarding a request for a different advocate or counsel and proceed accordingly.

You also have the right to request a different military lawyer to represent you. If the person you request is reasonably available, he or she would be appointed to represent you free of charge.

If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are only entitled to one military lawyer. You may ask his or her superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you (at no expense to _____ (enter the name of the Occupying Power)). If you are represented by a civilian lawyer, you can also keep your military lawyer on the

case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer.

Do you understand your rights to counsel?

ACC: (Responds.)

MJ: Do you have any questions about your rights to counsel?

ACC: (Responds.)

MJ: In addition, the qualified advocate or counsel selected to represent you shall be able to visit you freely and shall have available the necessary facilities to prepare your defense.

NOTE: Article 72, GC IV, provides that the accused's advocate or counsel is entitled to freely visit the accused and to the necessary facilities to prepare the accused's defense. See generally Zacarias Moussaoui case, U.S. District Court for the Eastern District of Virginia, Alexandria Division, Criminal Case No. 01-455-A (involving several pro se motions regarding defendant's rights to adequately prepare his defense, e.g., defendant's motion requesting access to witnesses held at Guantanamo Bay granted, but the government refused to follow the Court's order). Cf. Military Commission Order No. 1 (provides limited trial procedures to the accused).

You are also entitled to the services of an interpreter during the preliminary investigation and in preparation for trial and at the trial.

Lastly, representatives of _____ (enter the name of the Protecting Power) have the right attend the trial unless, in the interest of security, the sessions are to be closed. In the latter case,

_____ (enter the name of the Occupying Power) shall notify _____ (enter the name of the Protecting Power) accordingly that the sessions are to be held in camera.

NOTE: Article 74, GC IV. See Instruction 7-23, "Closed Trial Session", Impermissible Inference of Guilt, and RCM 804 and MRE 505 and 506.

Do you understand these rights?

ACC: (Responds.)

MJ: By whom will you be represented?

ACC: (Responds.)

MJ: Do you wish to be represented by (him/her) (them) alone?

ACC: (Responds.)

NOTE: Conflict of Interest: The military judge must be aware of any possible conflict of interest by counsel and, if a conflict exists, the military judge must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at INSTRUCTION 2-7-1, WAIVER OF CONFLICT-FREE COUNSEL.

MJ: Defense counsel will announce by whom (he/she) (they) (was) (were) detailed and (his/her) (their) qualifications.

NOTE: The military judge should require all defense counsel to place on the record their background(s) in detail, to specifically include capital litigation experience. In

U.S. v. Murphy, 50 M.J. 4 (1999), C.A.A.F. suggests defense counsel place on the record the following: training, experience, how long admitted to bar, the number of cases tried, experience in contested felony cases with panel members, experience in requesting mental health evaluations, dealings with forensic psychiatrists, the kinds of investigative assistance or other resources that are available, and knowledge or experience in the use of collateral resources.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____.
(I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

CIVILIAN DC: I am an attorney and licensed to practice law in the (state(s)) (country) of _____. (I am a member in good standing of the _____ bar(s).) I have not acted in any manner which might tend to disqualify me in this court-martial.

(OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

CDC: (Responds.)

MJ: I have been properly certified, sworn, and detailed (myself) (by _____) to this court-martial. Counsel for both sides appear to have the requisite qualifications and all personnel

required to be sworn have been sworn. Trial counsel will announce the general nature of the charge(s).

NOTE: Charges should allege nationality of accused, victim, accused's position, and that accused "violated the Law of Armed Conflict" or other codal provisions, if applicable. RCM 307(c)(2), Discussion, and 307(d).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____, (and) forwarded with recommendations as to disposition by _____; (and investigated by _____). (The Article 32 investigation was waived.)

NOTE: If the accused waived the Article 32 investigation, the military judge should inquire to ensure that it was a knowing and voluntary waiver. The script at INSTRUCTION 2-7-4, PRETRIAL AGREEMENT: ARTICLE 32 WAIVER, may be used, but, if the waiver was not IAW a pretrial agreement (PTA) the first sentence of the first question should be omitted. A plea of guilty may not be received to an offense for which the death penalty may be imposed by the court-martial (R.C.M. 910).

TC: Your Honor, are you aware of any matter which might be a ground for challenge against you?

MJ: (I am not.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Responds.)

8-1-2. FORUM RIGHTS.

MJ: _____, you have a right to be tried by a court consisting of at least five officer members (that is, a court composed of commissioned and/or warrant officers).

Because this case is referred to be tried as a capital case, that is, a case in which imposition of death may be a possible punishment if convicted, you may not be tried by military judge alone. Do you understand what I have said so far?

ACC: (Responds.)

MJ: Now, in a trial by court members, the members will vote by secret, written ballot and two-thirds of the members must agree before you could be found guilty of any offense. If you were found guilty, then two-thirds must also agree in voting on a sentence. If that sentence included confinement for more than 10 years, then three-fourths would have to agree.

For the death penalty to be adjudged, all court members would have to agree on both the findings of guilt and the sentence. In this case, that means that the court members must have a unanimous vote of guilty on the charge(s) and (its) (their) specification(s) for which death is an authorized sentence, that is, Specification(s) _____ of Charge(s) _____, (a) violation(s) of (state the codal law, order, or regulation) (_____), in order for the case to remain a capital case during any sentencing phase of the trial.

NOTE: RCM 1004 does include specific factors that would warrant imposition of the death penalty. Currently, the provision is unclear because it provides that death is possible where “death is authorized under the law of war”. Supreme Court precedent

may or may not require a factual finding in addition to the availability under the LOW. The government should be required to specify the factors, even if not listed in RCM 1004, it believes warrant the death penalty under the LOW. In addition, case law provides additional rights to the accused in a court-martial where death is sought.

NOTE: Article 71, GC IV, requires that the accused and PP “be informed as soon as possible of all proceedings involving the death penalty. Must advise court IAW Article 68, GC IV, that accused not bound by allegiance to DP.

NOTE: “No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve. The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.” Art. 75, GC IV.

TC: To impose a death sentence, the court members must: (1) unanimously find, beyond a reasonable doubt, that you are guilty of an offense for which death is an authorized punishment under the law; (2) unanimously find, beyond a reasonable doubt, evidence of (the) (at least one) aggravating factor; (3) unanimously find that any extenuating or mitigating circumstance(s) (is) (are) substantially outweighed by any aggravating circumstance(s), including the aggravating

factor(s); and (4) unanimously vote to impose death. If any one of these four votes is not unanimous, then death may not be adjudged.

Do you understand what I have told you so far?

ACC: (Responds.)

MJ: Do you understand the choices that you have?

ACC: (Responds.)

MJ: By what type of court do you wish to be tried?

ACC: (Responds.)

8-1-3. ARRAIGNMENT.

MJ: The accused will now be arraigned.

TC: All parties to the trial have been furnished with a copy of the charge(s). Does the accused want (it) (them) read?

NOTE: Article 71, GC IV, entitles accused to a copy of documents in the language which he understands.

DC: The accused (waives the reading of the charge(s)) (wants the charge(s) read).

MJ: (The reading may be omitted.) (Trial counsel will read the charge(s).)

TC: The charge(s) (is) (are) signed by _____, a person subject to the code as accuser; (is) (are) properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and (is) (are) properly referred to this court for trial by _____, the Convening Authority.

MJ: Accused and Defense Counsel please rise.

DC/ACC: (Complies.)

MJ: _____, how do you plead? Before receiving your plea, I advise you that any motions to dismiss or to grant other appropriate relief should be made at this time. Your defense counsel will speak for you.

DC: The defense (has (no) (the following) motions) (requests to defer motions at this time).

NOTE: Whenever factual issues are involved in ruling on a motion, the military judge shall state essential findings of fact. If the trial counsel gives notice that the government desires a continuance to file an appeal under Article 62 (see RCM 908), the military judge should note the time on the record so that the 72-hour period may be accurately calculated.

NOTE: The military judge must ensure that pleas are entered after all motions are litigated.

DC: The accused, _____, pleads as follows:

NOTE: If the accused enters a plea of guilty to an offense for which death is not an authorized punishment, continue at SECTION II, GUILTY PLEA INQUIRY. In a case which has been referred capital, if the accused attempts to plead guilty to an offense for which death is a possible punishment, you must refuse to accept the plea and enter a plea of Not Guilty on the accused's behalf (Art. 45, UCMJ and R.C.M.910(a)).

IF NOT GUILTY, mark the flyer as an appellate exhibit; ensure each court member packet contains a copy of the flyer, convening orders, note paper, and witness question forms; then GO TO SECTION III, COURT MEMBERS (CONTESTED).

Section II

Guilty Plea Inquiry

*NOTE: An accused cannot plead to a capitally referred offense. However, a pretrial agreement may require the Convening Authority to forgo death as a permissible punishment if an accused enters a provident guilty plea. This practice may require disclosure of this term of the PTA to the MJ prior to sentence being announced. If this is the intention of the parties, use the Introductions 2-2-1, **GUILTY PLEA INTRODUCTION**, through 2-2-4, **MAXIMUM PUNISHMENT INQUIRY**, and then continue below.*

8–2–5. PRETRIAL AGREEMENT.

*NOTE: If there is a PTA in a case referred capital, the military judge must determine if it has a provision providing for a non-capital referral by operation of the PTA. If so, the military judge should follow the procedural guide for a PTA with members at **INSTRUCTION 2-2-7, Pretrial Agreement (Members)**, but not review the quantum portion of the PTA. The military judge should make the following inquiry:*

MJ: Counsel, do you agree that, although under the Code the court may not accept a guilty plea to an offense for which the death penalty may be adjudged, that, in this case and under this agreement, the court may accept the accused's guilty plea to the capital offense?

TC/DC: (Respond.)

MJ: The court is aware of Article 45 of the Code and the appellate history of guilty pleas to capital offenses. However, under the circumstances which I am about to list, the court does not believe that Article 45 prohibits acceptance of a guilty plea. These circumstances are:

An offense was referred to trial as a capital offense.

In pretrial negotiations, both the Convening Authority and the accused agreed that, if the accused successfully pled guilty to the capital offense(s) (and also did _____), the case would be tried as a non-capital case.

The military judge has conducted a thorough providence inquiry and has found the accused's plea of guilty to the capital offense(s) to be provident.

The military judge has conducted a thorough inquiry concerning the pretrial agreement and has found that both sides agree with the military judge's interpretation and has found that the agreement was voluntary.

The military judge is prepared to accept the plea of the accused and enter findings thereon.

The military judge will enforce the agreement by not allowing the case to go forward, after entry of findings, as a capital case.

The public policy behind Article 45 and the appellate concern for entry of guilty pleas in capital cases are not violated by accepting the plea of guilty.

Do both sides agree that those circumstances exist in this case?

TC/DC: (Respond.)

MJ: Do both sides further agree that, upon entry of findings in this case, and based on the pretrial agreement and the circumstances I have just explained, the case is referred for trial only as a non-capital case?

TC/DC: (Respond.)

NOTE: After the case is referred non-capital by operation of the pretrial agreement, the military judge must advise the accused of his forum rights as he/she would for any case which was not referred capital. After the accused makes his selection, the military judge should follow the procedural guide for a non-capital case at CHAPTER 2, TRIAL PROCEDURE AND INSTRUCTIONS. [NOTE: If the accused still selects trial by court members, then the military judge may review the quantum portion of the PTA outside the presence of the members and conduct the discussion with the accused as provided at INSTRUCTION 2-2-7, PRETRIAL AGREEMENT (MEMBERS).]

Section III

Court Members (Contested)

8-3. PRELIMINARY INSTRUCTIONS.

MJ: Bailiff, call the court members.

NOTE: Whenever the members enter the courtroom, all persons except the military judge and the reporter shall rise. The members are seated alternately to the right and left of the president according to rank.

MJ: You may be seated. The court is called to order.

TC: The court is convened by Court-Martial Convening Order Number _____, Headquarters _____, dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) and referred capital as reflected on the charge sheet, copies of which have been furnished to each member of the court.

NOTE: Article 71, GC IV, entitles the accused to a copy of documents in the language which he understands.

The accused and the following persons detailed to this court-martial are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) ((and) _____, Defense Counsel) ((and) _____, Assistant Defense Counsel) ((and) _____, Civilian Defense Counsel) ((and) _____, (*state name of selected advocate*), Defense Advocate;) and

_____, _____, _____, and _____, court members. (The following person(s) detailed to this court (is) (are) absent: _____.)

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

NOTE: Members who have been relieved (viced) by orders need not be mentioned.

The prosecution is ready to proceed with trial in the case of the United States v. (state accused's name).

MJ: The members of the court will now be sworn. All persons in the courtroom, please rise.

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

MBRS: (Respond.)

MJ: Please be seated. The court is assembled.

Members of the court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the

law applicable to this case. You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial, including closed sessions and periods of recess or adjournment. Any questions you have of me should be asked in open court.

As court members, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty and, if you find (him)(her) guilty, to adjudge an appropriate sentence.

Under the law, the accused is presumed to be innocent of the offense(s). The government has the burden of proving the accused's guilt by legal and competent evidence beyond a reasonable doubt. A reasonable doubt is an honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt. The fact that charges have been preferred against this accused and referred to this court for trial does not permit any inference of guilt. You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In so doing, I may repeat some of the instructions which I will give now or, possibly, during the trial. Bear in mind that all of these instructions are designed to assist you perform your duties as court members.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In performing this duty, you must consider each witness' intelligence and ability to observe and accurately remember, in addition to the witness' sincerity and conduct in court, friendships, prejudices, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. The believability of each witness' testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

Counsel will soon be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Some of the grounds for challenge would be if you were the accuser in the case, if you had investigated any offense charged, if you have formed or expressed an opinion as to the guilt or innocence of the accused, or any matter that may affect your impartiality. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but, in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to whether the accused is guilty or not guilty, or as to an appropriate sentence if the accused is found guilty of (any) (this) offense. With regard to sentencing, should that become necessary, you may not have a preconceived idea or formula as to either the type or the amount of punishment that should be imposed if the accused were to be convicted.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so (at the close of evidence) (prior to any witness being permanently excused). The way we handle that is to require you to write out the question and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked because your questions, like the questions of counsel, are subject to objection. (There are forms provided to you for your use if you desire to question any witness.) I will conduct any needed examination. There are a couple of things that you need to keep in mind with regard to questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often, they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the panel members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess, but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearings out of your presence. Frequently, their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the court in announcing the results.

This general order of events can be expected at this court-martial: questioning of court members, challenges and excusals, opening statements by counsel, presentation of evidence, substantive instructions on the law to you, closing argument by counsel, procedural instructions on voting, your deliberations, and announcement of the findings. If the accused is convicted of any offense, there will also be sentencing proceedings.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or too cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you may (take your notes with you for safe keeping until the next session) (leave your notes in the courtroom).

One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.

Are there any questions?

MBRS: (Respond.)

MJ: (Apparently not.) Please take a moment to read the charge(s) on the flyer provided to you and to ensure that your name is correctly reflected on the convening order. If it is not, please let me know.

(Pause.) MJ: Trial counsel, you may announce the general nature of the charge(s).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____; forwarded with recommendation as to disposition by _____ (; and investigated by _____).

The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reason(s): _____).

If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MBRS: (Respond.) or

TC: (Negative response from the court members.) (_____.)

MJ: Members, before I or counsel ask you any questions, it is appropriate that I give you some additional instructions.

