PART III
MILITARY COMMISSION RULES OF EVIDENCE

SECTION I
GENERAL PROVISIONS

Rule 101. Scope

(a) *Applicability.* These rules apply in trials by military commissions convened pursuant to the Military Commissions Act of 2006 (10 U.S.C. Chapter 47A) (hereinafter "the M.C.A.").

(b) *Secondary sources.* If not otherwise prescribed in this Manual or these rules, and insofar as practicable and consistent with military and intelligence activities, and not inconsistent with or contrary to the M.C.A. or this Manual, military commissions shall apply:

(1) First, the Military Rules of Evidence ("Mil. R. Evid."), as applied in trials by courts-martial under 10 U.S.C. Chapter 47;

(2) Second, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and

(3) Third, when not inconsistent with subsections (b)(1) and (b)(2), the rules of evidence at common law.

Rule 102. Purpose and construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, the protection of national security, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Ruling on evidence

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling that admits or excludes evidence unless the ruling materially prejudices a substantial right of a party; and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the military judge makes a definitive

ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim or error for appeal.

(b) *Record of offer and ruling.* The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.

(c) *Hearing of members.* During military commissions, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.

(d) *Plain error.* Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

Rule 104. Preliminary questions

(a) *Questions of admissibility and procedure generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, whether to protect the identity of a witness, whether to afford protective testimonial procedures to a victim or child witness, or the availability of a witness to testify either at the site of trial or a remote site, shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence, except those with respect to privileges.

(b) *Probative value conditioned on fact.* When the probative value of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit the evidence upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary. If either party represents to the military judge that fulfillment of the condition may require consideration of classified evidence, the military judge will proceed pursuant to Mil. Comm. R. Evid. 505.

(c) *Hearing of members.* Hearings on the admissibility of statements of an accused shall in all cases be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) *Weight and credibility*. This rule does not limit the right of a party to introduce

before the members evidence probative of weight or credibility.

Rule 105. Limited admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly.

Rule 106. Remainder of or related writings or recorded statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it, consistent with Mil. Comm. R. Evid. 505.

SECTION II
JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts

(a) *Scope of rule*. This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts*. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary*. The military judge may take judicial notice, whether requested or not. The parties shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establishing an element of the case.

(d) *When mandatory*. The military judge shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing members.* The military judge shall instruct the members that they may, but are not required to, accept as conclusive any factual matter judicially noticed.

Rule 201A. Judicial notice of law

(a) *Domestic law*. The military judge may take judicial notice of domestic law. Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. Comm. R. Evid. 201—except Mil. Comm. R. Evid. 201(g)—apply.

(b) *Foreign law*. A party who intends to raise an issue concerning the law of a foreign country, the law of an international forum, or the international law of war shall give reasonable written notice. The military judge, in determining such law, may consider any relevant material or source, including testimony of lay and expert witnesses, whether or not submitted by a party or admissible under these rules. Such a determination shall be treated as a ruling on a question of law.

SECTION III
RULES RELATED TO SELF-INCRIMINATION AND CERTAIN OTHER STATEMENTS

Rule 301. Privilege concerning compulsory self-incrimination

(a) *General rule*. No person shall be required to testify against himself at a proceeding of a military commission under these rules. The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31, to the extent that either may be invoked in proceedings before military commissions, are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied.

Discussion

Alien unlawful enemy combatants have a statutory privilege against self incrimination under 10 U.S.C. § 948r. Other witnesses, such as United States citizens, may invoke privileges under the U.S. Constitution or Article 31 of the U.C.M.J., to the extent they apply.

(b) *Standing*.

(1) *In general*. Any privilege a witness may have to refuse to respond to a potentially incriminating question is a personal one that the witness may exercise or waive at the discretion of the witness.

(2) *Judicial advice*. If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

(c) *Exercise of the privilege*. If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless: (1) facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness, or (2) the witness has, with respect to the question, waived the privilege against self-incrimination, or (3) the relevant privilege against self-incrimination does not apply. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of a statute of limitations, or similar reason.

(1) *Immunity generally*. In evaluating the sufficiency of a grant of immunity to overcome the privilege exerted by a witness, the military judge shall ensure that the immunity is granted by an appropriate authority and that the grant provides, at least, that neither the testimony of the witness nor any evidence obtained from that testimony may

be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) *Notification of immunity or leniency*. When a prosecution witness before a military commission has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required in the interests of justice.

(d) *Waiver by a witness*. A witness who answers a question without having asserted a privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to that fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given and does not extend to a rehearing or new or other trial, and is subject to Mil. Comm. R. Evid. 608(b).

(e) *Waiver by the accused*. When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified.

Discussion

If the accused voluntarily introduces his own prior hearsay statements through the direct examination of a defense witness, but the accused exercises his right not to testify himself at the proceeding, the military judge shall instruct the members prior to the beginning of their deliberations: "The accused has the absolute right to testify as a witness or to choose not to testify in this proceeding. That the accused exercised (his)(her) right not to testify should not be held against (him)(her). However, in this case, the accused has voluntarily offered his prior statements as part of (his)(her) defense by eliciting those statements through other defense witnesses. At the same time, the accused, by electing not to testify in the proceeding, has prevented the Government from subjecting those statements to cross-examination. In evaluating the weight to be accorded to the accused's hearsay statements, you may consider the fact that the accused chose not to be cross-examined on those statements and that those statements were not sworn testimony."