NOTE: The instruction immediately below is structured for the usual peace-time death penalty case, i.e., for an accused charged with premeditated and/or felony murder under Article 118(1) or (4), UCMJ, which prescribe the mandatory minimum penalty of confinement for life. The military judge may have a case referred capital for some other offense, where the death penalty is a possible penalty but no mandatory is specified (such as wartime assault on or willful disobedience of a commissioned officer, Article 90; compelling a superior to surrender, Article 100; willfully hazarding a vessel, Article 110; rape, Article 120; or wartime misbehavior before the enemy or by a sentinel, Articles 99 or 113, respectively). In such cases, appropriately tailored instructions concerning other possible sentences should be inserted at this point.

MJ: Members, this is a capital (murder) (_____) case. I want to direct your attention specifically to (the) (those) offense(s), (a) violation(s) of (state applicable codal provision), commonly referred to as (premeditated murder) (_____). If the accused is convicted of (premeditated murder) (_____) by a unanimous vote, then the court may, but is not required to, impose the death penalty. In the sentencing phase of the trial, the death penalty is a permissible punishment only if: (1) the court members unanimously find, beyond a reasonable doubt, that (an) (the) aggravating factor exists; and (2) the court members unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, to include any aggravating factor(s). If you unanimously find those two items, then the death penalty will be a possible punishment, but only if you vote unanimously to impose death. You must bear in mind that, even if death is a possible

sentence, the decision whether or not to vote for the death penalty is within the discretion of each member.

If the accused is convicted of (premeditated murder) (_____), but, the vote for conviction was not unanimous, the death penalty may not be adjudged. Under Article 118, GC IV, the court also is free to reduce the penalty for the prescribed offense to include no punishment.

Court members, should it become necessary, I will explain your options in great detail at the appropriate time during the trial.

Remember, court members, as I have previously instructed you, the accused is presumed to be innocent and the burden is on the government to prove (his)(her) guilt beyond a reasonable doubt.

Because one possible punishment is death, it will be necessary to ask you questions regarding your views concerning the death penalty. This inquiry has no relationship at all to whether or not the accused is guilty or not guilty of any offense. As I stated before, the accused is presumed not guilty of (this) (these) offense(s).

8-3-1. VOIR DIRE.

MJ: Before counsel ask you any questions, I will ask a few preliminary questions. If any member has an affirmative response to any question, please raise your hand.

NOTE: The military judge should indicate for the record the members' response to the following questions, i.e., [Negative response from (all members) (state name(s) or if the

names are not disclosed in open court, a number assigned to that member). *[Positive response from (all members) (state name of member(s)).]*

1. Does anyone know the accused?

2. (If appropriate) Does anyone know any person named in any of the specifications?

3. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?

4. Does anyone have any prior knowledge of the facts or events in this case?

(5. Members, this case has received attention in the (local) (and) (national) media. Is there any member who has seen or heard any mention of this case in the media?

NOTE: To the members who have seen or heard mention of this case in the media, continue with Questions 6-11; if none, go to Question 12.

6. Is there any member who has participated in a military operation that received press coverage?

7. To those who have been in operations that received press coverage: did any member find that the press coverage was 100 percent accurate and complete?

8. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

9. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

10. Is there, then, any member who believes that the reports that he (or she) received from the media about this case are completely accurate and truthful?

11. For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case, based solely upon the evidence you receive in this court and the law as I instruct you?)

12. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

13. (If appropriate) Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?

14. If so, will that experience influence the performance of your duties as a court member in this case in any way?

NOTE: If Question 14 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the presence of the other members.

15. How many of you have previously served as court members?

16. (As to those members) Can each of you put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and the instructions as to the applicable law?

17. The accused has pled not guilty to (all charges and specifications) (_____), and is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?

18. Can each of you apply this rule of law and vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?

19. You are all basically familiar with the military justice system, and you know that the accused has been charged and (his)(her) charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

20. On the other hand, can each of you vote for a finding of guilty if you are convinced that, under the law, the accused's guilt has been proved by legal and competent evidence beyond a reasonable doubt?

21. Does each member understand that the burden of proof to establish the accused's guilt rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's innocence?

22. Does each member understand, therefor, that the defense has no obligation to present any evidence or to disprove the elements of the offense(s)?

23. Has anyone had any legal training or experience other than that generally received by soldiers of your rank or position?

24. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, corrections officer, or comparable duties, other than the general law enforcement duties common to military personnel of your rank and position?

25. I have previously advised you that it is your duty as court members to weigh the evidence and to resolve controverted questions of fact. If the evidence is in conflict, you will necessarily be required to give more weight to some evidence than to other evidence. The weight, if any, to be given to all of the evidence in this case is solely within your discretion. However, it is expected that you should use the same standards in weighing and evaluating all of the evidence, and the testimony of each witness, and that you should not give more or less weight to the testimony of a particular witness merely because of that witness' status, position, or station in life. Will each of you use the same standards in weighing and evaluating the testimony of each witness?

26. Is any member of the court in the rating chain, supervisory chain, or chain of command of any other member?

NOTE: If Question 26 is answered in the affirmative, the military judge may want to ask questions 27 and 28 outside the presence of the other members.

27. (To junior members:) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

28. (To senior members:) Will you be embarrassed or restrained in any way in performing your duties as a court member if a member over whom you hold a position of authority should disagree with you?

29. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

30. Does anyone know of anything of either a personal or professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

31. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be sentenced if found guilty. What that means, Members, is that you believe that the commission of “Crime X” must always result in “Punishment Y.” Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment, if the accused is found guilty, solely because of the nature of the charge(s)?

32. Members, as I have told you earlier, if the accused is convicted of (premeditated murder) (state applicable codal provision) (_____) by a unanimous vote, one of the possible punishments is death. Is there any member, due to his (or her) religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to the imposition of the death penalty?

33. Is there any member who, based on your personal, moral, or ethical values, believes that the death penalty must be adjudged in any case involving (premeditated murder) (state applicable codal provision) (_____)?

34. If sentencing proceedings are required, you will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments from no punishment up to the imposition of the death penalty. You should consider all forms of punishment within that range. Consider does not necessarily mean that you would vote for that particular punishment. Consider means that you think about and choose an appropriate punishment within that range. Each member must keep an open mind and not make a choice, nor foreclose from consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

35. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence, if called upon to do so in this case?

36. Can each of you reach a decision on sentence, if required to do so, on an individual basis in this particular case and not solely upon the nature of the offense(s) of which the accused may be convicted?

37. Is any member aware of any matter which might raise a substantial question concerning your participation in this trial as a court member?

Do counsel desire to question the court members?

TC/DC: (Respond.)

NOTE: Trial counsel and defense counsel will conduct voir dire if desired and individual voir dire will be conducted, if required (see INSTRUCTION 2-5-2, INDIVIDUAL VOIR DIRE).

8-3-2. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members. This may occur at a side-bar conference or at an Article 39(a) session. What follows is a suggested procedure for an Article 39(a) session.

MJ: Members of the court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

MJ: All of the members are absent. All other parties are present. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

NOTE: The military judge will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that he or she has been excused, and the remaining members will be rearranged.

MJ: Call the members.

8-3-3. ANNOUNCEMENT OF PLEA

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

NOTE: If the accused has pled not guilty to all charges and specifications, or if the accused has pled guilty to only some specifications and has specifically requested members be advised of those guilty pleas, announce the following:

MJ: Court members, at an earlier session, the accused pled (not guilty to all charges and specifications) (not guilty to Charge ___, Specification ___, but guilty to Charge ___, Specification ____).

NOTE: If the accused has pled guilty to lesser included offenses and the prosecution is going forward on the greater offense, continue below; if not, GO TO INSTRUCTION 8-3-4, TRIAL ON MERITS.

MJ: The accused has pled guilty to the lesser included offense of (_____), which constitutes a judicial admission of some of the elements of the offense charged in _____. These elements have therefor been established by the accused's plea without the necessity of further proof. However, the plea of guilty to this lesser included offense provides no basis for a conviction of the offense alleged as there remains in issue the element(s) of _____.

The court is instructed that no inference of guilt of such remaining element(s) arises from any admission involved in the accused's plea, and to permit a conviction of the alleged offense, the prosecution must successfully meet its burden of establishing such element(s) beyond a reasonable doubt by legal and competent evidence. Consequently, when you close to deliberate, unless you are satisfied beyond a reasonable doubt that the prosecution has satisfied this burden of proof, you must find the accused not guilty of _____, but the plea of guilty to the lesser included offense of _____ will require a finding of guilty of that lesser offense without further proof.

NOTE: If mixed pleas were entered and the accused requests that the members be informed of the accused's guilty pleas, the military judge should continue below; if not, GO TO INSTRUCTION 8-3-4, TRIAL ON MERITS.

MJ: The court is advised that findings by the court members will not be required regarding the charge(s) and specification(s) of which the accused has already been found guilty pursuant to (his)(her) plea. I inquired into the providence of the plea(s) of guilty, found (it) (them) to be provident, accepted (it) (them), and entered findings of guilty. Findings will be required, however, as to the charge(s) and specification(s) to which the accused has pled not guilty.

8-3-4. TRIAL ON MERITS

MJ: I advise you that opening statements are not evidence; rather, they are what counsel expect the evidence will be in the case. Does the government have an opening statement?

TC: (Responds.)

MJ: Does the defense have an opening statement or do you wish to reserve opening statement?

DC: (Responds.)

MJ: Trial Counsel, you may proceed.

NOTE: The trial counsel administers the oath/affirmation to all witnesses.

NOTE: When questioning is finished, the military judge should instruct the witness along the following lines.

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within _____ minutes) (_____).

TC: The government rests.

NOTE: This is the time that the defense may make motions for a finding of not guilty. (The motions should be made outside the presence of the court members.) The military judge's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. (If the motion is made before the court members and is denied, give INSTRUCTION 2-7-9, MOTION FOR FINDING OF NOT GUILTY.)

8-3-5. TRIAL RESUMES WITH DEFENSE CASE, IF ANY

MJ: Defense Counsel, you may proceed.

NOTE: If the defense reserved opening statement, the military judge shall ask if the defense counsel wishes to make an opening statement at this time.

DC: The defense rests.

8-3-6. REBUTTAL AND SURREBUTTAL, IF ANY

NOTE: If members have not previously been allowed to ask questions, the military judge should ask:

MJ: Does any court member have any questions of any witness?

MBRS: (Respond.)

NOTE: If the members have questions, the trial counsel or bailiff will collect the written questions, have them marked as appellate exhibits, examine them, show them to the defense counsel, and present them to the military judge so that the military judge may ask the witness the questions.

Court members, you have now heard all of the evidence. At this time, we need to have a hearing outside of your presence to discuss the instructions. You are excused until approximately _____.

MBRS: (Comply.)

8–3–7. DISCUSSION OF FINDINGS INSTRUCTIONS

MJ: All parties are present with the exception of the court members. Counsel, which exhibits go to the court members?

TC/DC: (Respond.)

MJ: Counsel, do you see any lesser included offenses that are in issue in this case?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

MJ: I intend to give the following instructions: _____.

Does either side have any objection to those instructions?

TC/DC: (Respond.)

MJ: What other instructions do the parties request?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Findings Worksheet as Appellate Exhibit ____, show it to the defense, and present it to me.

TC: (Complies.)

MJ: Defense Counsel, do you have any objections to the Findings Worksheet?

DC: (Responds.)

MJ: Is there anything else that needs to be taken up before the members are called?

TC/DC: (Respond.)

MJ: Call the court members.

8-3-8. PREFATORY INSTRUCTIONS ON FINDINGS

MJ: The court is called to order. All parties are again present as before to include the court members.

NOTE: RCM 920(b) provides that instructions on findings shall be given before or after arguments by counsel or at both times. What follows is the giving of preliminary instructions prior to argument with procedural instructions given after argument.

MJ: Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions that I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge(s) against (him)(her).

You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During the trial, some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged. In (the) Specification (____) of (the) Charge (____), the accused is charged with the offense of (*specify the offense*). To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the offense(s) using Chapter 3 of the Benchbook.

NOTE: If lesser included offenses are in issue, continue below; if no lesser-included offenses are in issue, GO TO INSTRUCTION 8-3-10, OTHER APPROPRIATE INSTRUCTIONS.

8-3-9. LESSER INCLUDED OFFENSE(S)

NOTE: After instructions on the elements of an offense alleged, the members of the court must be advised of all lesser included offenses raised by the evidence and within the scope of the pleadings. The members should be advised, in order of diminishing severity, of the elements of each lesser included offense, and its differences from the principal offense and other lesser included offenses, if any. The members will not be instructed on lesser included offenses that are barred by the statute of limitations unless the accused waives the bar. These instructions may be stated substantially as follows:

8-3-9a. LIO Introduction

MJ: The offense(s) of _____ (is) (are) (a) lesser included offense(s) of the offense set forth in (the) Specification (____) (of) (the) Charge (____). When you vote, if you find the accused not guilty of the offense charged, that is _____, then you should next consider the lesser included offense of _____, in violation of (state applicable codal provision). To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the LIO using Chapter 3 of the Benchbook.

8-3-9b. LIO Differences

MJ: The offense charged, _____, and the lesser included offense of _____ differ primarily (in that the offense charged requires, as (an) essential element(s), that you be convinced beyond a reasonable doubt that (state the element(s) applicable only to the greater offense), whereas the lesser offense of _____ does not include such (an) element(s) (but it does require that you be satisfied beyond a reasonable doubt that (state any different element(s) applicable only to the lesser offense).

8-3-9c. Other LIOs Within the Same Specification

MJ: Another lesser included offense of the offense alleged in (the) Specification _____ (of) (the) Charge _____, is the offense of _____ in violation of (state applicable codal provision). To

find the accused guilty of this lesser offense, you must be convinced beyond a reasonable doubt of the following elements: (list the elements).

This lesser included offense differs from the lesser included offense I discussed with you previously in that this offense does not require, as (an) essential element(s), that the accused (state the element(s) applicable only to the greater offense) but it does require that you be satisfied beyond a reasonable doubt that (state any different element(s) applicable only to the lesser offense).

NOTE: Repeat the above as necessary to cover all LIOs and then continue below.

8–3–10. OTHER APPROPRIATE INSTRUCTIONS

NOTE: For other instructions which may be appropriate in a particular case, see Chapter 4, “Confessions and Admissions,” Chapter 5, “Special and Other Defenses,” Chapter 6, “Mental Responsibility,” and Chapter 7, “Evidentiary Instructions.” Generally, instructions on credibility of witnesses (see INSTRUCTION 7-7) and circumstantial evidence (see INSTRUCTION 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.

8–3–11. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS

MJ: You are further advised:

First, that the accused is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is a reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused and (he)(she) must be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt to which there is no reasonable doubt; and

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of (each) (the) offense.

By “reasonable doubt” is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense(s), although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable doubt. However, if on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world. In light of all of the circumstances in the

case, you should consider the inherent probability or improbability of the evidence. Bear in mind that you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment, statement, or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty because you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

8–3–12. FINDINGS ARGUMENT

MJ: At this time, you will hear argument by counsel. As the government has the burden of proof, trial counsel may open and close. Trial Counsel, you may proceed.

TC: (Argument.)

MJ: Defense, you may present findings argument.

DC: (Argument.)

MJ: Trial Counsel, rebuttal argument?

TC: (Respond.)

MJ: Counsel have referred to instructions that I gave you and if there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

8-3-13. PROCEDURAL INSTRUCTIONS ON FINDINGS

MJ: The following procedural rules will apply to your deliberations and must be observed:

The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all of the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

(The order in which the (several) charges and specifications are to be voted on should be determined by the President subject to objection by a majority of the members.) You vote on the specification(s) under the charge before you vote on the charge.