(f) *Effect of claiming the privilege*.

(1) *Generally*. The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.

(2) *On cross-examination*. If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

(g) *Instructions*. When the accused does not testify at trial, defense counsel may request that the members of the commission be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.

Discussion

References to the Fifth Amendment of the U.S. Constitution and Article 31 of the U.C.M.J. that can be found in Mil. R. Evid. 301 have been deleted as inapposite. Under the M.C.A., an alien unlawful enemy combatant's privilege against self-incrimination is limited to his testimony before a military commission. *See* 10 U.S.C. § 948r(a).

Rule 302. Privilege concerning mental examination of an accused

(a) *General rule*. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.M.C. 706 from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings.

(b) *Exceptions*.

(1) There is no privilege under this rule when the accused first introduces into evidence such statements.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in subsection (1).

(c) *Release of evidence*. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.M.C. 706. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) *Noncompliance by the accused.* The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.M.C. 706 from presenting any expert medical testimony as to any issue that would have been the subject

of the mental examination.

(e) *Procedure.* The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. Comm. R. Evid. 304 for an objection or a motion to suppress.

Rule 303. Degrading questions

No person may be compelled to make a statement or produce evidence before any military commission if the statement or evidence is not material to the issue and may tend to degrade that person.

Rule 304. Confessions, admissions, and other statements

(a) *General rules.*

(1) A statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made.

(2) A statement alleged to be the product of coercion may only be admitted as provided in section (c) below.

(3) A statement produced by torture or otherwise not admissible under section (c) may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

Discussion

This rule tracks 10 U.S.C. § 948r, which differs from Mil. R. Evid. 304. In determining whether a statement was "obtained by use of torture" or is the subject of a "dispute" as to the "degree of coercion," the military judge should consider the totality of the circumstances under which the contested statement was produced or obtained. *See* 10 U.S.C. § 948r.

(b) *Definitions.* As used in these rules:

(1) *Confession.* A "confession" is an acknowledgment of guilt.

(2) *Admission.* An "admission" is a self-incriminating statement not comprising an acknowledgment of guilt, whether or not intended by its maker to be exculpatory.

(3) *Torture.* For the purpose of determining whether a statement must be excluded under section (a) of this rule, "torture" is defined as an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within the actor's custody or physical control. "Severe mental pain or suffering" is defined as the prolonged mental harm caused by or resulting from:

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Discussion

See 18 U.S.C. § 2340.

(4) *Cruel, inhuman or degrading treatment.* The cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

(c) *Statements allegedly produced by coercion.* When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.

(1) As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.

(2) As to statements obtained on or after December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (B) the interests of justice would best be served by admission of the statement into evidence; and (C) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment.

Discussion

The Detainee Treatment Act, or "D.T.A.," enacted on December 30, 2005, provides that no individual in the custody or under the physical control of the United States Government shall be subject to cruel, inhuman, or degrading treatment or punishment, as defined by reference to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution, regardless of the nationality or location of the individual. Therefore, the M.C.A. requires military judges in military commissions to treat allegedly coerced statements differently, depending on whether the statement was made before or after December 30, 2005. *See* 10 U.S.C. § 948r(c), (d). For statements made on or after that date, the military judge may admit

an allegedly coerced statement only if the judge determines that the statement is reliable and possessing sufficient probative value, that the interests of justice would best be served by admitting the statement, and that the interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment or punishment prohibited by the D.T.A. If a party moves to suppress or object to the admission of a proffered statement made before December 30, 2005, the military judge may admit the statement if the judge determines that the statement is reliable and possessing sufficient probative value, and that the interests of justice would best be served by admitting the statement. In evaluating whether the statement is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement.

(d) *Procedure.*

(1) *Disclosure.* Subject to the requirements of Mil. Comm. R. Evid. 505, prior to arraignment, the prosecution shall disclose to the defense the contents of all relevant statements, oral, written, or recorded, made or adopted by the accused, that are within the possession, custody or control of the Government; the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense under R.M.C. 701 or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

(2) *Motions and objections.*

(A) Motions to suppress or objections under this rule to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(3) *Specificity.* The military judge may require the defense to specify, to the extent practicable, the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement or otherwise to obtain information necessary to specify the grounds for a motion to suppress, the military judge may, subject to the requirements and protections of Mil. Comm. R. Evid. 505, make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

Discussion

Where a party moves to suppress or object to evidence under section (c) on the ground that the degree of coercion is disputed, the military judge may require the party to state with specificity the grounds for the

motion or objection before requiring the party proposing the evidence to introduce evidence in support. *See, e.g., United States v. Jones*, 14 M.J. 700, 701 (N-M. C.M.R. 1982).

(4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(5) *Effect of guilty plea.* Except as otherwise expressly provided in R.M.C. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

(e) *Burden of proof.* When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subsection (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(1) *In general.* The military judge must find by a preponderance of the evidence that a statement by the accused comports with the requirements of this rule before it may be received into evidence.

(2) *Weight of the evidence.* If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances.