If you find the accused guilty of any specification under a charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the President, who will immediately announce the result of the ballot to the members.

**Table 8-1
Votes Needed for a Finding of Guilty**

No. of Members	Two-thirds
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

NOTE: The MJ must be alert to a charge under Article 106, UCMJ (Espionage), and the MJ may need to modify the instruction, e.g., the court may base findings on evidence introduced on issue of guilt, evidence introduced during sentencing proceeding, or all such evidence.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Because we have ____ members, that means ____ members must concur in any finding of guilty.

If you have at least ____ votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than ____ members vote for a finding of guilty, then your ballot resulted in a finding of not guilty (bearing in mind the instructions I just gave you about voting on the lesser included offense(s)).

Bear in mind, as I just said, that a finding of guilty results if at least two-thirds of the members vote for a finding of guilty (of the offense(s) of (____)); however, the President of the court must note whether the vote was unanimous concerning the capital offense(s) charged,

that is (the) Specification(s) (____) of (the) Charge(s) (____). If the accused is found guilty of a capital offense and if the vote was unanimous, the President will announce such unanimity as part of the announcement of the finding of guilt. If the accused is found guilty of a capital offense but the vote is not unanimous, no announcement as to lack of unanimity should be made. A format for proper announcement of your findings is contained on the Findings Worksheet you will receive, and (it) (they) contain(s) language for each of the three possible findings as to the capital offense(s) charged; that is, not guilty, guilty, or guilty by unanimous vote.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the President should announce only that reconsideration of a finding has been proposed. Do not state: (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-10, RECONSIDERATION INSTRUCTION (FINDINGS).

MJ: As soon as the court has reached its findings and I have examined the Findings Worksheet, the findings will be announced by the President in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit ____, the Findings Worksheets (which the (Trial Counsel) (Bailiff) will now hand to the President).

TC/BAILIFF: (Complies.)

NOTE: The military judge may explain how the Findings Worksheet should be used. Appendix B contains sample Findings Worksheets. A suggested approach follows:

MJ: (COL) (____) _____, as indicated on Appellate Exhibit(s) _____, the first portion will be used if the accused is completely acquitted of (the) (all) charge(s) and specification(s). The second part will be used if the accused is convicted, as charged, of (the) (all) charge(s) and specification(s); (and the third portion will be used if the accused is convicted of some but not all of the offenses).

(The next page of Appellate Exhibit ____ would be used if you find the accused guilty of the lesser included offense of _____ [by exceptions (and substitutions)]. This was (one of) (the) lesser included offense(s) I instructed you on.)

Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that, when I check your findings, I can ensure that they are in proper form.

You will note that the Findings Worksheet has been modified to reflect the words that would be deleted (as well as the words that would be substituted therefor) if you found the accused guilty of the lesser included offense(s). (These) (This) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or counsel concerning any degree of guilt of this accused. (They are) (This is) merely included to aid you in understanding what findings might be made in the case and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision.

Any questions about the Findings Worksheet?

MBRS: (Respond.)

MJ: If, during your deliberations, you have any questions, notify the Bailiff, we will open the court and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of the trial, you must all remain together in the deliberation room during deliberations. While in your closed session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached findings, you may notify the Bailiff, who will then notify me that you desire to return to open court to make your desires or findings known. Further, during your deliberations, you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Protection of Civilians in Time of War, or any other publication or writing unless it has been admitted into evidence.

Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions concerning these instructions?

MBRS: (Respond.)

MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed session deliberations, you must notify us, we must come into the courtroom, formally convene and then recess the court; and, after the recess, we must reconvene the court and formally close again for your deliberations. So, with that in mind, (COL) (___)

_____, do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please hand to the President of the court Prosecution Exhibit(s) _____ (and Defense Exhibit(s) _____) for use during the court's deliberations.

TC/BAILIFF: (Complies.)

MJ: (COL) (____) _____, please do not mark on any of the exhibits except the Findings Worksheet (and please bring all of the exhibits with you when you return to announce your findings).

The court is closed.

8-3-14. PRESENTENCING SESSION

NOTE: When the members close to deliberate, the military judge may convene an Article 39(a) session to cover pre-sentencing matters, or may wait until after findings.

MJ: This Article 39(a) session is called to order. All parties are present, except the court members.

_____ (*state name of accused*), when the members return from their deliberations, if you are acquitted of all charges and specifications, that will terminate the trial. On the other hand, if you are convicted of any offense, then the court will determine your sentence. During that part of the trial, you (will) have the opportunity to present evidence in extenuation and mitigation of the

offense(s) of which you have been found guilty, that is, matters about the offense(s) or yourself which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case the court will not draw any adverse inference from your silence. On the other hand, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross examined on it. However, the government may offer evidence to rebut any statement of fact contained in an unsworn statement. The unsworn statement may be made orally or in writing, or both. It may be made by you or by your counsel on your behalf, or by both you and your counsel. Do you understand these rights that you have?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

NOTE: Illegal pretrial punishment. A punishment or penalty imposed on a civilian internee while being held for trial that exceeds the limitations specified in the GC IV may constitute Article 13 punishment. By analogy, a punishment or penalty imposed on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note 2, infra.)) that exceeds the limitations for “disciplinary sanctions” under Article 119, GC IV, may also constitute Article 13

punishment. The applicable disciplinary punishments, which may not exceed 30 days for any single punishment, are the following:

- (1) Fine: 50 percent of wages (see Article 95, GC IV);*
- (2) Discontinuance of privileges granted over and above the treatment provided by the GC IV;*
- (3) Fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment; and*
- (4) Confinement.*

(See Arts. 71-76 and 117-126, GC IV.)

The accused's time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 117, GC IV, provides that "No internee may be punished more than once for the same act, or on the same count." Disciplinary sanctions imposed IAW Article 117-126, GC IV, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment or a penalty for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the specification or portion of the specification involved.

MJ: (_____), is that correct?

ACC: (Responds.)

NOTE: Pretrial confinement credit. If the accused was confined while awaiting trial, Articles 69 and 122, GC IV, require that such time “shall be deducted from any period of imprisonment awarded.” The accused’s time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under Articles 69 and 112 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, any period of time spent by you in confinement while you were awaiting trial shall be deducted from any sentence of confinement. However, the period during which you were interned under Articles 42 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War will not be considered when deliberating your sentence. Do you understand that?

ACC: (Responds.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with _____ day(s) of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Counsel, do you have any documentary evidence on sentencing which could be marked and offered at this time?

TC/DC: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

MJ: This Article 39(a) session is terminated to await the members' findings.

8-3-15. FINDINGS

MJ: The court is called to order. All parties are again present as before to include the court members. (COL) (____) _____, has the court reached findings?

PRES: (Responds.)

MJ: Are the findings reflected on the Findings Worksheet?

PRES: (Responds.)

MJ: Please fold the worksheet and give it to the (Trial Counsel) (Bailiff) so that I may examine it.

TC/BAILIFF: (Complies.)

NOTE: If a possible error exists on the Findings Worksheet, the military judge must take corrective action. All advice or suggestions to the court from the military judge must occur in open session. In a complex matter, it may be helpful to hold an Article 39(a) session to secure suggestions and agreement on the advice to be given to the court. Occasionally, corrective action by the court involves reconsideration of a finding and, in that situation, instructions on the reconsideration procedure are required (see INSTRUCTION 2-7-10, RECONSIDERATION INSTRUCTION (FINDINGS)).

MJ: I have reviewed the Findings Worksheet and (the findings appear to be in proper form) (_____). (Bailiff) (Trial counsel), please return the Findings Worksheet to the President.

TC/BAILIFF: (Complies.)

MJ: Defense Counsel and accused please rise.

DC/ACC: (Comply.)

MJ: (COL) (___) _____, please announce the findings of the court.

PRES: (Complies.)

MJ: Counsel and accused may be seated.

DC/ACC: (Comply.)

MJ: (Trial counsel) (Bailiff), please retrieve all exhibits from the President.

TC/BAILIFF: (Complies.)

NOTE: If there are findings of guilty of a capital offense by a unanimous vote, go to the sentencing proceedings. If not, GO TO to INSTRUCTION 2-5-17, SENTENCING PROCEEDINGS. If acquitted, continue below.

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal

observations of what happened in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service.

This court-martial is adjourned.

8–3–16. SENTENCING PROCEEDINGS

NOTE: If the military judge has not previously advised the accused of his allocution rights at INSTRUCTION 8-3-14, PRESENTENCING INSTRUCTIONS, the military judge must do so at this time outside the presence of the court members. If there were findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.

MJ: Members of the court, at this time, we will enter into the sentencing phase of the trial. (Before doing so, would the members like to take a recess?)

PRES/MBRS: (Respond.)

MJ: Trial Counsel, you may read the personal data concerning the accused as shown on the charge sheet.

TC: The first page of the charge sheet shows the following personal data concerning the accused: (Reads the data).

MJ: Members of the court, I have previously admitted into evidence (Prosecution Exhibit(s) _____, which (is) (are) _____) (and) (Defense Exhibit(s) _____, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations.

Trial Counsel, do you have anything to present at this time?

TC: (Responds and presents case on sentencing.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

8–3–17. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Members of the court, you have now heard all of the evidence in this case. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again at _____.

MBRS: (The members withdraw from the courtroom.)

8–3–18. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present, except the court members who are absent.

Counsel, what do you calculate the maximum sentence to be based upon the findings of the court?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ____, show it to the defense, and present it to me.

TC: (Complies.)

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, I intend to give the following sentencing instructions: _____.

NOTE: The military judge may require the defense counsel to provide in writing a list of all mitigating factors/circumstances that the defense counsel wants the military judge to instruct upon to the court panel.

MJ: Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

NOTE: Unsworn statement instruction within discretion of military judge. See United States v Breese, 11 M.J. 17 (C.M.A. 1981).

MJ: Call the members. (The members are called and reenter the courtroom.)

8-3-19. SENTENCING ARGUMENTS

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Complies.)

MJ: Defense Counsel, you may present argument.

DC: (Complies.)

8–3–20. SENTENCING INSTRUCTIONS

MJ: Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as those in aggravation,) you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he)(she) has been found guilty.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the Convening or higher Authority. A single sentence shall be adjudged for all offenses of which the accused has been found guilty.

NOTE: Sentencing instruction. Under Articles 67 and 118, GC IV, the court shall take into account the fact that the accused is not a national of the Occupying Power.

In determining a legal, appropriate, and adequate punishment, this court will bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Articles 67 and 118 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, this court is not bound to apply any punishment prescribed for an offense and it is at liberty to arrive at any lesser sentence to include no punishment.

8-3-21. MAXIMUM PUNISHMENT

Note: Confinement for Life without Eligibility for Parole, Section 856a of The Defense Authorization Act of 1998 adds Article 56a, which provides for a sentence to life without eligibility for parole. The act applies to offenses occurring after 19 November 1997. When an accused is eligible to be sentenced to death for an offense occurring after 19 November 1997, the military judge must instruct that confinement for life without eligibility for parole is also a permissible sentence.

MJ: The maximum permissible punishment that may be adjudged in this case is (confinement for life) (confinement for life without eligibility for parole) (to be put to death). The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence, of which I will instruct you later.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are a few matters which each member should consider in determining an appropriate sentence. First, bear in mind that there are several principal

reasons for the sentence of those who violate the law. These reasons include: punishment of the wrongdoer, protection of society from the wrongdoer, and deterrence of the wrongdoer and those who know of (his)(her) crime(s) and (his)(her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion. Next, you should be aware of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

NOTE: Lack of rehabilitative potential is not a proper consideration.

The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

8-3-22. TYPES OF PUNISHMENT

MJ: I will now instruct you on the various kinds of punishments to which you can sentence the accused:

8-3-29. PRETRIAL CONFINEMENT CREDIT (IF APPLICABLE)

NOTE: Pretrial confinement credit. If the accused was confined while awaiting trial, Articles 69 and 122, GC IV, require that such time “shall be deducted from any period of imprisonment awarded.” The accused’s time in internment for safety and security reasons under Articles 42 and 78, GC IV, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under Articles 69 and 112 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, any period of time spent by you in confinement while you were awaiting trial shall be deducted from any sentence of confinement. However, the period during which you were interned under Articles 42 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War will not be considered when deliberating your sentence. Do you understand that?

In determining an appropriate sentence in this case, you should consider the fact that the accused has spent _____ day(s) in pretrial confinement. If you adjudge confinement as part of your sentence, the day(s) the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his)(her) confinement, and will be given on a day-for-day basis.

8-3-30. CONFINEMENT

MJ: As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of _____ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) (A) sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(A sentence to “confinement for life without eligibility for parole” means that the accused will be confined for the remainder of (his)(her) life and will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to “confinement for life” or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from such confinement under such circumstances as are or may be provided by law or regulations for civilian internees. “Parole” is a form of conditional release of a prisoner from actual incarceration, before (his)(her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his)(her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge, if either, “confinement for life without eligibility for parole” or “confinement for life” in the sentence, bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the Convening Authority or any other appropriate authority.)

8-3-33. DEATH

MJ: The court may sentence the accused to be put to death.

8-3-34. CLEMENCY (RECOMMENDATION FOR SUSPENSION)

MJ: Although you have no authority to suspend either a portion of or the entire sentence that you adjudge, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority. Therefor, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the Convening or higher Authority refuses to adopt your recommendation for suspension.

If fewer than all members of the court wish to recommend suspension of a portion of or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the President, after announcing the sentence, may announce the recommendation and the number of members joining that recommendation. Whether to make any recommendation for suspension of a portion of or the entire sentence is solely a matter within the discretion of the court.

However, you should keep in mind that your responsibility is to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the Convening or higher Authority.

8-3-34a. NO PUNISHMENT.

MJ: Finally, if you wish, this court may sentence the accused to no punishment.

8-3-35. PLEA OF GUILTY.

MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

8-3-36. ACCUSED'S NOT TESTIFYING.

MJ: The court will not draw any adverse inference from the fact that the accused elected not to testify.

8-3-37. ACCUSED'S NOT TESTIFYING UNDER OATH.

MJ: The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by the court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut any statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement was not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

NOTE: Scope of Accused's Unsworn Statement. The scope of an accused's unsworn statement is broad. If the accused addresses the treatment or sentence of others, command options, or other matters that would be inadmissible but for their being presented in an unsworn statement, the instruction below may be appropriate. In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.

(MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted.)

(For example, it is not your duty (to determine relative blame worthiness of) (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, (whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (_____).)

(Your duty is to adjudge an appropriate sentence for this accused that you regard as fair and just when it is imposed and not one whose fairness depends upon actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases).)

8-3-38. MENDACITY.

MJ: The evidence presented (and the sentencing argument of Trial Counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did testify falsely under oath to this court.

Second, such false testimony must have been, in your view, willful and material, meaning important, before it may be considered in your deliberations.

Finally, you may consider this factor only insofar as you conclude that it, along with all other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

8-3-39. ARGUMENT FOR A SPECIFIC SENTENCE.

MJ: During argument (Trial Counsel) (and) (Defense Counsel) recommended that you consider a specific sentence in this case. The arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

NOTE: The military judge must instruct the court members on the two tests which must be met before a death sentence may be adjudged. First, the court members must determine unanimously and beyond a reasonable doubt that one or more of the aggravating factors specified by the trial counsel under the provisions of RCM 1004(c) have been proven. If so, then the court members must find that the aggravating circumstances substantially outweigh any extenuating or mitigating circumstances before a sentence of death may be adjudged. Even if aggravating circumstances are found, the court members must propose sentences and vote on them, beginning with the lightest, as in non-capital cases.