(f) *Defense evidence.* The defense may present matters relevant to the admissibility of any statement as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that, under the circumstances, the statement is admissible under this rule. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this section. When the accused testifies under this section, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

Discussion

This rule departs from the Mil. R. Evid. 304(f) so as to comport with 10 U.S.C. § 948r.

(g) *Miscellaneous.*

(1) *Oral statements.* An oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(2) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement, consistent with the provisions of Mil. Comm. R. Evid. 505.

Discussion

Mil. Comm. R. Evid. 304 contains no requirement for corroboration for admission of an inculpatory statement by the accused (*compare* Mil. R. Evid. 304(g)); however, in determining the probative value and reliability of such a statement, the military judge may consider the degree of corroboration, if any.

Rule 306. Statements by one of several accused

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

SECTION IV
PROBATIVE EVIDENCE AND ITS LIMITS

Rule 401. Scope of probative evidence in military commissions

Evidence has "probative value to a reasonable person" when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.

Rule 402. Evidence having "probative value to a reasonable person" generally admissible

All evidence having probative value to a reasonable person is admissible, except as otherwise provided by these rules, this Manual, or any Act of Congress applicable to trials by military commissions. Evidence that does not have probative value to a reasonable person is not admissible.

Rule 403. Exclusion of probative evidence on grounds of prejudice, confusion, or waste of time

The military judge shall exclude any evidence the probative value of which is substantially outweighed: (1) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or (2) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. Comm. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution;

(2) *Character of the alleged victim.* Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or assault case to rebut evidence that the alleged victim was an aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in

Mil. Comm. R. Evid. 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods of proving character

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) *Affidavits.* The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this section, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) *Definitions.* "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" includes, but is not limited to, a town, city, tribal area, and as to the armed forces also includes post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit; routine practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements

(a) *In general.* Except as otherwise provided in this rule, evidence of the following is

not admissible in any military commission proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) a plea of guilty that was later withdrawn;

(2) any statement made in the course of any judicial inquiry regarding the foregoing pleas; or

(3) any statement made in the course of plea discussions with the convening authority, legal advisor, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (A) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (B) in a military commission proceedings for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) *Definitions.* A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under any authorized alternative procedure for release from United States custody or other action in lieu of trial by military commission; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Rule 412. Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct, except as provided in sections (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions.* In a proceeding under this chapter, the following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would adversely affect the integrity or fairness of the proceeding.

Discussion

Mil. Comm. R. Evid. 412(b)(3) departs from Mil. R. Evid. 412(b)(3) insofar as the constitutional standard reflected in the latter does not apply here. Mil. Comm. R. Evid. 412(b)(3) nonetheless permits the military judge to ensure that evidence is admitted where the exclusion would adversely affect the integrity or fairness of the proceeding.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under section (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer probative evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a military commission, the military judge shall conduct the hearing outside the presence of the members pursuant to R.M.C. 803. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the commission or a superior court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in subsection (2) of this section that the probative value of the evidence that the accused seeks to offer outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the members.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, sexual assault, sexual abuse, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a military commission in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it has probative value to a reasonable person.

(b) In a trial by military commission in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 20 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "offenses of sexual assault" means an offense punishable under titles 10 or 18 of the United States Code, or any similar offense arising under the laws of any nation or under international law or the law of war that involved—

(1) any sexual act or sexual contact, without consent, proscribed by the law applicable to the site of that act or contact;

(2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;

(3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subsections (1) through (4).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a

hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

SECTION V
PRIVILEGES

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States, as applicable;

(2) An Act of Congress applicable to trials by military commissions;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by military commissions is practicable and not contrary to or inconsistent with the M.C.A., these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term "person" includes an appropriate representative of the Federal Government, a State, or political subsection thereof, or any other entity claiming to be the holder of a privilege.

Rule 502. Lawyer-client privilege

(a) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(b) *Definitions.* As used in this rule:

(1) A "client" is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a military commission case or in any military investigation or proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist, unless the member:

(A) is detailed, assigned, or otherwise provided to represent a person in a military commission case or in any military investigation or proceeding;

(B) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or

(C) is authorized to practice law and renders professional legal services during off-duty employment.

(3) A "representative" of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) *Who may claim the privilege.* The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule under the following circumstances:

(1) *Crime or fraud.* If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to clergy

(a) *General rule of privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions.* As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) *Who may claim the privilege.* The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule if the communication clearly contemplated the future commission of a fraud or crime, including concealment or asportation of evidence of a past crime, or if the consultation of the clergyman was sought or obtained to enable or aid anyone to commit or plan to commit what the maker of the communication knew or reasonably should have known to be a crime or fraud.

Rule 504. Husband-wife privilege

(a) *Spousal incapacity.* A person has a privilege to refuse to testify against his or her spouse.

(b) *Confidential communication made during marriage.*

(1) *General rule of privilege.* A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) *Definition.* A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) *Who may claim the privilege.* The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions.*

(1) *Spousal incapacity only.* There is no privilege under section (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) *Spousal incapacity and confidential communications.* There is no privilege under sections (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse; or

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in section (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in section (b), the relationship was a sham at the time of the communication.