MJ: Members of the court, because death may become a possible sentence in this case, your deliberations require the following procedures.

8–3–40. CONCLUDING SENTENCING INSTRUCTIONS.

MJ: When you close to deliberate and vote, only the members will be present. Your deliberation should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of the members in the exercise of their judgment.

You may adjudge a sentence of death only under certain circumstances.

First, a death sentence may not be adjudged unless all of the court members find, beyond a reasonable doubt, that (an) (one or more) aggravating factor(s) existed. The alleged aggravating factor(s) (is) (are) as follows: (read the aggravating factor(s) specified by the trial counsel upon

which some evidence has been introduced). (This) (These) alleged aggravating factor(s) (is) (are) also set out on Appellate Exhibit ____, the Sentence Worksheet, which I will discuss in a moment.

All of the members of the court must agree, beyond a reasonable doubt, that (this) (one or more of the) aggravating factor(s) existed at the time of the offense(s) or resulted from the offense(s).

NOTE: If more than one aggravating factor is involved, the following instruction should be given.

(MJ: It is not sufficient that some members find that one aggravating factor existed, while the remaining members find that a different aggravating factor existed; rather, all of you must find, beyond a reasonable doubt, that the same aggravating factor or factors existed before a sentence of death may be adjudged.)

In this regard, you are again advised that the term “reasonable doubt” is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving caused by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty although not necessarily to an absolute or mathematical certainty.

NOTE: The military judge should also give additional definitional or explanatory instructions relevant to the specified aggravating factors, such as “national security” (RCM 1004(c)), proof of intent or knowledge by circumstantial evidence (INSTRUCTION 7-3), “persons in execution of office” (INSTRUCTIONS 3-15-1, 3-

15-3, or 3-104-1), or the elements of any substantive offense relevant to the aggravating factor(s).

MJ: Members, in making the determination of whether or not (the) (an) aggravating factor(s) existed, you may consider all of the evidence in the case, including the evidence presented prior to the findings of guilty, as well as any evidence presented during the sentencing hearing. Your deliberations on the aggravating factor(s) should properly include a full and free discussion on all of the evidence that has been presented.

After you have completed your discussion, then voting on (the) (each) aggravating factor must be accomplished (separately) by secret written ballot, and all members are required to vote. The junior member will collect and count the ballots. The count will be checked by the President, who will immediately announce the results of the ballot to the other members of the court.

If you fail to find unanimously that (at least one of) the aggravating factor(s) existed, then you may not adjudge a sentence of death.

If, however, you do find by unanimous vote that (at least one of) (the) aggravating factor(s) existed, then proceed to the next step. In this next step, you may not adjudge a sentence of death unless you unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including (such) (the) factor(s) as you have found existed in the first step of this procedure. Thus, in addition to the aggravating factor(s) that you have found by unanimous vote, you may consider the following aggravating circumstances:

(Previous convictions),
(Prosecution exhibits, stipulations, etc.),
(Rebuttal testimony of _____),
(Nature of weapon used in the commission of the offense),
(Nature and extent of injuries suffered by the victim),
(Nature of the harm done to national security), and/or
(Other _____).

NOTE: After consulting with the defense counsel, the military judge should instruct on applicable extenuating and mitigating circumstances, including, but not limited to, the following:

MJ: You must also consider all evidence in extenuation and mitigation and balance them against the aggravating circumstances using the test I previously instructed you upon.

You are also instructed to consider in extenuation and mitigation any other aspect of the accused's character, background, and any other aspect of the offense(s) you find appropriate. In other words, that list of extenuating and mitigating circumstances I just gave you is not exclusive.

You may consider any matter in extenuation and mitigation, whether it was presented before or after findings and whether it was presented by the prosecution or the defense. Each member is at liberty to consider any matter which he (or she) believes to be a matter in extenuation and mitigation, regardless of whether the panel as a whole believes that it is a matter in extenuation and mitigation.

Once again, Members, your deliberations should begin with a full and free discussion on the aggravating circumstances and the extenuating and mitigating circumstances. After you have completed your discussions, then you will vote on whether or not the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances. The vote will be by secret written ballot and all members of the court are required to vote.

The junior member will collect and count the ballots. The count will then be checked by the President, who will immediately announce the results of the ballot to the other members of the court.

If the court does not determine unanimously that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, then a sentence of death will not be a possible punishment.

If you unanimously find (the) (one or more) aggravating factor(s) and even if you unanimously determine that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, you still have the absolute discretion to decline to impose the death sentence.

Members, at this point, you will know, because you have gone through the aforementioned steps, whether or not death is among the punishments that may be proposed.

However, no proposed sentence may include both (1) confinement for the period of (his)(her) natural life or confinement for life without eligibility for parole and (2) death. Those two are inconsistent.

A sentence of death may be adjudged only upon the unanimous vote of all of the members. A sentence of death includes confinement which is a necessary incident of a sentence of death but not a part of it. If you adjudge the death sentence, the accused will be confined until the death sentence is carried out. Thus, if you adjudge death, you need not announce confinement as part of your sentence.

The imposition of any other lawful punishment is totally within your discretion. In determining a legal, appropriate, and adequate punishment, this court will bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Articles 67 and 118 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, this court is not bound to apply any punishment prescribed for an offense, and it is at liberty to arrive at a lesser sentence to include no punishment.

Members, even if you have found, in accordance with the instructions I have given you, that (an) (the) aggravating factor(s) exist(s) and that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, each member still has the absolute discretion to not vote for a death sentence. Even if death is a possible sentence, the decision to vote for death is each member's individual decision.

Members, the (only) offense(s) that (is) (are) punishable by a death sentence is Specification(s) _____ of Charge(s) _____, i.e., a violation of (*state applicable codal provision*).

Again, your deliberations on an appropriate sentence should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence of the members in the exercise of their judgment.

When you have completed your discussions, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the President, who will arrange them in order of their severity.

The court will then vote by secret written ballot on each proposed sentence in its entirety, beginning with the least severe and continuing with the next least severe, until a sentence is adopted by the required concurrence. You are reminded that the most severe punishment is the death penalty. To adopt a sentence that does not include the death penalty, the required concurrence is three-fourths. That is _____ of the _____ members present.

The junior member will collect and count the votes. The count will then be checked by the President, who shall immediately announce the result of the ballot to the other members of the court.

If you vote on all of the proposed sentences without reaching the required concurrence, repeat the process of discussion, proposal, and voting.

Once a sentence has been reached, any member of the court may propose that it be reconsidered prior to its being announced in open court. If, after you determine your sentence, any member

suggests that you reconsider the sentence, open the court and the President should announce that reconsideration has been proposed, without reference to whether the proposed rebalot concerns increasing or decreasing the sentence. I will then give you detailed instructions in open court on how to reconsider it.

NOTE: See INSTRUCTION 2-7-14, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, you will have the use of the Sentence Worksheet, Appellate Exhibit _____, which the (Trial Counsel) (Bailiff) will now hand to the President.

TC/BAILIFF: (Complies.)

MJ: As a reminder, you must first vote on (the) (each) aggravating factor which (is) (are) listed on the worksheet in Part A, and then reflect the court's vote on (the) (each) aggravating factor in the space provided. (Then strike out any factor not unanimously found by the members.) If (this) (these) vote(s) result in a unanimous finding that (the) (one or more) factor(s) (has) (have) been proven, then the court members should go to Part B of Appellate Exhibit _____. On the other hand, if the court does not find unanimously that (the) (any) aggravating factor has been proven, you should then line out Part A (Aggravating Factor(s)) and Part B (Balancing of Aggravating Circumstances and Extenuating and Mitigating Circumstances) by marking a large "X" across them and the President should not read any of the language from Parts A and B because a death sentence cannot be considered.

If the court members unanimously find (the) (any) aggravating factor(s) in accordance with the instructions I have previously given you, then you should next direct your attention to Part B

(Balancing Aggravating Circumstances, including the aggravating factor(s), against Extenuating and Mitigating Circumstances).

The members must then vote on whether the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor(s) specifically found as indicated in Part A.

If the court members do not unanimously find that the extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor(s) specifically found as indicated in Part A, then you may not adjudge a sentence of death and Parts A and B of Appellate Exhibit _____ should be lined out by marking a large “X” across them, and the President should not read any of the language from Parts A and B of Appellate Exhibit _____.

Mr. President, as I have previously instructed you, a sentence to (1) death and (2) confinement for life or life without eligibility for parole are inconsistent. You may not return a sentence that contains both of them.

Now, Mr. President, please turn your attention to Part C of the Sentence Worksheet, Appellate Exhibit _____.

If the sentence does not include death, then where it says “signature of President,” only you as the President will sign there because all of the members are not required to sign. If the sentence does include death, all of the court members will then sign at the appropriate place as indicated on the Sentence Worksheet, Appellate Exhibit _____, at the end of Part C.

Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Protection of Civilians in Time of War, or any other publication or writing not properly admitted or received during this trial.

These instructions must not be interpreted as indicating any opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of adherence to the laws and customs of war in general, punishment of the accused, and the protection of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet and the President will then announce the sentence.

Do counsel object to the instructions as given or request additional instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBRS: (Respond.)

MJ: (COL) (____) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial counsel) (Bailiff), please give the President Prosecution Exhibit(s) _____ (and Defense Exhibit(s) _____).

TC/BAILIFF: (Complies.)

MJ: (COL) () _____, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all of the exhibits with you when you return to announce the sentence.

The court is closed.

8-3-41. ANNOUNCEMENT OF SENTENCE.

MJ: The court is called to order.

TC: All parties to include the court members are present as before.

MJ: (COL) () _____, have you reached a sentence?

PRES: (Responds.)

NOTE: If the President indicates that the members are unable to agree on a sentence, the military judge should give INSTRUCTION 2-7-13, "HUNG JURY" INSTRUCTION.

MJ: (COL) () _____, is the sentence reflected on the Sentence Worksheet?

PRES: (Responds.)

MJ: (COL) () _____, please fold the Sentence Worksheet and give it to the (Trial Counsel) (Bailiff) so that I can examine it.

PRES/TC/BAILIFF: (Comply.)

MJ: I have examined the Sentence Worksheet and it appears (to be in proper form) (_____). (Trial Counsel) (Bailiff), you may return it to the President.

TC/BAILIFF/PRES: (Complies.)

MJ: Defense Counsel and accused, please rise.

DC/ACC: (Comply.)

MJ: (President), please announce the sentence of the court.

PRES: (Complies.)

NOTE: If the adjudged sentence involves confinement for two years or more, Article 74, GC IV, requires the Occupying Power to immediately notify the Protecting Power of the accused's sentence. The notification shall contain a reference to the notification required under Article 71, GC IV, and, in the case of a sentence of confinement, the name of the place where the sentence is to be served. The record of judgment shall be open for inspection by the Protecting Power. Any period allowed for appeal in the case of a sentence involving confinement of two years or more shall not run until notification of judgment has been received by the Protecting Power. Art. 74, GC IV.

MJ: Please be seated.

DC/ACC: (Comply.)

MJ: (Trial counsel) (Bailiff), please retrieve the exhibit(s) from the President.

TC/BAILIFF: (Complies.)

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations of what happened in the courtroom and how the process of a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

MBRS: (Withdraw.)

MJ: The members have withdrawn from the courtroom. All other parties are present.

8-3-42. PRETRIAL CONFINEMENT CREDIT.

MJ: The accused will be credited with _____ day(s) of pretrial confinement against the accused's term of confinement.

8-3-43. POST-TRIAL and APPELLATE RIGHTS ADVICE.

NOTE: Right of appeal. Article 73, GC IV, provides: “A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.” This appears to require an inquiry on the record that the accused is “fully informed” of his appellate rights.

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the convening authority for action. The convening authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he or she may disapprove the findings or the sentence in whole or in part. The convening authority may reduce the sentence adjudged by the court-martial, but he or she cannot increase it. The convening authority can disapprove a finding of guilty, but cannot change a finding of not guilty. Although the convening authority is not required to review the case for legal errors, he or she may take action to correct legal errors.

[(SENTENCE ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the staff judge advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the convening authority takes action on your case.]

Before the convening authority takes action, you have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings

and sentence in your case (including a response to the staff judge advocate's post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the staff judge advocate) (is) (are) served on you or your counsel. You may request up to an additional 20 days and, for good cause, the convening authority may approve the request.

[(IF APPROVED SENTENCE IS DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves (death) (confinement for one year or more), your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

NOTE: The GC IV does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.

MJ: After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves a sentence that does not include death or confinement for one year or more, your case will be examined in the Office of the Judge Advocate General for legal sufficiency and to determine if the sentence is appropriate. The Judge Advocate General may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH:) You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case and send it to the convening authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

Do you have any questions?

ACC: (Responds.)

8-3-44. IF MORE THAN ONE DEFENSE COUNSEL.

MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the Staff Judge Advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there any other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Appendix A

References

Section I

Required Publications

Manual for Courts–Martial, United States, 2002

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949). (Available at <http://www.unhchr.ch/html/menu3/b/91.htm>).

Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949).

(Available at <http://www.unhchr.ch/html/menu3/b/92.htm>).

Section II

Related Publications

FM 27-10, The Law of Land Warfare.

Section III

Prescribed Forms

This section contains no entries.

Section IV

Referenced Forms

This section contains no entries.

Appendix B

Findings Worksheets

- 1.** Sample findings worksheets for each of the various situations which may arise are located at B-1 through B-4. An alternative findings worksheet is located at B-5.
- 2.** The Findings Worksheet must be carefully reviewed by the military judge after the conclusion of the evidence in the case. It must be tailored for each case to ensure that the worksheet allows the court members to reach findings on all theories of the case which have been raised by the evidence. The worksheet should be made as simple as possible.
- 3.** In cases in which the evidence requires that the court members reach findings by exceptions and/or substitutions, the military judge should attempt to have both sides agree on amendments to the specification in question. This will substantially reduce the problems involved with exceptions and substitutions. Use of the instruction on variance will also ensure that the panel members focus on the guilt or innocence factors, rather than the specific day or amount or nomenclature.
- 4.** Counsel for both sides should consent to the Findings Worksheet on the record before it is given to the court members. This is especially important in cases involving lesser-included offenses.
- 5.** The military judge should keep a copy of the worksheet in order to review it with the President prior to the court closing.
- 6.** When the court members return from deliberations, the military judge must review the Findings Worksheet to insure that the findings are lawful and in proper form. The judge must have the President correct any mistake or omissions prior to announcement of the findings.

Appendix B-1

Findings Worksheet—No Lesser Included Offenses

Table B-1
Sample Findings Worksheet—No Lesser Included Offenses

UNITED STATES)	
)	
v.)	
	)	FINDINGS WORKSHEET
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)

or

Of Specification 1 of Charge I: (Not Guilty) (Guilty)

Of Specification 2 of Charge I: (Not Guilty) (Guilty)

Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)

or

Of Specification 1 of Charge II: (Not Guilty) (Guilty)

Of Specification 2 of Charge II: (Not Guilty) (Guilty)

Of Charge II: Guilty

(Signature of President)

Appendix B-2

Findings Worksheet—Lesser Included Offenses

Table B-2
Sample Findings Worksheet—Lesser Included Offenses

UNITED STATES)	
)	
v.)	
	)	FINDINGS WORKSHEET
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)

or

Of Specification 1 of Charge I: (Not Guilty) (Guilty)

(Not Guilty of (state greater offense alleged) but Guilty of (state lesser include offense alleged)). As to Specification 1 of Charge I, Not Guilty of a Violation of Article (____), but Guilty of a Violation of Article (____).

Of Specification 2 of Charge I: (Not Guilty) (Guilty)

Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)

or

Of Specification 1 of Charge II: (Not Guilty) (Guilty)

Of Specification 2 of Charge II: (Not Guilty) (Guilty)

(Not Guilty of (state greater offense alleged), but Guilty of (state lesser included offense alleged)).

Of Charge II: Guilty

(Signature of President)

Appendix B-3

Findings Worksheet—Capital Cases

Table B-3
Sample Findings Worksheet—Capital Cases

UNITED STATES)	
)	
v.)	
	)	FINDINGS WORKSHEET
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal

Of (the) (all) Charge(s) and (its) (their) Specification(s):
Not Guilty

II. Mixed Findings

Of the Specification of Charge I:

- a. Not Guilty
- b. By unanimous vote of all members, Guilty

President

COL James Member

LTC Joyce Member

CSM Brenda Member

1SG Sally Member

SFC Steven Member

- c. Guilty
- d. Not Guilty of (premeditated murder), but Guilty of (unpremeditated murder)

Of Charge I: (Not Guilty) (Guilty)

Of Charge II and its Specification: (Not Guilty) (Guilty)

Of The Specification of the Additional Charge:

- a. Not Guilty
- b. By unanimous vote of all members, Guilty

President

COL James Member

LTC Joyce Member

CSM Brenda Member

1SG Sally Member

SFC Steven Member

- c. Guilty
- d. Not Guilty of (felony murder), but Guilty of (unpremeditated murder).

Of The Additional Charge: (Not Guilty) (Guilty)

(Signature of President)

Appendix B-4

Findings Worksheet—Exceptions and Substitutions

Table B-4
Sample Findings Worksheet—Exceptions and Substitutions

UNITED STATES)	
)	
v.)	
	)	FINDINGS WORKSHEET
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)

or

Of Specification 1 of Charge I: (Not Guilty) (Guilty)

(Guilty, Except the [words] [figures] [words and figures]):

Of the excepted [words] [figures] [words and figures]:

Not Guilty)

Of Specification 2 of Charge I: (Not Guilty) (Guilty)

Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)

or

Of Specification 1 of Charge II: (Not Guilty) (Guilty)

(Guilty, Except the [words] [figures] [words and figures]):

Substituting therefor the [words] [figures] [words and figures]:

Of the excepted [words] [figures] [words and figures]:

Not Guilty

Of the substituted [words] [figures] [words and figures]:

Guilty)

Of Specification 2 of Charge II: (Not Guilty) (Guilty)

Of Charge II: Guilty

(Signature of President)

Appendix B-5

Alternative Findings Worksheet

Table B-5
Sample Alternative Findings Worksheet

UNITED STATES)	
)	
v.)	
	)	FINDINGS WORKSHEET
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):

- [a]** Not Guilty
- [b]** Guilty

II. Mixed Findings

Charge I (state offense alleged)

Of Charge I and its Specification:

- [a]** Not Guilty
- [b]** Guilty

Charge II (state offense alleged)

Of Specification 1 of Charge II:

- [a]** Not Guilty
- [b]** Guilty
- [c]** Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)
- [d]** Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)
- [e]** Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)
- [f]** Guilty, except the (words) (figures) (words and figures)

(and substituting therefor the (words) (figures) (words and figures))

of the excepted (words) (figures) (words and figures), Not Guilty, of the substituted (words) (figures) (words and figures), Guilty.

Of Specification 2 of Charge II:

[a] Not Guilty

[b] Guilty

[c] Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)

[d] Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)

[e] Guilty, except the (words) (figures) (words and figures)

(and substituting therefor the (words) (figures) (words and figures)

of the excepted (words) (figures) (words and figures), Not Guilty, of the substituted (words) (figures) (words and figures), Guilty.

Of Charge II

[a] Not Guilty

[b] Guilty

Charge III (state offense alleged)

Of the specification of Charge III:

[a] Not Guilty, and of Charge III, not Guilty

[b] Guilty, and of Charge III, Guilty

[c] Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)

[d] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)

[e] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)

[f] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)

(Signature of President)

Appendix C

Sentence Worksheets

1. Sample sentence worksheets for the various types of courts-martial are located at C-1 through C-4.
2. The sentence worksheet must be carefully reviewed by the military judge before it is given to the court members. The samples should be modified to insure that the court is not given the opportunity to adjudge an unlawful sentence or one that is inappropriate. Examples include:
 - a. Fines. The fine heading and sentence element should be removed unless there is an unjust enrichment or some other colorable basis for imposing a fine. The trial counsel may announce that the government does not intend to argue for imposition of a fine, in which case the military judge may elect to delete that punishment from the worksheet. The contingent confinement language is rarely appropriate.
 - b. Mandatory Sentences. In cases in which there is a mandatory sentence for certain elements, that sentence element should be the only one placed on the sentence worksheet. For example, in a case in which the accused has been convicted of Article 118(1) or (4), Murder, the confinement element should read: To be confined for the length of your natural life. In such cases, the restriction and hard labor without confinement elements should be removed.
3. Counsel for both sides should consent to the sentence worksheet on the record prior to it being given to the court members. In a capital case, the court must ensure that the aggravating factors listed on the sentence worksheet are the same factors of which the accused was given notice.
4. When the court members return from deliberations, the military judge must review the sentence worksheet to ensure that the sentence is lawful and in proper form. The judge must have the President correct any mistakes or omissions prior to announcement of the sentence.

Appendix C-1

Sentence Worksheet—General Court-Martial (Non-Capital)

Table C-1
Sample Sentence Worksheet—General Court-Martial (Non-Capital)

UNITED STATES)	
)	
v.)	
	)	SENTENCE WORKSHEET
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial sentences you:

1. To no punishment.

FINE AND FORFEITURES

2. To pay the United States a fine of \$ _____ (and to serve (additional) confinement of _____ (days) (months) if the fine is not paid).

3. To forfeit \$ _____ pay per month for _____ (months).

4. To forfeit all pay and allowances.

RESTRAINT AND HARD LABOR

5. To be restricted for _____ (days) (months) to the limits of:

6. To perform hard labor without confinement for _____ (days) (months).

7. To be confined for _____ (days) (month(s)) (year(s)) (the length of your natural life with eligibility for parole) (the length of your natural life without eligibility for parole).

(Signature of President)

Appendix C-2

Sentence Worksheet—General Court-Martial (Capital Case)

Table C-2
Sample Sentence Worksheet—General Court-Martial (Capital Case)

UNITED STATES)	
)	
v.)	
	)	SENTENCE WORKSHEET
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: If the court-martial adjudges a death sentence, the court shall indicate below which aggravating factor(s) have been proven. The factor(s) which are not proven shall be lined out. If the sentence does not include death, the aggravating factor(s) portion of this worksheet and the extenuating and mitigating circumstances portion of this worksheet shall be nullified by marking a large 'X' across them. The President will not read the language in bold print.]

AGGRAVATING FACTORS

Specialist James D. Jones, this court-martial unanimously finds that the following aggravating factor(s) (has) (have) been proven beyond a reasonable doubt:

- | Proven | Not Proven | |
|--------|------------|--|
| 1. () | () | That you committed the offense of <u>(state the offense alleged)</u> . |
| 2. () | () | That you committed the offense of <u>(state the offense alleged)</u> . |
| 3. () | () | That you committed the offense of <u>(state the offense alleged)</u> . |

(Signature of President)

[NOTE: If the sentence includes death, all members must sign the sentence worksheet below.]

President

COL James Member

LTC Joyce Member

CSM Brenda Member

1SG Sally Member

SFC Steven Member

EXTENUATING AND MITIGATING CIRCUMSTANCES

Specialist James D. Jones, this court-martial unanimously finds that any extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factors specifically found by the court and listed above.

(Signature of President)

[NOTE: If the sentence includes death, all members must sign the sentence worksheet below.]

President

COL James Member

LTC Joyce Member

CSM Brenda Member

1SG Sally Member

SFC Steven Member

[NOTE: After the court members have reached a sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the sentence by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, it is my duty as president of this court-martial to announce that the court-martial, (all) (three-fourths) of the members concurring, sentences you:

FINE AND FORFEITURES

1. To pay the United States a fine of _____ (and to serve (additional) confinement of ____ (days) (months) (years) if the fine is not paid).
2. To forfeit \$ _____ pay per month for _____ months.
3. To forfeit all pay and allowances.

CONFINEMENT

4. To be confined for _____ (days) (months) (years) (the length of your natural life with eligibility for parole) (the length of your natural life without eligibility for parole).

DEATH

5. To be put to death.

(Signature of President)

[NOTE: If the sentence includes death, all court members must sign the sentence worksheet below.]

President

COL James Member

LTC Joyce Member

CSM Brenda Member

1SG Sally Member

SFC Steven Member

Appendix D

Rehearings, New or Other Trials and Revision Procedure

NOTE: Scope of this appendix. In new or other trials and in rehearings which require findings on all charges and specifications referred to a court-martial, the procedure in general is the same as in an original trial.

D-1. Sentence.

NOTE 1: Rehearing on sentence only. In a rehearing on sentence only, sound practice dictates that an out-of-court hearing be held as soon as it is lawfully authorized to consider such matters as: (1) motions to dismiss or for other appropriate relief; (2) sufficiency and timeliness of the written notice of rehearing served upon accused; (3) examination of prior appellate decisions, if any, and applicable promulgating orders (in this regard, the trial counsel should be cautioned that when announcing the general nature of the charges, only those charges and specifications on which findings of guilty stand approved or affirmed should be announced); (4) stipulations, portions of the original record of trial, and other evidence and information normally offered in presentence proceedings (in this regard, the trial counsel should be reminded not to disclose improperly any period of post-trial confinement resulting from the sentence of the original trial); (5) examination of Sentence Worksheet; (6) proposed instructions concerning the rules applicable in determining the maximum punishment and other sentence matters. After this out-of-court hearing, the trial should proceed in open session through the normal challenge procedure. Thereafter, the portion of the procedure through and including the findings should be omitted and the court should be instructed:

MJ: The accused stands convicted but unsentenced of (specify the relevant offense(s)). These proceedings are being held so that you may determine an appropriate sentence for the accused for the commission of such offense(s). In this connection, both sides have agreed that I inform you that there has been a prior trial of this case. This is what is called a “rehearing” and more specifically a “sentence rehearing.” I bring this to your attention solely to remove confusion and speculation from your mind. There will, undoubtedly, be references to a “prior trial” or a “prior hearing.” There will be a time gap concerning some dates on documents. (There will be testimony concerning the accused’s conduct at the (_____) since _____.)

The fact the accused was sentenced for these offenses in (state date of prior hearing) is not evidence. What is an appropriate sentence in this case must be decided only on what legal and competent evidence is presented for your consideration. (An error) (Errors) occurred at the first trial. Therefore, you may not consider, for any reason, that earlier trial, unless evidence therefrom is admitted in this trial. To assist you in your determination of an appropriate sentence, I now call

upon the trial counsel to present evidence of facts and circumstances pertinent to such findings of guilty.

NOTE 2: After such evidence has been presented, normally by stipulation or by reading from the record of the original hearing, the presentence procedure will be the same as in any trial after findings are announced until the court determines and announces its sentence. The accused may not withdraw any plea of guilty upon which the findings of guilty now before the court were based. However, if the accused establishes that such a plea was improvident, the hearing will be suspended and the matter referred to the authority directing the rehearing on the sentence, for appropriate action.

D-2. Combined Rehearing.

NOTE: Rehearing on sentence combined with a trial on the merits. When a rehearing on sentence is combined with a trial on the merits of some of the specifications referred to the court, the trial will first proceed on the merits without reference to the rehearing on sentence. After the court has announced its findings, it will then be advised of the offenses on which the rehearing on sentence is being held, additional voir dire and challenges for cause will be permitted, and the principles set forth in D-1, NOTE 1, above, will apply to those offenses. The court will then continue with its sentencing procedure and will adjudge a single sentence for all offenses under consideration. A suggested guide for informing the court members about the rehearing follows:

MJ: There has been a prior trial in this case and this is what is known as a “rehearing.” I bring this to your attention with the concurrence of both sides and for one reason only.

There has been a considerable time gap between the alleged offenses and today. There inevitably will be references to what was said at “a prior hearing” or “the first trial.” Documents may appear to be outdated or old. I bring this to your attention only to remove confusion and speculation from your mind and to allow you to concentrate on what you hear in court during this rehearing.

The fact that the accused was previously tried is not evidence of guilt. It must be totally disregarded by you. The accused sits before you presumed innocent of the charged offenses. (His) (Her) guilt or innocence maybe decided only on what legal and competent evidence is presented for your consideration in this trial. You may only convict the accused if the legal and competent evidence presented to you in this trial convinces you of (his) (her) guilt beyond a reasonable doubt.

D-3. Proceedings in Revision.

NOTE 1: Procedures. A revision proceeding is a method by which a court-martial reconvenes for the purpose of revising its action or correcting its record. The following guide illustrates two typical uses of a revision proceeding:

MJ: This Article 39(a) session is called to order.

TC: Let the record reflect that all parties present when the court last adjourned are once again present. There have been no changes in the convening orders since the last date of trial, _____.

MJ: I've called this session for the purpose of clarifying the record in this case in accordance with Article 62(b) of the Uniform Code of Military Justice, and RCM 1102 of the Manual for Courts-Martial. We will follow, insofar as applicable, the procedural guide for this type of hearing contained in The Military Judges' Benchbook For Provost Courts. These proceedings in revision have been undertaken by the court (on its own motion pursuant to RCM 1102) (pursuant to the following communication: _____ which will be inserted at this point in the record). The purpose is to correct an unintended omission in my discussion with the accused of (the maximum punishment in this case) (the request for trial by military judge alone). I determine that this matter does not involve a substantive error which would preclude such revision, and, in accordance with RCM 1102 of the Manual, I would point out that (in reading the record of trial for authentication, I noted on page(s) _____ (and _____), I did not include in my discussion of the maximum punishment with the accused that it included confinement for six months) (I noted after adjournment that, in discussing the request for trial by military judge alone, I had failed to discuss with the accused the requirement that in a trial with members, a sentence which includes confinement for more than 10 years requires a concurrence of three-fourths of the members). Although, in accordance with RCM 1102, witnesses may not be called or recalled at this type of session, the accused may be questioned as to (his) (her) understanding of the subject matter under inquiry.

NOTE 2: Procedures when error was as to maximum punishment. The military judge may use the following guide when the proceedings in revision involve an error as to the maximum punishment:

MJ: (State the name of the accused), do you recall our discussion of the maximum punishment at the prior session of your court-martial?

ACC: (Responds.)

MJ: At the prior session of your court-martial, your defense counsel (_____), stated (she) (he) had advised you of the maximum punishment and that (she) (he) advised you that the maximum included, among other things (confinement for six months) (_____). Do you recall (him) (her) making that statement?

ACC: (Responds.)

MJ: So, you recall then, discussing (the maximum punishment) (_____) with _____ prior to submitting your offer to plead guilty?

ACC: (Responds.)

MJ: And do you recall that (she) (he) told you (the maximum punishment in your case would include confinement for six months) (_____)?

ACC: (Responds.)

MJ: And did you understand that at the time (she) (he) discussed that with you?

ACC: (Responds.)