(3) *Criminal activities.* There is no privilege under this rule if the communication clearly contemplated the future commission of a fraud or crime, including concealment or

asportation of evidence of a past crime, or if the communication with the spouse was sought or obtained to enable or aid anyone to commit or plan to commit what the maker of the communication knew or reasonably should have known to be a crime or fraud.

Rule 505. Classified information

(a) *General rule of privilege.* Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. This rule applies to all stages of the proceedings.

Discussion

This Manual contains numerous explicit cross-references to Mil. Comm. R. Evid. 505. The omission of such a cross-reference, however, should not be interpreted to prejudice the applicability of Mil. Comm. R. Evid. 505, which applies to all stages of the proceedings.

(b) *Definitions.* As used in this rule:

(1) *Classified information.* "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

(2) *National security.* "National security" means the national defense and foreign relations of the United States.

(3) *In camera presentation*. In accordance with 10 U.S.C. § 949d(f)(2)(C), an *in camera* presentation is not a "proceeding" within the meaning of 10 U.S.C. § 949d(b). Unless conducted *ex parte*, such presentations may be conducted as a conference under the provisions of R.M.C. 802, except that, at the request of the trial counsel, the accused shall be excluded. Any ruling of the military judge pursuant to such presentations will be in writing, appended to the record, and appropriately protected from disclosure. If so provided in this rule, an *in camera* presentation may be *ex parte*, in which case the presentation will be made by the trial counsel, in writing, to the military judge, outside the presence of the accused and defense counsel.

Discussion

See Mil. Comm. R. Evid. 506(i)(1) for the definition of an "*in camera* proceeding," which is a session under R.M.C. 803 from which the public is excluded. Such proceedings fall within the scope of 10 U.S.C. § 949d.

(c) *Who may claim the privilege.* The privilege may be claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a representative, witness or trial counsel to claim the privilege and make the finding on behalf of such a

person on his or her behalf. The authority of the representative, witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

Discussion

Upon delegation of the authority, the representative of the agency head exercises the authority to claim the privilege as if the agency head were making the claim personally and need not consult with the agency head prior to making the claim. The delegation of the authority can involve authorization for the representative to act in a single instance or by provision of blanket authorization on behalf of the agency head. This serves to resolve any question on the permissible scope of the delegation authority in favor of a broad interpretation of that delegation authority.

(d) *Pretrial session.* At any time after referral of charges, any party may move for a session under R.M.C. 803 to consider matters relating to classified information that may arise in connection with the trial. Following such motion or *sua sponte*, the military judge promptly shall hold a session under R.M.C. 803 to establish the timing of requests for discovery, provision of notice under section (g) and the initiation of the procedures under section (h). In addition, the military judge may consider any other matters that relate to classified information or that may promote a fair and expeditious trial.

(e) *Protection of classified information if disclosed; alternatives to disclosure; protection of the fairness of the proceedings; certain witness statements; protection of sources, methods or activities; record of trial.*

(1) *Protective order*. The military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the defense. The terms of any such protective order may include, among other things, provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge;

(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(D) Ordering all persons requiring security clearances to cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance;

(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(F) Regulating the making and handling of notes taken from material containing classified information; or

(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(2) *Additional protective orders*. At the request of the government the military judge shall enter such additional protective orders as are necessary for the protection of national security information to include protective orders limiting the scope of direct examination and cross examination of witnesses.

(3) *Alternatives to discovery of classified information.* The military judge, upon motion of the Government, shall authorize, to the extent practicable, (A) the deletion of specified items of classified information from materials to be made available to the defense, (B) the substitution of a portion or summary of the information for such classified materials, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, subject to subsection (e)(4) of this rule. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge *in camera* and *ex parte*.

(4) *Protection of the fairness of the proceeding.* If the military judge determines that the government's proposed alternative to full disclosure under subsection (3) would be inadequate or impracticable, and the Government objects to disclosure of the information in a form approved by the military judge, the military judge, upon a finding that the information in question is evidence that the Government seeks to use at trial, exculpatory evidence, or evidence necessary to enable the defense to prepare for trial, shall issue any order that the interests of justice require. Such an order may include:

(A) striking or precluding all or part of the testimony of a witness at trial;

(B) declaring a mistrial;

(C) finding against the Government on any issue as to which the evidence is probative and material to the defense;

(D) dismissing the charges, with or without prejudice; or

(E) dismissing the charges or specifications or both to which the information relates with or without prejudice.

Any such order shall permit the Government to avoid a sanction issued for nondisclosure by agreeing to the disclosure of the information at the pertinent military commission proceeding.

(5) *Disclosure at trial of certain statements previously made by a witness.*

(A) *Scope.* After a witness called by the Government has testified on direct examination, the military judge, on motion of the defense, may order production of

statements in the possession of the United States under R.M.C. 914. This provision does not preclude discovery or assertion of a privilege otherwise authorized under these rules or this Manual.

(B) *Review*. If the privilege in this rule is invoked during consideration of a motion under R.M.C. 914, the Government may deliver such statement for the inspection only by the military judge *in camera* and *ex parte*. If the military judge finds that disclosure of any portion of the statement identified by the Government as classified would be detrimental to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise the portion from the statement. If the military judge finds that such portion of the statement is inconsistent with the witness' testimony he shall, upon motion of the Government, review alternatives to disclosure in accordance with subsection (e)(3) above.