MJ: And did you understand at the time you entered your plea of guilty at the prior session that the maximum punishment for the offenses to which you pleaded guilty included (confinement for six months) (_____)?

ACC: (Responds.)

MJ: And do you understand now that the maximum punishment for the offenses to which you pleaded guilty was: (to be confined for six months; and to forfeit two-thirds of your pay per month for six months) (_____)?

ACC: (Responds.)

MJ: I reaffirm my findings that the accused's plea of guilty was providently made. Now, do counsel for either side perceive any other matters that we should take up at this time?

TC/DC: (Respond.)

MJ: Court is adjourned.

NOTE 3: Procedures when the error was as to forum request. The military judge may use the following guide when the proceedings in revision involve an error in the forum request:

MJ: (State the name of the accused), do you recall in our discussion earlier with regard to your request for trial by military judge alone, I told you that, in a trial before a court which included members, two-thirds of those members present voting by secret written ballot would have to concur or agree in any findings of guilty against you?

ACC: (Responds.)

MJ: And did you understand that then?

ACC: (Responds.)

MJ: And do you understand it now?

ACC: (Responds.)

MJ: And do you also recall that I advised you that, in a trial with a court consisting of members, two-thirds of the members present voting by secret written ballot would have to agree before there could be any sentence adjudged against you in the event that there was a guilty finding?

ACC: (Responds.)

MJ: I failed to advise you at that time, but I advise you now; (do you understand that, if the findings of such a court, that is, a court with members, were to authorize a sentence of more than 10 years confinement, then three-fourths of the members present, voting by secret written ballot, would have to concur in any sentence which included confinement for more than 10 years) (_____)?

ACC: (Responds.)

MJ: Now, understanding (that requirement of three-fourths concurrence in any sentence which included confinement for more than 10 years, do you wish to renew your request for trial before me as military judge alone) (_____)? In other words, would you still want to be tried (by me judge alone, or would you prefer to be tried by court members) (_____)?

ACC: (Responds.)

MJ: In view of the accused's response, I reaffirm my finding that the accused's request for trial before me as military judge alone was voluntarily made, that it was an informed and knowing request, and I reaffirm my approval of the request for trial by military judge alone. There being no other matters to be taken up, then the court is adjourned.

Appendix E

Contempt Procedure

NOTE 1: Article 48, UCMJ. “A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceeding by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of \$100, or both.”

NOTE 2: Procedure prior to instituting contempt proceedings. When a person’s conduct borders upon contempt, that person should ordinarily be advised that his or her conduct is improper and that persisting in such conduct may cause the court to hold him or her in contempt. Such warning should be made a part of the record of trial in order to show a proper foundation for contempt proceedings. (In court-martial with members, any warning to an accused or defense counsel should occur outside the presence of the members.) Contempt proceedings may often be avoided by causing the offender to be removed from the courtroom. Before an accused is removed from the court-martial, the military judge must comply with the requirements of RCM 804 and determine that the accused’s continued presence will materially interfere with the conduct of the proceedings. Ordinarily, alternatives exist to removal of a disruptive accused. (See RCM 804 discussion.)

NOTE 3: Types and timing of contempt proceedings. Two types of contempt proceedings exist: (1) summary disposition, and (2) disposition upon notice and hearing. Each type of contempt proceeding is explained in the following two Notes. However, in both proceedings, contempt power resides solely in the military judge, who has discretion as to when the proceedings will occur during the court-martial to avoid unnecessarily disrupting the court-martial or prejudicing an accused. If the accused has elected court-martial by members, the contempt proceeding will occur outside of the presence of the members. A contempt proceeding is part of the court-martial in which it occurs; therefore, it must occur before adjournment of the court-martial. Also, because the contempt proceeding occurs during the court-martial, the accused at the court-martial, even when not an actual participant in the contempt proceeding, should be present unless the accused waives the right to be present under RCM 804(b).

NOTE 4: Summary disposition. Summary disposition of contempt may be used only when the military judge directly witnesses the allegedly contemptuous conduct in the actual presence of the court-martial. Under such circumstances, the military judge must recite the facts for the record, and indicate that the judge directly witnessed them in the actual presence of the court-martial. See R.C.M. 809(c). The following is a suggested guide for a summary disposition of contempt:

MJ: [To Respondent] I am considering whether you should be excluded from the proceedings for (here describe the conduct witnessed by the military judge in the actual presence of the court-martial). I now give you an opportunity to tell me anything about whether you should be removed

and excluded from further proceedings of this court-martial. (Your defense counsel will speak for you.)

RESPONDENT/DC: [Makes a statement or declines.]

[The military judge may close to deliberate, or immediately enter findings:]

MJ: (State the name of the person), I find beyond a reasonable doubt, based upon my directly witnessing your conduct in the actual presence of the court-martial, that you (state the specific conduct which was observed). I conclude beyond a reasonable doubt that your act(s) constituted (menacing (words) (signs) (and) (gestures) in the presence of this court) (a disturbance of the proceedings of this court by (riotous) (disorderly) conduct).

(State name of the person), I find that you were not in contempt of this court.) (Based upon this conduct, I hold you in contempt of court and I sentence you: To pay the United States a fine of \$ _____; (and to be confined for ___ days).)

NOTE 5: Disposition upon Notice and Hearing. If the military judge did not witness the allegedly contemptuous conduct, the notice and hearing procedures must be used. In such cases, the alleged offender is brought before the military judge presiding at the court-martial and informed orally or in writing of the alleged contempt, and given a reasonable opportunity to present evidence. The alleged offender has the right to be represented by counsel, and shall be so advised. A suggested guide to accomplish the notice and hearing follows:

MJ: (State the name of the Respondent), I have (heard) (received (a) report(s)) that you (state the conduct allegedly committed by the offender). If true, you (may have used menacing (words) (signs) (and) (gestures) in the presence of this court) (may have disturbed the proceedings of this court by (riotous) (disorderly) conduct). Article 48, Uniform Code of Military Justice, provides that any person who uses any menacing (word) (signs) (or) (gesture) in the presence of a court-martial, or who disturbs its proceedings by a (riot) (disorder) maybe punished for contempt. The maximum punishment is a fine of \$100 and confinement for 30 days. I will conduct a hearing in which I will determine if you should be held in contempt of court. At that hearing, you have the right to present evidence, to call witnesses, and to present argument. You are entitled to be represented by counsel at the contempt hearing.

(For military offender) You may be represented by military counsel appointed to represent you at no expense to you, or you may be represented by civilian counsel of your choosing at no expense to the Government. Do you understand these rights?

(For civilian offender) That counsel must be someone you arrange for at no expense to the Government. Do you understand these rights? Do you desire to be represented by counsel?

RESPONDENT: (Responds.)

MJ: You will be present at (state time/place for contempt hearing) with your counsel for the contempt proceeding. Do you have any questions?

[At the subsequent contempt proceeding, proceed as follows:]

MJ: This contempt proceeding is called to order.

TC: The accused at this court-martial, the respondent for this contempt proceedings, and the following persons detailed to this proceeding are present: _____, Military Judge; _____, Trial Counsel for the court-martial (and this contempt proceeding); (Trial Counsel for this contempt proceeding); _____, Defense Counsel for the accused; and _____, Defense Counsel for the respondent. _____, has been detailed reporter for this proceeding and (has been previously sworn) (will now be sworn.) [or] (_____ continues as court reporter for this proceeding.)

(I) (All members of the prosecution for this proceeding) have the same detailing and qualifications as announced at the court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred). [or] (I) (All members of the prosecution for this proceeding) have been detailed to this proceeding by _____. (I am) (All members of the prosecution are qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me)(us) in this proceeding.

MILITARY DC: (I) (All members of the defense for the respondent) have the same detailing and qualifications as announced at the court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred). [or] (I) (All members of the defense for the respondent) have been detailed to this proceeding by _____. (I am) (All members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense for the respondent has) acted in any manner which might tend to disqualify (me) (us) in this proceedings.

CIVILIAN DC: I will represent the respondent in this contempt proceeding. I am an attorney and licensed to practice law in the state(s) of _____. I am a member in good standing of the _____ bar(s). I have not acted in any capacity which might tend to disqualify me in this contempt proceeding.

[If necessary, the military judge should administer the oath to the civilian counsel, for oath see page 8.]

MJ: (State the name of the defense counsel), during this court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred), I indicated to your client that I had (heard) (received (a) report(s)) that (he) (she) (may have used menacing (words) (signs) (and) (gestures) in the presence of this court) (may have disturbed the proceedings of this

court by (riotous) (disorderly) conduct). This proceeding is being held to determine if your client should be held in contempt, and if so, what your client's punishment should be.

Trial counsel, do you wish to make an opening statement?

TC: (Responds with opening statement, if desired.)

MJ: Defense counsel, do you desire to make an opening now or wish to reserve?

DC: (Responds with opening statement, waives, or reserves.)

MJ: Trial counsel, you may call your first witness.

[The hearing proceeds with evidence being presented by the trial counsel, and cross-examination by the defense counsel, if desired. After the trial counsel rests, the defense counsel may present an opening statement (if originally reserved) or proceed to present witnesses/evidence on behalf of the respondent to show why he or she should not be held in contempt. To hold the offender in contempt, the evidence must establish the contempt beyond a reasonable doubt.]

MJ: [To Respondent] After counsel have argued, I will decide whether you should be held in contempt. If I hold you in contempt, I will also adjudge a sentence. I now give you an opportunity to tell me anything about whether you should be held in contempt or what sentence I should adjudge if you are held in contempt. If you wish to say nothing, that fact will not be held against you and I will draw no adverse inference from your silence. Is there anything you wish to say?

RESPONDENT: (Makes a statement or declines.)

MJ: Trial counsel, you may present argument.

TC: (Argument or waiver.)

MJ: Defense counsel, you may present argument.

DC: (Argument or waiver.)

[The military judge may close to deliberate, or immediately enter findings:]

MJ: The contempt proceeding is called to order. All parties present when the contempt proceeding closed are again present.

((State the name of the person alleged)), I find that you were not in contempt of this court.)

((State the name of the person alleged)), I find beyond a reasonable doubt that your act(s) constituted (menacing (words) (signs) (and) (gestures) in the presence of this court) (a disturbance of the proceedings of this court by (riotous) (disorderly) conduct). I hold you in contempt of court and I sentence you: You will be excluded for further proceedings.

NOTE 6: Approval by convening authority of sentence. Because RCM 809 indicates that the convening authority shall designate the place of confinement for any person sentenced to confinement for contempt and further states that confinement begins when adjudged unless the convening authority defers, suspends, or disapproves the confinement, the convening authority should be notified immediately of any contempt sentence which includes confinement. This immediate notification will ensure that the offender is properly confined if the convening authority approves the sentence. A fine does not become effective until ordered executed by the convening authority; therefore, if the sentence only includes a fine, there is not the same urgency in notifying the convening authority.

NOTE 7: Record of contempt proceeding. A record of the contempt proceeding will be made and will be included in the regular record of trial. If the person is held in contempt, a separate record of the contempt proceeding will be prepared and forwarded to the convening authority for review. (As stated in Note 6 above, when the sentence includes confinement, the convening authority should be immediately notified; however, the notification need not consist of a complete record of the proceedings.)

NOTE 8: Barring person held in contempt from the courtroom. When a person has been held in contempt, pending the convening authority's review of the record of the contempt proceeding, that person may be removed from the courtroom and his or her return during the subsequent proceedings may be prohibited. The immediate commander of a person held in contempt should be advised of the court's action. In the case of a civilian, the convening authority should be immediately advised. In either case, a sentence to confinement begins to run when it is adjudged unless suspended, deferred, or disapproved by the convening authority. If the offender is a witness, he or she may be permitted to complete testimony before contempt proceedings are initiated. Ordinarily, the trial and defense counsel should be allowed to continue to perform their duties before the court even though held in contempt, unless it appears that they cannot be expected to conduct themselves properly during subsequent proceedings. The military judge may also delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings. See Note 2, above, about removing an accused from the court-martial proceedings.

REFERENCES:

- (1) Article 48, UCMJ.***
- (2) RCM 801, 804, 809, and RCM 809 analysis at Appendix A, MCM.***
- (3) United States v. Burnett, 27 M.J. 99 (C.M.A. 1988).***

Appendix F

Reserved

Appendix G

General and Special Findings

G-1. General.

NOTE 1: Essential findings of fact. Under RCM 905(d), “essential findings of fact” must be stated by the military judge on the record when “factual issues are involved” in ruling on motions. Also under the Military Rules of Evidence, when ruling upon certain motions, the military judge must state essential findings of fact on the record. See MRE 304(d)(4), 311(d)(4), and 321(f). This is a *sua sponte* responsibility.

NOTE 2: Requested special findings. Under RCM 918(b), the military judge MUST, upon request, find the facts specially in the event of a general finding of guilty. Counsel may make requests for special findings more than once during the trial of a case but the judge is required to make only one set of special findings and then only if there is a conviction. The request must be made before findings and the judge may ask counsel to submit the request for special findings and actual proposed findings in writing. Proposed special findings submitted by counsel should be marked as appellate exhibits and appended to the record. However, a failure of counsel to submit proposed special findings in writing does not absolve the judge from the requirement to make special findings.

NOTE 3: Discretionary special findings. The military judge may make such special findings as deemed appropriate even if none are requested. In this regard, special findings may be made, if there is a conviction, whenever the judge concludes that the record does not adequately reflect all significant matters considered when “the trial court saw and heard the witnesses” (See Article 66(c), UCMJ).

NOTE 4: Effect of acquittal or conviction of lesser included offense. If an accused is acquitted, the judge is not obliged to make special findings nor need any be made regarding the greater offense when an accused is convicted of a lesser offense.

G-2. Preparing special findings.

NOTE 1: Findings of law. Special findings must reflect application of correct legal principles to the facts of the case. Conceptually, therefore, the judge cannot properly find the critical and relevant facts unless the evidence is fully considered in the light of rules of law governing the theories of the prosecution and defense.

A review of those instructions contained in this Benchbook concerning elements of offenses and the special and the other defenses in issue should be considered a prerequisite to drafting special findings. The judge should, as a general rule, make findings on all matters upon which members would be instructed. In this connection, it is suggested that the judge use the instructions checklist contained in Appendix J, as an aid in guarding against inadvertent omissions of crucial matters.

NOTE 2: Findings of fact. Appropriate special findings are not only findings on elements of offenses, but also on all factual questions placed reasonably in issue prior to findings, as well as controverted issues of fact which are deemed relevant to the sentencing decision. Jurisdictional facts must be found when they are controverted, and conclusions concerning issues of jurisdiction should be set forth.

However, superfluous findings are not required nor are findings on each particular minor matter concerning which there may be conflicting evidence.

In preparing findings of fact, the judge should exercise care to find the facts simply, clearly and with economy of expression. The judge, when stating special findings in the record, should first prepare a draft or detailed outline of the contemplated special findings. Findings should include facts which are admitted as well as those in dispute. Extended recital of testimony or discussion of evidence is not a substitute for simple findings by the judge as to the facts.

Additionally, special findings should include finding of all facts necessary to the disposition of evidentiary motions and motions to dismiss.

NOTE 3: Form of special findings. Special findings of fact may, in the discretion of the judge, be expressed orally in open court, in writing as an appellate exhibit, or in a written opinion or memorandum of decision filed within a reasonable time after trial but prior to authentication, or by a combination of these methods. However, when the need for special findings may be mooted by the findings, such as when the accused is acquitted, a nonverbatim record may result, a danger of inadvertent omission exists, or the judge wishes to analyze conflicting evidence to demonstrate the basis for any of his determinations, the judge should defer the special findings until after the trial and utilize the opinion or memorandum form. Citation of legal authority for factual conclusions and undisputed principles of law should not be utilized. However, if a memorandum or opinion is filed, citations of authority supporting conclusions of law are appropriate, particularly with regard to principles of law which are not universally accepted.

NOTE 4: Modification of special findings. When a military judge expresses the special findings at the time of trial, but later, prior to authentication, concludes that the special findings should be modified in any material respect, the judge should file an opinion or memorandum of decision to accomplish any necessary modification. Such opinion or memorandum should explain any discrepancy between the announced special findings and the later opinion or memorandum. For example, if a special finding of an element was in fact made by the judge, but omitted through inadvertence when stating the special findings at the trial, the judge may state such omitted special finding in a subsequent opinion or memorandum and include the explanation for its original absence from the record. Revision proceedings may also be utilized for this purpose (see Appendix D). A certificate of correction may be made when the finding was made but left out of the record inadvertently.

NOTE 5: Special findings in nonverbatim case. In a trial by general or special court-martial in which no verbatim record of the proceedings is to be made, the judge should write the special findings completely and append the written document to the record as an appellate exhibit.

NOTE 6: Sample special findings. The following examples of special findings are suggested for use by the military judge when the judge feels it advisable in a given case to announce special findings from the bench after making general findings and after having prepared a draft or outline covering the elements, defenses, and other matters in issue.

EXAMPLE A:

MJ: In view of the request (need) for special findings in this case, I shall now announce them. The court finds beyond a reasonable doubt as follows:

1. I considered all legal and competent evidence, and the reasonable inferences to be drawn therefrom. I resolved all issues of credibility. I found the accused guilty beyond a reasonable doubt of each and every element of the Charge at its specification, and I make the further findings as reflected *infra*.

2. I find that near Fort Blank, Missouri, in September 1999, the accused placed his hand on Jones' leg while traveling in the accused's automobile (R. 40). I find that approximately a week later, still in September, the accused kissed Jones on the mouth in the restroom of a theater in the town of Blank near Fort Blank (R. 50, 53). The accused put his hand on Jones' leg in the same theater on the same date (R. 54). He continued this conduct although Jones moved his leg (R. 55). Approximately one week later, in October 1999, Jones again accompanied the accused to town (R. 56), where accused kissed Jones on the lips in a pizza parlor bathroom (R. 57). Later the same day the accused kissed Jones on the lips in a theater latrine (R. 1). The accused put his hand on Jones' leg on the way home in accused's car (R. 73). The accused visited Jones at Jones' home in December 1999 (R. 75). and while there, grabbed Jones' penis through Jones' clothing (R. 76). The accused visited Jones at Jones' home in early January 1996 (R. 73-74) where he kissed Jones on the mouth in the basement (R. 79).

3. I find that Thomas Jones was a male person, and was under the age of 16 years (R. 36, 38).

4. I find that the acts of the accused, as portrayed upon the entire record were in fact indecent. In so finding I have consulted my common sense and my knowledge of the ways of the world. I find that these acts were depraved, grossly vulgar, obscene and repugnant to common propriety and that they tended to excite lust and deprave morals with respect to sexual relations.

5. I find upon a reading of the entire record as it pertains to these acts, that the intent of the accused was totally unambiguous. I find his intent clearly was to appeal to and gratify the lust, passions and sexual desires of both the accused and his victim, Thomas Jones.

6. I find that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the service and was of a nature to bring discredit upon the armed forces.

JAMES HASH
COL, JA
Military Judge

NOTE 8: Essential Findings. A suggested format for use when the military judge decides or needs to include findings in an opinion or memorandum of decision is contained below. This format can also be used for oral essential findings.

Table G-2
Sample Letter—Essential Findings of Fact

UNITED STATES)	
)	
v.)	
	)	ESSENTIAL FINDINGS OF FACT
SSG Richard Simmons)	
123-45-6789	)	5 April 2000
Company B, 1st Battalion,)	
329th Infantry,)	
52d Infantry Division)	

Having had all of the evidence and having resolved issues of credibility, I find as follows:

1. The investigation into the accused's alleged misconduct began in Saudi Arabia on or about 24 January 1999.
2. The accused made various statements concerning his actions while he was in Saudi Arabia.
3. In Saudi Arabia he saw a lawyer, CPT White, on at least two occasions.
4. Apparently, no action was taken to end the matter prior to the accused's departure from Saudi Arabia.
5. On 10 December 1999, he was issued an administrative reprimand. (A. E. XXXI)
6. At that point he believed the investigation was completed and no further adverse action would befall him.
7. Subsequently, the accused was informed thorough the news media that the matter was not closed and that further action might occur.
8. Eventually the CID was directed to investigate the matter.
9. In the course of this investigation CID Agent Brown met with the accused at Kirtland AFB, New Mexico on 24 March 2000.
10. During the course of that meeting the accused agreed to undergo a polygraph examination.
11. Subsequently, the examination was scheduled for 14 April 2000 at a motel in Albuquerque, New Mexico. CID Agent Orange was to be the examiner.
12. Prior to 0850 on 14 April 2000, the accused arrived at the motel with MAJ Blue.
13. Mr. Brown informed MAJ Blue that he could not attend the examination in the motel room but he was welcome to wait in the lobby.
14. The accused and Mr. Brown then went to the hotel suite and MAJ Blue returned to his duties.
15. In the suite, the accused was introduced to Special Agent Orange and the polygraph examination routine began.
16. The pre-test phase began at 0905 and continued until 1055. After a five minute break, the pre-test phase continued until 1155. The parties reconvened at 1215. At 1240 the instrument phase began and lasted until 1320.
17. Agent Orange then informed the accused that he had shown deception.
18. The post test phase continued for several hours. During this phase, Orange threatened to leave.
19. Eventually, the accused made an oral inculpatory statement.

20. Agent Orange then departed, and Agent Brown continued the interrogation.
21. During the Brown interrogation, the accused made statements which were not as inculpatory as those made to Orange.
22. Eventually Brown typed a statement, the accused signed it at 1633 and departed at 1645 (AE VIII).
23. During early 2000, the accused was informed by a radio broadcast that the investigation was to be reopened.
24. During this period there were a number of newspaper articles concerning his case, a Congressman became involved (not on his side), and a rape crisis counselor was also involved.
25. The accused was not on active duty and not training with his regular reserve unit.
26. The accused made many efforts to obtain a lawyer.
27. He approached civilian lawyers, civilian lawyers who were members of the Reserves, and the Army Trial Defense Service.
28. In the United States, prior to 14 April 2000, he never retained nor was furnished a lawyer who could help him with the criminal investigation.
29. On 24 March 2000 and 14 April 2000, he was advised by the CID agents that if he desired a lawyer, one would be furnished to him. He declined to request a lawyer.
30. Prior to 24 March 2000, the accused felt himself to be alone against the United States Government which was pursuing a criminal case against him.
31. As a last resort he asked MAJ Blue to accompany him to the CID interrogations.
32. MAJ Blue attended the 24 March interrogation but as noted was denied entry to the 14 April polygraph examination and interrogation.
33. During the entire polygraph examination/interrogation the accused had two breaks, one of five minutes and one for 20 minutes. He had access to food but only had a coke.
34. He was accompanied by no one.
35. Proper rights warnings were given and waived by the accused.
36. The test I used to determine if the accused's statement of 14 April was voluntary is —Was the confession the product of an essential free and unconstrained choice by its maker?
37. In applying that test, I considered two other rules of law. First, the government had the burden of convincing me by a preponderance of the evidence that the statement was voluntary. If they could not so convince me, the statement would not be admitted. Second, in determining the issue, the totality of the circumstances were to be considered.

38. In making my determination, I considered that the accused believed himself to be alone against the government. Essentially all of his efforts to obtain legal counsel in the United States were fruitless. He was denied the accompaniment of MAJ Blue. It appeared to him that the media had chosen sides and was against him. The CID told him he had lied and gave him another scenario which it offered as the truth. He was not a member of an active duty unit which he could rely on for support and his reserve unit told him to train elsewhere.

39. With all these matters weighing on him and affecting him he cracked and gave up.

40. Although he could physically leave the motel suite, psychologically he could not.

41. Under these conditions he told the CID what it wanted to hear.

42. Under these conditions, his statement was not the product of an essentially free and unconstrained choice.

43. Under these conditions the government did not convince me by a preponderance of the evidence that the statement was voluntary.

JAMES HASH
COL, JA
Military Judge

REFERENCES:

(1) RCM 918, MCM.

(2) United States v. Gerard, 11 M.J. 446 (C.M.A. 1982).

(3) United States v. Orben, 28 M.J. 172 (C.M.A. 1989).

(4) United States v. Martinez, 38 M.J. 82 (C.M.A. 1993).

Appendix H

Rules of Practice Before Army Courts-Martial

The Chief Trial Judge is authorized to promulgate general Rules of Court, and local Rules of Court may be prescribed by Chief Circuit Judges for courts-martial within their circuits. RCM 108; AR 27-10, para. 8-8. Such rules must be consistent with the Constitution, the UCMJ, the Manual for Courts-Martial, Army regulations, and other applicable legal authority. See United States v. Williams, 23 M. J. 382 (C. M. A. 1987). Local rules must be forwarded to the Chief Trial Judge.

Appendix I

Form for Certificate of Correction of Record of Trial

NOTE: Once a record of trial has been authenticated and forwarded to the convening authority, it may be changed only through issuance of a certificate of correction. A certificate of correction may be used only to make the record correspond to that which actually occurred at the trial. A certificate of correction may not be used to correct a defect or error in the trial proceedings. Prior to authentication of the correction, all parties will be given notice of the proposed correction and an opportunity to respond. The certificate will be authenticated in the same manner as the record of trial and the accused will be furnished, and receipt for, a copy of the certificate. RCM 1104(d) and Appendix 14f, MCM.

Table I-1
Sample Letter—Certificate of Correction

UNITED STATES)	
)	
v.)	
)	
SSG Richard Simmons)	
123-45-6789	)	Certificate of Correction
Company B, 1st Battalion,)	
329th Infantry,)	
52d Infantry Division)	

The record of trial in the above case, which was tried by the general court-martial convened by Court-Martial Convening Order Number 10, Headquarters, Fort Bragg, dated 4 October 1999, as amended by Court-Martial Order Number 6, Headquarters, Fort Bragg, dated 31 May 2000, at Fort Bragg, North Carolina 28307, on 3-7 and 10 June 2000, is corrected by insertion of photographs as suitable descriptions of Defense Exhibit K, a pair of regular combat boots; Defense Exhibit L, a pair of jungle combat boots; and Defense Exhibit M, a pair of tennis shoes, at their appropriate place in the record. Substitution of photographs was authorized by the military judge on page 365 of the record of trial.

This correction is made because the original exhibits, photographs, or suitable descriptions of these exhibits as required by RCM 1103 are missing from the record of trial.

Substitute authentication by the trial counsel is authorized pursuant to RCM 1104(a)(2)(B) because the military judge has been retired from active duty and is not available.

All parties were given notice of this correction and permitted to examine and respond prior to the authentication of this Certificate of Correction pursuant to RCM 1104(d)(2).

A copy of this Certificate of Correction is being served on the accused by certified mail, return receipt requested, and will be sent for attachment to the record of trial when received.

JOHN Q. SMITH
CPT, JA
Trial Counsel

Appendix J

Instructions Checklists

Instructions checklists for contested cases (mental responsibility not in issue and mental responsibility (sanity) in issue) are located at J-1 and J-2.

Appendix J-1

Instructions Checklist-Mental Responsibility Not In Issue

I. PRIOR TO FINDINGS

- Preliminary instructions (2-5)
- Joint offenders (7-2)
- Elements of offenses (Chap 3)
- Vicarious liability (7-1)
- Absent accused (2-7-23)
- _____
- _____

II. DURING TRIAL (As Required)

- Stipulation of Fact (7-4-1 and 2-7-24)
- Stipulation of Expected Testimony (7-4-2 and 2-7-24)
- Expert Testimony (7-9-1)
- Prior Inconsistent Statement (7-11-1)
- Prior Consistent Statement (7-11-2)
- Accused's Failure to Testify (7-12)
- Uncharged Misconduct (7-13-1)
- Prior Conviction to Impeach (7-13-2)
- Have You Heard Questions to Impeach Opinion (7-18)
- Comment on Rights to Silence or Counsel (2-7-20)
- _____
- _____

III. FINDINGS (Mental Responsibility NOT an Issue)

A. Prefatory Instructions (2-5-9 or 8-3-8)

(B. Argument of Counsel. Can be done following Closing Substantive Instructions, at MJ's discretion.)

C. Elements of offenses (Chap 3)

- CH/SP _____ LIO _____

D. Terms having special legal significance.

_____ _____ _____

E. Vicarious Liability (7-1)

F. Joint Offenders (7-2)

G. Special and Other Defenses

Self-Defense (5-2)

Homicide/Aggravated Assault (5-2-1)

Non-Aggravated Assault (5-2-2)

Assault as LIO (5-2-3)

Homicide/Unintended Death (5-2-4)

Use of Force to Deter (5-2-5)

Other Instructions - Self-Defense (5-2-6)

Defense of Another (5-3)

Homicide/Aggravated Assault (5-3-1)

Assault/Battery (5-3-2)

Homicide/Agg Assault plus LIO (5-3-3)

Accident (5-4)

Duress (Compulsion or Coercion) (5-5)

Entrapment (5-6)

Defense of Property (5-7)

Obedience to Orders (5-8)

Unlawful Order (5-8-1)

Lawful Orders (5-8-2)

Physical Impossibility (5-9-1)

Physical Inability (5-9-2)

Financial and Other Inability (5-10)

Ignorance or Mistake of Fact (5-11)

Specific intent/knowledge (5-11-1)

General intent (5-11-2)

Article 134 Check Offenses (5-11-3)

Drug Offenses (5-11-4)

Voluntary Intoxication (5-12)

Alibi (5-13)

Voluntary Abandonment (5-15)

Parental Discipline (5-16)

Evidence Negating Mens Rea (5-17)

Claim of Right (5-18)

Causation-Lack of (5-19)

Other _____

Other _____

Other _____

H. Pretrial Statements

Pretrial Statements (Chap 4)

I. Vicarious Liability (7-1) (if not given in Part III E)

- Aider and Abettor (7-1-1)
- Counseling, Commanding, Procuring (7-1-2)
- Causing an Act to be Done (7-1-3)
- Liability of Coconspirators (7-1-4)

J. Joint Offenders (7-2) (if not given in Part III F)

K. Evidentiary and other instructions

- Circumstantial Evidence (7-3)
 - Proof of intent
 - Proof of knowledge
- Stipulation of Fact (7-4-1)
- Stipulation of Expected Testimony (7-4-2)
- Depositions (7-5)
- Judicial Notice (7-6)
- Credibility of Witness (7-7-1)
- Eyewitness/Interracial Identification (7-7-2)
- Character Evidence - Accused (7-8-1)
- Character Evidence - Victim (7-8-2)
- Character for Untruthfulness (7-8-3)
- Expert Testimony (7-9-1)
- Polygraph Expert (7-9-2)
- Accomplice Testimony (7-10)
- Prior Inconsistent Statement (7-11-1)
- Prior Consistent Statement (7-11-2)
- Accused's Failure to Testify (7-12)
- Uncharged Misconduct - Accused (7-13-1)
- Prior Conviction to Impeach (7-13-2)
- Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
- Variance-Findings by Exceptions and Substitutions (7-15)
- Variance-Value, Damage or Amount (7-16)
- Spill-Over (7-17)
- Have you Heard Questions to Impeachment Opinion (7-18)
- Witness under Grant of Immunity (7-19)
- Chain of Custody (7-20)
- Privilege (7-21)
- False Exculpatory Statements (7-22)
- Closed Trial Sessions (7-23)
- Brain Death (7-24)
- _____
- _____
- _____

L. Closing Substantive Instructions on Findings (2-5-12 or 8-3-11)

(M. Argument by Counsel. If not done in Part III B above.)