Discussion

When conducting a review pursuant to subsection (e)(5), the military judge does not conduct a *de novo* review of the classification of sources, methods, or activities information in its original form or as it might possibly be reconstituted in a summarized form. Rather, the military judge should verify that appropriate officials within the agency concerned conducted an authorized review in accordance with governing regulations and determined that such a disclosure of information, in either original or summarized form would or would not be detrimental to national security. The review is to verify the existence of a legal basis for the agency official's determination that the information is classified and that no summary of such information can be provided consistent with national security. This initial review by the trial judge is not for the purpose of conducting a *de novo* review of the propriety of the agency official's determination(s). All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. *See United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

(6) *Protection of sources, methods, or activities.* The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that the sources, methods, or activities by which the United States acquired the evidence are classified and the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

Discussion

This subsection contemplates that the military judge's determinations of reliability and admissibility may be made *in camera, ex parte*. Because there may be no prior evaluation of the evidence by the defense and little or no statement of any specific defense objection, the military judge's consideration must encompass a broad range of potential objections.

(7) *Record of trial.* If, under this section, any information is withheld from the defense, the defense objects to such withholding, and the trial is continued to an

adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be sealed and attached to the record of trial as an appellate exhibit. Such material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(f) *Introduction of classified information.*

(1) *Assertion of privilege at trial*. During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

(2) *Classification status*. Writings, recordings and photographs containing classified information may be admitted into evidence without change in their classification status.

(3) *Precautions by the military judge.* In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording or photograph or may order admission into evidence of the whole, writing, recording or photograph with the excision of some or all of the classified information contained therein.

(4) *Contents of writing, recording or photograph.* The military judge may permit proof of the contents of a writing, recording or photograph that contain classified information without requiring introduction into evidence of the original or a duplicate.

(5) *Closed session.* The military judge may exclude the public during any portion of the presentation of evidence that discloses classified information upon making a specific finding that such closure is necessary to protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities.

(6) *Record of trial.* The record of trial with respect to any classified matter will be prepared under R.M.C. 1103(c) and 1104(d).

(g) *Notice of the defense's intention to disclose classified information.*

(1) *Notice by the defense.* If the defense reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a military commission proceeding, defense counsel shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given

within the time specified by the military judge under section (d), or, if no time has been specified, prior to arraignment of the accused.

(2) *Continuing duty to notify.* Whenever the defense learns of classified information not covered by a notice under subsection (1) that the defense reasonably expects to disclose at any such proceeding, the defense shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) *Content of notice.* The notice required by this subsection shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The defense must state, with particularity, which items of classified information it reasonably expects will be revealed by the defense.

(4) *Prohibition against disclosure.* The defense may not disclose any information known or believed to be classified until notice has been given under this subsection and until the Government has been afforded a reasonable opportunity to seek a determination under this rule.

(5) *Failure to comply.* If the defense fails to comply with the requirements of this subsection, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defense of any witness with respect to any such information.

(h) *In camera presentation for cases involving classified information.*

(1) *Motion for in camera presentation.* Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an *in camera* presentation concerning the invocation of the national security privilege or the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an *in camera* presentation, at which, upon request of the trial counsel, the accused shall be excluded, concerning the use of additional classified information.

(2) *Demonstration of national security nature of the information.* In order to obtain an *in camera* presentation under this rule, the Government may submit at the request of the military judge (or make available for review) the classified information and an affidavit *ex parte* for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(3) *In camera presentation.* Upon finding that the Government has met the standard set forth in subsection (h)(2) with respect to some or all of the classified information at issue, the military judge shall conduct an *in camera* presentation from

which the accused, upon motion of the trial counsel, shall be excluded. Prior to the *in camera* presentation, the Government shall provide the defense with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the defense in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the defense in connection with pretrial proceedings. Following briefing and argument by the parties in the *in camera* presentation the military judge shall determine whether the information may be disclosed at the commission proceeding. Where the Government's motion under this subsection is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

(4) *Standard*. Classified information is not subject to disclosure under this section unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.

(5) *Ruling*. Unless the military judge makes a written determination that the information meets the standard set forth in subsection (4), the information may not be disclosed or otherwise elicited at a commission proceeding. The record of the *in camera* presentation shall be sealed and attached to the record of trials as an appellate exhibit.

(6) *Alternative to full disclosure*. If the military judge makes a determination under this section that would permit disclosure of the information or if the Government elects not to contest the relevance, necessity and admissibility of any classified information, the Government may move that in lieu of the disclosure of such specific classified information, the military judge order:

(A) the substitution for such classified information of a statement admitting the relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The military judge shall order that such statement, portion or summary be used by the defense in place of the classified unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

(7) *Sanctions*. If the military judge determines that the alternative to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice may require. Such an order may include:

(A) striking or precluding all or part of the testimony of a witness at trial;

(B) declaring a mistrial;

(C) finding against the Government on any issue as to which the evidence is probative and material to the defense;

(D) dismissing the charges, with or without prejudice; or

(E) dismissing the charges or specifications or both to which the information relates with or without prejudice.

Any such order shall permit the Government to avoid the sanction for nondisclosure by permitting disclosure of the information at the pertinent military commission proceeding.

Discussion

When conducting a review pursuant to section (h), the military judge does not conduct a *de novo* review of the classification of sources, methods, or activities information in its original form or as it might possibly be reconstituted in a summarized form. Rather, the military judge should verify that appropriate officials within the agency concerned conducted an authorized review in accordance with governing regulations and determined that such a disclosure of information, in either original or summarized form would or would not be detrimental to national security. The review is to verify the existence of a legal basis for the agency official's determination that the information is classified and that no summary of such information can be provided consistent with national security. This initial review by the trial judge is not for the purpose of conducting a *de novo* review of the propriety of the agency official's determination(s). All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. *See United States v. Grunden,* 2 M.J. 116 (C.M.A. 1977).

Rule 506. Government information other than classified information

(a) *General rule of privilege.* Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

(b) *Scope.* "Government information" includes official communication and documents and other non-classified information within the custody or control of the Federal Government.

(c) *Who may claim the privilege.* The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General of the executive or military department or government agency concerned may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) *Action prior to referral of charges.* Prior to referral of charges, the Government shall respond in writing to a request for government information if the privilege in this rule is claimed for such information. The Government shall:

(1) delete specified items of government information claimed to be privileged from documents made available to the defense;

(2) substitute a portion or summary of the information for such documents;

(3) substitute a statement admitting relevant facts that the government information would tend to prove;

(4) provide the document subject to conditions similar to those set forth in section (g) of this rule; or

(5) withhold disclosure if actions under subsections (1) through (4) cannot be taken without causing identifiable damage to the public interest.

(e) *Pretrial session.* At any time after referral of charges and prior to arraignment, any party may move for a session under R.M.C. 803 to consider matters relating to government information that may arise in connection with the trial. Following such motion, or *sua sponte*, the military judge promptly shall hold a pretrial session under R.M.C. 803 to establish the timing of requests for discovery, the provision of notice under section (h), and the initiation of the procedure under section (i). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

(f) *Action after motion for disclosure of information.* After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this rule, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under section (i);

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates; or

(4) take other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

(g) *Disclosure of government information to the defense.* If the Government agrees to

disclose government information to the defense subsequent to a claim of privilege under this rule, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the defense. The terms of any such protective order may include provisions:

(1) Prohibiting the disclosure of the information except as authorized by the military judge;

(2) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed; upon reasonable notice;

(3) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

(5) Regulating the making and handling of notes taken from material containing government information; or

(6) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Prohibition against disclosure.* The defense may not disclose any information known or believed to be subject to a claim of privilege under this rule unless the military judge authorizes such disclosure.

(i) *In camera proceedings.*

(1) *Definition.* For the purpose of this section, an "*in camera* proceeding" is a session under R.M.C. 803 from which the public is excluded.

(2) *Motion for in camera proceeding.* Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an *in camera* proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege may grant the Government leave to move for an in camera proceeding concerning the use of additional government information.

(3) *Demonstration of public interest nature of the information.* In order to obtain an *in camera* proceeding under this rule, the Government shall demonstrate, through the submission of affidavits and information for examination only by the military judge, that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(4) *In camera proceeding.*

(A) *Finding of identifiable damage.* Upon finding that the disclosure of some or all of the information submitted by the Government under subsection (i)(3) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an *in camera* proceeding.

(B) *Disclosure of the information to the defense.* Subject to paragraph (F), below, the Government shall disclose government information for which a claim of privilege has been made to the defense, for the limited purpose of litigating, *in camera*, the admissibility of the information at trial. The military judge shall enter an appropriate protective order to the defense and all other appropriate trial participants concerning the disclosure of the information according to section (g), above. The defense shall not disclose any information provided under this section unless, and until, such information has been admitted into evidence by the military judge. In the *in camera* proceeding, both parties shall have the opportunity to brief and argue the admissibility of the government information at trial.

(C) *Standard.* Government information is subject to disclosure at the military commission proceeding under this section if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the military commission proceeding.

(D) *Ruling.* No information may be disclosed at the military commission proceeding or otherwise unless the military judge makes a written determination that the information is subject to disclosure under the standard set forth in paragraph (C), above. The military judge will specify in writing any information that he or she determines is subject to disclosure. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The defense may seek reconsideration of the determination prior to or during trial.

(E) *Alternatives to full disclosure.* If the military judge makes a determination under this paragraph that the information is subject to disclosure, or if the Government elects not to contest the relevance, necessity, and admissibility of the government information, the Government may proffer a statement admitting for purposes of the military commission any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The military judge shall order that such statement, portion, summary, or some other form of information which the military judge finds to be consistent with the interests of justice, be used by the defense in place of the government information, unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

(F) *Sanctions.* Government information may not be disclosed over the

Government's objection. If the Government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require. Such an order may include:

(i) striking or precluding all or part of the testimony of a witness;

(ii) declaring a mistrial;

(iii) finding against the Government on any issue as to which the evidence is relevant and necessary to the defense;

(iv) dismissing the charges, with or without prejudice; or

(v) dismissing the charges or specifications or both to which the information relates.