N. Procedural Instructions on Findings (2-5-14 or 8-3-13)

O. Presentencing Session (2-5-15)

P. NO SENTENCING PROCEEDINGS (If no sentencing proceedings are required, give Excusal Instruction at end of 2-5-16.)

IV. SENTENCING

A. Argument or Request for Punitive Discharge Inquiry (2-7-27)

(B. Argument by Counsel)

C. Sentence Instructions (2-5-21 through 2-5-23)

Offenses considered one for sentencing

Escalator clause

Article 58a

Pretrial confinement credit

Article 58b deferment

58b clemency powers by CA

Fine

Punitive discharge -- Vested benefits

Summary of evidence in extenuation/mitigation

Accused's failure to testify

Accused's not testifying under oath

Scope of accused's unsworn statement

Effect of guilty plea

Mendacity

Argument for specific sentence

Clemency (2-7-16 and 2-7-17 or 8-3-34))

Relative severity of sentence (2-7-15))

Credit for Article 15 punishment (2-7-21))

Concluding instructions (2-5-24)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-25

Appendix J-2

Instructions Checklist-Mental Responsibility IS In Issue

I. PRIOR TO FINDINGS

- Preliminary instructions (2-5)
- Joint offenders (7-2)
- Elements of offenses (Chap 3)
- Vicarious liability (7-1)
- Preliminary instruction on insanity (6-3)
- _____
- _____

II. DURING TRIAL (As Required)

- Stipulation of Fact (7-4-1 and 2-7-24)
- Stipulation of Expected Testimony (7-4-2 and 2-7-24)
- Expert Testimony (7-9-1)
- Prior Inconsistent Statement (7-11-1)
- Prior Consistent Statement (7-11-2)
- Accused's Failure to Testify (7-12)
- Uncharged Misconduct (7-13-1)
- Prior Conviction to Impeach (7-13-2)
- Have You Heard Questions to Impeach Opinion (7-18)
- Comment on Rights to Silence or Counsel (2-7-20)
- Preliminary instruction on insanity (6-3)
- _____
- _____

III. FINDINGS (Mental Responsibility IS an Issue)

A. Prefatory Instructions (2-5-9 or 8-3-8)

(B. Argument of Counsel. Can be done following Closing Substantive Instructions, at MJ's discretion.)

- C. Elements of offenses (Chap 3)
- CH/SP _____ LIO _____
 - CH/SP _____ LIO _____
 - CH/SP _____ LIO _____
 - CH/SP _____ LIO _____

D. Terms having special legal significance.

_____ _____ _____

E. Vicarious Liability (7-1)

F. Joint Offenders (7-2)

G. Special and Other Defenses

- Self-Defense (5-2)
 - Homicide/Aggravated Assault (5-2-1)
 - Non-Aggravated Assault (5-2-2)
 - Assault as LIO (5-2-3)
 - Homicide/Unintended Death (5-2-4)
 - Use of Force to Deter (5-2-5)
 - Other Instructions - Self-Defense (5-2-6)
 - _____
 - _____
 - _____
 - _____
- Defense of Another (5-3)
 - Homicide/Aggravated Assault (5-3-1)
 - Assault/Battery (5-3-2)
 - Homicide/Agg Assault plus LIO (5-3-3)
- Accident (5-4)
- Duress (Compulsion or Coercion) (5-5)
- Entrapment (5-6)
- Defense of Property (5-7)
- Obedience to Orders (5-8)
 - Unlawful Order (5-8-1)
 - Lawful Orders (5-8-2)
- Physical Impossibility (5-9-1)
- Physical Inability (5-9-2)
- Financial and Other Inability (5-10)
- Ignorance or Mistake of Fact (5-11)
 - Specific intent/knowledge (5-11-1)
 - General intent (5-11-2)
 - Article 134 Check Offenses (5-11-3)
 - Drug Offenses (5-11-4)
- Voluntary Intoxication (5-12)
- Alibi (5-13)
- Voluntary Abandonment (5-15)
- Parental Discipline (5-16)
- NO!! Evidence Negating Mens Rea (5-17)
- Claim of Right (5-18)
- Causation-Lack of (5-19)
- Other _____
- Other _____
- Other _____

H. Pretrial Statements (Chap 4)

I. Vicarious Liability (7-1) (if not given in Part III E)

- Aider and Abettor (7-1-1)
- Counseling, Commanding, Procuring (7-1-2)
- Causing an Act to be Done (7-1-3)
- Liability of Coconspirators (7-1-4)

J. Joint Offenders (7-2) (if not given in Part III F)

K. Defense of Lack of Mental Responsibility

- Mental Responsibility at Time of Offense (6-4)
- Partial Mental Responsibility (6-5)
- Expert Testimony (7-9-1)
- Evaluation of Testimony (6-6)

L. Evidentiary and other instructions

- Circumstantial Evidence (7-3)
 - Proof of intent
 - Proof of knowledge
- Stipulation of Fact (7-4-1)
- Stipulation of Expected Testimony (7-4-2)
- Depositions (7-5)
- Judicial Notice (7-6)
- Credibility of Witness (7-7-1)
- Eyewitness/Interracial Identification (7-7-2)
- Character Evidence - Accused (7-8-1)
- Character Evidence - Victim (7-8-2)
- Character for Untruthfulness (7-8-3)
- Expert Testimony (7-9-1)
- Polygraph Expert (7-9-2)
- Accomplice Testimony (7-10)
- Prior Inconsistent Statement (7-11-1)
- Prior Consistent Statement (7-11-2)
- Accused's Failure to Testify (7-12)
- Uncharged Misconduct - Accused (7-13-1)
- Prior Conviction to Impeach (7-13-2)
- Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
- Variance-Findings by Exceptions and Substitutions (7-15)
- Variance-Value, Damage or Amount (7-16)
- Spill-Over (7-17)
- Have you Heard Questions to Impeachment Opinion (7-18)
- Witness under Grant of Immunity (7-19)
- Chain of Custody (7-20)
- Privilege (7-21)
- False Exculpatory Statements (7-22)
- Closed Trial Sessions (7-23)
- Brain Death (7-24)
- _____
- _____
- _____

M. Closing Substantive Instructions on Findings (2-5-12 or 8-3-11)

(N. Argument by Counsel. If not done in Part III B above.)

O. Procedural Instructions on Findings (Mental Responsibility at Issue) (6-7)

P. Presentencing Session (2-5-15)

Q. NO SENTENCING PROCEEDINGS (If no sentencing proceedings are required, give Excusal Instruction at 2-5-16)

IV. SENTENCING

A. Argument or Request for Punitive Discharge Inquiry (2-7-27)

(B. Argument by Counsel)

C. Sentence Instructions (2-5-21 through 2-5-23)

Offenses considered one for sentencing

Escalator clause

Article 58a

Pretrial confinement credit

Article 58b deferment

58b clemency powers by CA

Fine

Punitive discharge -- Vested benefits

Summary of evidence in extenuation/mitigation

Mental responsibility sentencing factors (6-9)

Accused's failure to testify

Accused's not testifying under oath

Scope of accused's unsworn statement

Effect of guilty plea

Mendacity

Argument for specific sentence

Clemency (2-7-16 and 2-7-17 or 8-3-34))

Relative severity of sentence (2-7-15))

Credit for Article 15 punishment (2-7-21))

Concluding instructions (2-5-24)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-25

Appendix K

DuBay Hearing Procedure

NOTE: Scope of this appendix. When a record of trial is deficient on a particular issue, appellate courts sometimes order limited evidentiary hearings to assist them in performing their appellate duties. These hearings generally require the military judge to make specific findings of fact and conclusions of law on a particular issue, thus eliminating “the unsatisfactory alternative of settling [an] issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims.” United States v. DuBay, 37 C.M.R. 411, 413 (CMA 1967).

MJ: Please be seated. This limited hearing is called to order.

TC: This limited hearing was ordered by _____ in accordance with United States v. DuBay. Appellate Exhibit I () is the order from _____ returning the record of trial to The Judge Advocate General, for remand to a convening authority to order a limited hearing pursuant to United States v. DuBay. Appellate Exhibit II () is the memorandum from The Judge Advocate General to the Commander, _____, designating (him)(her) as the convening authority authorized to order this limited hearing. Appellate Exhibit III () is the advice from the Staff Judge Advocate to the convening authority and the convening authority’s order to conduct this limited hearing. (Appellate Exhibit IV () is the docketing order for this hearing, with the written input from both sides attached.) A copy of these Appellate Exhibits, along with the record of trial in this case, have been furnished to the military judge, counsel and the appellant.

NOTE: The military judge should also require any additional documents relating to the hearing be made Appellate Exhibits at this point. The record of trial of the prior trial ordinarily should not be marked as an Appellate Exhibit.

TC: The government is ready to proceed in this limited hearing.

MJ: Defense counsel, do you have any challenges to the jurisdiction of this limited hearing?

DC: (Responds.)

TC: (I) (All members of the prosecution) have been detailed to this limited hearing by (name of detailing authority). (I am) (All members of the prosecution are) qualified and certified under Article 27(b), and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner that might tend to disqualify (me) (us) in this hearing.

TC: The appellant and the following persons detailed to this hearing are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) (and) _____, Defense Counsel(; (and) _____, Assistant Defense Counsel;) (and) _____, Civilian Defense Counsel). No voting members of the court are present or required. The following persons detailed to this court are absent: _____.

NOTE: Oaths for counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge: “Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?”

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

NOTE: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

MJ: _____, you have the right to be represented by _____, your detailed military defense counsel. (He) (She) is provided to you at no expense to you.

You also have the right to request a different military lawyer to represent you. If the person you request were reasonably available, he or she would be appointed to represent you free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled only to one military lawyer. You may ask (his) (her) superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at no expense to the government.

If a civilian lawyer represents you, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer. Do you understand that?

APP: (Responds.)

MJ: Do you have any questions about your rights to counsel?

APP: (Responds.)

MJ: By whom do you wish to be represented?

APP: (Responds.)

MJ: And by (him) (her) (them) alone?

APP: (Responds.)

NOTE: If the accused elects pro se representation, see applicable inquiry at 2-7-2, PRO SE REPRESENTATION. The military judge must be aware of any possible conflict of interest by counsel and, if a conflict exists, the military judge must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

NOTE: If the original defense counsel from trial is not present, the military judge should inquire or explain as applicable why the attorney-client relationship has ceased

(Example: Former defense counsel left active duty or appellant is claiming ineffective assistance of counsel against former defense counsel). In any situation where it appears the appellant may have a legal right to the assistance of a former defense counsel, the military judge should obtain from the appellant an affirmative waiver of that former defense counsel's presence.

MJ: _____ is no longer on active duty and cannot be detailed by military authority to represent you at this hearing. However, you could attempt to retain _____ as civilian counsel. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing with out _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Because you have made allegations after trial that _____ was ineffective in (his) (her) former representation of you, (he) (she) has not been detailed to represent you at this hearing. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Defense counsel will announce by whom (he) (she) (they) (was) (were) detailed and (his) (her) (their) qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this hearing by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this proceeding.

(OATH FOR CIVILIAN COUNSEL:) **MJ:** Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this hearing. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

TC: Your honor, are you aware of any matter that might be a ground for challenge against you?

MJ: (I am not. I was the trial judge for the _____ portion of this case.) (I am not. I was not the trial judge for any prior proceedings in this case, whether pretrial, trial or post-trial.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Responds.)

MJ: Counsel, based on Appellate Exhibit(s) __, the purpose of this limited hearing is _____ . Do both counsel agree?

TC/DC: (Respond.)

MJ: _____ has your defense counsel explained the nature of this hearing to you?

APP: (Responds.)

MJ: Defense counsel, does the accused have in front of (him) (her) a copy of Appellate Exhibit I (___), the appellate court's order directing this hearing?

DC: (Responds.)

MJ: _____, look at page (___) of Appellate Exhibit I (___). The appellate court told me to determine _____. Do you see that portion of Appellate Exhibit I (___)? Do you understand that my sole purpose at this hearing is to listen to the matters presented by the parties and then make findings of fact and conclusions of law with respect to the issue(s) that the appellate court specified?

APP: (Responds.)

MJ: I have no authority to change anything that happened at your original trial. I cannot alter any prior ruling, finding or sentence. When I provide my findings and conclusions, the appellate court will decide what happens in your case. Do you understand that?

APP: (Responds.)

MJ: Because the Defense raised the matter at issue in this hearing, I will allow the Defense to go first with opening statement, presentation of the evidence and argument. Does the Defense have an opening statement?

DC: (Responds.)

MJ: Does the Government have an opening statement?

TC: (Responds.)

MJ: Defense counsel, you may present evidence.

NOTE: The TC administers the oath/affirmation to all witnesses. After a witness testifies, the military judge should instruct the witness along the following lines:

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within ___ minutes).

DC: The Defense has nothing further.

MJ: Government, you may present evidence.

TC: The Government has nothing further.

MJ: Defense, do you wish to present any rebuttal evidence?

DC: (Responds.)

MJ: Defense, you may present closing argument.

DC: (Responds.)

MJ: Government, you may present closing argument.

TC: (Responds.)

MJ: I will prepare findings of fact and conclusions of law, which will be provided to counsel and attached to this record as Appellate Exhibit __ prior to my authentication of the record.

Is there anything further from either party?

TC/DC: (Respond.)

MJ: This hearing is adjourned.

Glossary

Section I Abbreviations

A.B.R.

Board of Review

A.C.C.A.

Army Court of Criminal Appeals

ACC

Accused

A.C.M.R.

Army Court of Military Review

A.F.B.R.

Air Force Board of Review

A.F.C.C.A.

Air Force Court of Criminal Appeals

A.F.C.M.R.

Air Force Court of Military Review

ADC

Assistant/Associate Defense Counsel

ATC

Assistant Trial Counsel

BCD

Bad Conduct Discharge

CDC

Civilian Defense Counsel

C.G.C.C.A.

Coast Guard Court of Criminal Appeals

C.G.C.M.R.

Coast Guard Court of Military Review

C.M.A.

United States Court of Military Appeals

C.A.A.F.

Court of Appeals for the Armed Forces

CI

Civilian internee

DC

Defense Counsel

DD

Dishonorable Discharge

DP

Detaining power

EPW

Enemy prisoner of war

GCM

General Court-Martial

IMC

Individual Military Defense Counsel

MCM

Manual for Courts-Martial

MJ

Military Judge

M.J.

Military Justice Reporter

MRE

Military Rules of Evidence

N.M.C.M.R.

Navy-Marine Corps Court of Military Review

N.M.C.C.A.

Navy-Marine Corps Court of Criminal Appeals

OP

Occupying Power

PP

Protecting Power

RCM

Rules for Courts-Martial

SCM

Summary Court-Martial

SPCM

Special Court-Martial

TC

Trial Counsel

UCMJ

Uniform Code of Military Justice

Section II**Terms**

This section contains no entries.

Section III**Special Abbreviations and Terms**

This section contains no entries.