(j) *Appeals of orders and rulings.* The Government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The Government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the United States to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The Government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

(k) *Introduction of government information subject to a claim of privilege.*

(1) *Precautions by military judge.* In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the government information contained therein.

(2) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

(3) *Taking of testimony.* During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose governmental information not previously found relevant and necessary to the defense if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring the Government to provide the military judge with a proffer of the witness' response to the

question or line of inquiry and requiring the defense to provide the military judge with a proffer of the nature of the information the defense seeks to elicit.

(*l*) *Procedures to safeguard against compromise of government information disclosed to military commissions.* The Secretary of Defense may prescribe procedures for protection against the compromise of government information submitted to military commissions and appellate authorities after a claim of privilege.

Rule 507. Identity of informants

(a) *Rule of privilege.* The United States has a privilege to refuse to disclose the identity of an informant.

(1) An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime, for the United States government or a foreign government.

(2) Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

(b) *Who may claim the privilege.* The privilege may be claimed by an appropriate representative of the United States, including the trial counsel, if authorized to do so.

(c) *Exceptions.*

(1) *Voluntary disclosures; informant as witness.* No privilege exists under this rule: (A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; (B) if the informant appears as a witness for the prosecution; or (C) if the government introduces a statement by the informant on the merits.

(2) *Testimony on the issue of guilt or innocence.* If a claim of privilege has been made under this rule, the military judge shall, upon motion by the defense, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) *Fair trial considerations.* If the military judge determines that extending the privilege, in part or in full, would adversely affect the integrity or fairness of the

proceedings, the military judge may decline to extend the privilege, in part or in full, to the claimant or may issue any order required in the interests of justice.

(d) *Procedures.* If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time disclosure is not made, the military judge, *sua sponte* or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

Rule 508. Political vote

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 509. Deliberations of courts, juries, and military commissions

Except as provided in Mil. Comm. R. Evid. 606, the deliberations of courts, grand and petit juries, and military commissions are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

Rule 510. Waiver of privilege by voluntary disclosure

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege

(a) Evidence of a statement or other disclosure of privileged matter is not admissible

against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

(b) The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege; instruction

(a) *Comment or inference not permitted.*

(1) The claim of privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

(b) *Claiming privilege without knowledge of members.* In a trial before a military commission, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members.

(c) *Instruction.* Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subsection (a)(2).

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the U.C.M.J. or the M.C.A., if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social

worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense to counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.M.C. 706 or Mil. Comm. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is required to avoid an adverse effect on the integrity or fairness of the proceeding.

(e) *Procedure to determine admissibility of patient records or communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subsection (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a military commission composed of military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or

communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

SECTION VI
WITNESSES

Rule 601. General rule of competency

Every person is competent to be a witness, except as otherwise provided in these rules.

Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Mil. Comm. R. Evid. 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

Rule 605. Competency of military judge as witness

(a) The military judge presiding at the military commission may not testify in that military commission as a witness. No objection need be made to preserve the point.

(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

Rule 606. Competency of military commission member as witness

(a) *At the military commission.* A member of the military commission may not testify as a witness before the other members in the trial of the case in which the member is sitting. If the member is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the members.

(b) *Inquiry into validity of findings or sentence*. Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the military commission or, to the effect of anything upon the member's or any other member's mind or emotions as

influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the military commission, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

Rule 607. Who may impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of character, conduct, and bias of witness

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Mil. Comm. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(c) *Evidence of bias*. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Rule 609. Impeachment by evidence of conviction of crime

(a) *General rule.* For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Mil. Comm. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of

such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 of the U.C.M.J., at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the military judge determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of impeachment until review has been completed pursuant to Article 64 or Article 66 of the U.C.M.J., if applicable. Evidence of the pendency of an appeal is admissible.

(f) *Definition.* For purposes of this rule, there is a “conviction” in a trial by court-martial or a military commission when a sentence has been adjudged.

Rule 610. Religious beliefs or opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation

(a) *Control by the military judge.* The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination, consistent with Mil. Comm. R. Evid. 505.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness or a witness identified with an adverse party, interrogation may be by leading questions.

(d) *Alternative forms of testimony of a child, victim, protected entity, or witness whose presence at trial cannot be procured by legal process.*

(1) In a case involving a child witness, the military judge shall, subject to the requirements below, allow the child or victim to testify from an area outside the courtroom as prescribed in R.M.C. 914A.

(A) The term “child” means a person who is under the age of 16 at the time of his or her testimony. The term victim is defined as a person who has suffered a direct physical, emotional, or pecuniary harm or loss as a result of the commission of an offense as defined in the Act, the law of war, or under this Manual.

(B) The military judge will permit remote testimony by a child witness upon a finding that the child or victim is unable to testify in open court in the presence of the accused, for any of the following reasons:

(i) The child is unable to testify because of fear;

(ii) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(iii) The child suffers from a mental or other infirmity; or

(iv) Conduct by an accused or defense counsel causes the child or victim to be unable to testify or to continue testifying. Such conduct may include pretrial statements or actions calculated to, or having a reasonable likelihood of tending to, threaten or otherwise intimidate the child or victim, or any member of the child's immediate family.

(2) In a case involving a person whose identity or name and appearance is classified, privileged, or otherwise protected from disclosure under any Act of Congress, this Manual, or these Rules, the military judge may, subject to the provisions of Mil. Comm. R. Evid. 505, 506, and 507, allow the witness to be identified by a pseudonym during all commissions sessions, and to testify from behind a protective screen (out of the view of the accused and counsel, but within view of the military judge and the members) or from a screened area outside the courtroom, consistent with R.M.C. 914A, but the military judge may extend that area worldwide.

(3) If the presence at trial of any relevant and necessary civilian witness cannot be obtained by the process described in R.M.C. 703, the military judge may, subject to the requirements below, permit the witness to testify by two-way video feed from a remote location. The party requesting remote testimony by a witness must establish by a preponderance of the evidence that:

(A) either the witness was served with process and offered sufficient logistical support to effect travel to the trial site, reasonable attempts at such service and offer were made, or military and intelligence or security imperatives would prevent the witness from physically appearing before the commission; and

(B) the witness declined to travel to the trial site, could not effectively be served, or was unavailable because of military and intelligence or security imperatives, as described in paragraph (A); and

(C) remote testimony of the witness would better serve the confrontation interests of the opposing party and ends of justice than any alternative form of testimony and confrontation available to the commission.

(4) In applying the provisions of this rule, the military judge may decline to extend any protective measure under this rule to any witness if the judge determines that applying the protective measure, as requested, would adversely affect the integrity or fairness of the proceedings.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing pro-

duced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in the discretion of the military judge it is determined that the interests of justice so require, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

Rule 613. Prior statements of witnesses

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. Comm. R. Evid. 801(d)(2).

Rule 614. Calling and interrogation of witnesses by the military commission

(a) *Calling by the military commission.* The military judge may, *sua sponte*, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine, after hearing the position of the parties on the question, whether it is appropriate to do so under these rules or this Manual.

(b) *Interrogation by the military commission.* The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the military commission by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) *Objections.* Objections to the calling of witnesses by the military judge or the

members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

Rule 615. Exclusion of witnesses

At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case, or (4) a person authorized by statute to be present at military commissions, or (5) any victim of an offense from the trial of an accused for that offense on the grounds that such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings.

SECTION VII
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses

The military judge shall permit testimony from any witness whose opinion, whether lay or expert, would have probative value to a reasonable person. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based in scientific, technical, or other specialized knowledge within the scope of Mil. Comm. R. Evid. 702.

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the members by the proponent of the opinion or inference unless the military judge determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on ultimate issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion

The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Experts appointed by the military commission

(a) *Appointment and compensation.* The trial counsel, the defense counsel, and the military commission have reasonable opportunity to obtain expert witnesses. The employment and compensation of expert witnesses is governed by R.M.C. 703.

(b) *Disclosure of employment.* In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

(c) *Accused's experts of own selection.* Nothing in this rule limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense.

Rule 707. Polygraph examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

SECTION VIII
HEARSAY

Rule 801. Definitions

The following definitions apply under this rule:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under paragraph (C), the agency or employment relationship and the scope thereof under paragraph (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under paragraph (E).

Rule 802. Hearsay rule

Hearsay may be admitted on the same terms as any other form of evidence except as provided by these rules or by any Act of Congress applicable in trials by military commissions.

Discussion

The M.C.A. recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Because hearsay is admissible on the same terms as other evidence, the proponent still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403.

Rule 803. Admissibility of hearsay

(a) Hearsay evidence may be admitted in trials by military commission if the evidence would be admitted under the rules of evidence applicable in trial by general courts-martial, and the evidence would otherwise be admissible under these Rules or this Manual.

(b)(1) Hearsay evidence not admissible under section (a) may be admitted in trials by military commission if the proponent of the evidence makes known to the adverse party:

(A) the intention of the proponent to offer the evidence; and

(B) the particulars of the evidence (including information on the general circumstances under which the evidence was obtained, the name of the declarant, and, where available, the declarant's address).

(2) The proponent of the evidence may satisfy the requirement of subsection (1) by notifying the opposing party, in writing, of the statement and its circumstances 30 days in advance of trial or hearing and by providing the opposing party with any materials regarding the time, place, and conditions under which the statement was produced that are in the possession of the proponent of the evidence. Absent such notice, the military judge shall determine whether the proponent has provided the adverse party with a fair opportunity under the totality of the circumstances.

(3) The disclosure of information under this section is subject to the requirements and limitations applicable to the disclosure of classified information in Mil. Comm. R. Evid. 505.

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.

Discussion

As recognized under Mil. Comm. R. Evid. 802, as a general matter, hearsay shall be admitted on the same terms as any evidence. Thus, where the evidence has probative value to a reasonable person, the question of its weight is a matter that should ordinarily be determined by the trier of fact. This rule, however, provides the party opposing the admission of the evidence with an opportunity to demonstrate that under the totality of the circumstances (which may include extrinsic evidence), the evidence in question is not reliable and therefore should not be considered by the trier of fact.

Rule 806. Hearsay within hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 807. Attacking and supporting credibility of declarant

When a hearsay statement, or a statement defined in Mil. Comm. R. Evid. 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

SECTION IX
AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification

Evidence shall be admitted as authentic if:—

(a) the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be; and

(b) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.