

ACT 286

S.B. NO. 3085

A Bill for an Act Relating to the Hawaii Code of Military Justice.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to update the procedures and punitive sections of military justice within the state military forces. Chapter 124A, Hawaii Revised Statutes, relating to the Hawaii code of military justice, was enacted in 1982. This was the first major update to the code of military justice for the state military forces since 1894-1895. The current Hawaii code of military justice lacks the necessary disciplinary options to provide for effective and efficient good order and discipline in the state military forces. This Act will remedy those issues and bring the state military justice process in line with the Uniform Code of Military Justice.

The purpose of the proposed Hawaii code of military justice is to provide a comprehensive law setting forth military judicial procedures, which will apply to all members of the State's military forces, primarily the National Guard units, while they are not in federal service. The Hawaii code is based on the Uniform Code of Military Justice as contained in title 10 United States Code sections 801 et seq. and the Model State Code of Military Justice that was proposed by the American Bar Association in 2005. Authorization for states to enact their codes of military justice is found in title 32 United States Code sections 326-328, except for provisions not applicable to or suitable for state military forces not in federal service. The Hawaii code continues to include provisions relating to apprehension, restraint, and confinement of suspects; punishable offenses; nonjudicial punishment; state courts-martial jurisdiction, composition, and trial procedures; and confinement.

The code also provides for the right of appeal through a civilian court process. This, and other features designed to ensure better protection of the rights of the individual without sacrificing command efficiency, are included in this version of the Hawaii code of military justice.

Accordingly, the purpose of this Act is to repeal and replace the Hawaii code of military justice.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

“CHAPTER
HAWAII CODE OF MILITARY JUSTICE
PART I. GENERAL PROVISIONS

§ -1 **Definitions.** In this chapter, unless the context otherwise requires:

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

“Adjutant general” means the adjutant general of the State as defined in section 121-7.

“Apprehension” means the taking of a person into custody.

“Arrest” means the restraint of a person by an order, not imposed as a punishment for an offense, directing the person to remain within certain specified limits.

“Arrest in quarters” means the restraint involved is enforced by a moral obligation rather than by physical means. This punishment shall be imposed only on officers. An officer undergoing this punishment may be required to perform those duties prescribed by the Secretary of the Armed Service concerned; provided that an officer so punished shall be required to remain within that officer’s quarters during the period of punishment unless the limits of arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of a military residence, whether a tent, stateroom, or other quarters assigned, or a private residence when government quarters have not been provided.

“Cadet” means any person who is enrolled in or attending a state military academy, a regional training institute, or any other formal education program for the purpose of becoming a commissioned officer in the state military forces.

“Candidate” shall have the same meaning as the term “cadet”, as defined in this section.

“Code” means the Hawaii Code of Military Justice.

“Commander” shall have the same meaning as the term “commanding officer”, as defined in this section.

“Commanding officer” includes:

- (1) Only commissioned officers of the state military forces; and
- (2) Officers in charge only when administering nonjudicial punishment under section -21.

“Commissioned officer” includes a commissioned warrant officer.

“Confinement” means the physical restraint of a person.

“Contemptuous words” means words or speech manifesting or expressing deep hatred or disapproval.

“Convening authority” includes, in addition to the person who convened the court, a commissioned officer commanding for the time being or a successor in command to the convening authority.

“Cowardly conduct” means conduct committed by an accused while the accused was before or in the presence of the enemy, that constitutes an act of cowardice that was the result of fear.

“Day” means calendar day and is not synonymous with the term “unit training assembly”. Any punishment authorized by this chapter and measured in terms of days shall, when served in a status other than annual field training, be construed to mean succeeding duty days.

“Disrespect” means behavior that detracts from the respect due the authority and person of a superior commissioned officer or fellow soldier. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer or fellow soldier.

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

“Governor” means the governor of the State.

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

“Judge advocate” means a commissioned officer of the organized state military forces who is a member in good standing of the bar of the highest court of a state, and is:

- (1) Certified or designated as a judge advocate in the Judge Advocate General’s Corps of the United States Army, Air Force, Navy, Marine Corps, or Coast Guard, or a reserve component of one of the above;
- (2) Certified as a non-federally recognized judge advocate by the senior force judge advocate as competent to perform the military justice duties required by this chapter; or
- (3) Certified by a senior judge advocate of the commander of another force in the state military forces, as the convening authority directs; provided that there is no judge advocate available as described under paragraph (1) or (2).

“Legal officer” means any commissioned officer of the organized militia of the State designated to perform legal duties for a command.

“Midshipman” shall have the same meaning as the term “cadet”, as defined in this section.

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

“Military court” means a court-martial or court of inquiry.

“Military judge” means an official of a general or special court-martial detailed in accordance with part V of this chapter.

“Military offenses” means those offenses that are enumerated in part X of this chapter that do not have a corresponding offense in the civilian penal code.

“Officer” means a commissioned officer.

“Officer in charge” means a member of the state military forces designated by the appropriate authority.

“President” means the detailed member senior in rank of a court-martial then serving.

“Rank” means the order of precedence among members of the state military forces.

“Record”, when used in connection with the proceedings of a court-martial or court of inquiry, means:

- (1) An official written transcript, written summary, or other writing relating to the proceedings; or
- (2) An official audiotape, videotape, digital image or file, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.

“Restriction” means the least severe form of deprivation of liberty. “Restriction” involves moral rather than physical restraint. The severity of this type of restraint depends on its duration and the geographical limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if reasonably necessary to ensure that the punishment is being properly executed. Unless otherwise specified by the nonjudicial punishment authority, a person in restriction may be required to perform any military duty.

“Senior force judge advocate” means the senior judge advocate of the commander of the same force of the state military forces as the accused and who is that commander’s chief legal advisor.

“State judge advocate” means the commissioned officer responsible for supervising the administration of military justice in the state military forces.

“State military forces” means the National Guard of the State, as defined in title 32 United States Code section 101(3), the organized naval militia of the State, and any other military force organized under the laws of the State.

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

§ -2 Persons subject to this chapter; jurisdiction. (a) This chapter applies to all members of the state military forces at all times.

(b) Subject matter jurisdiction is established if a nexus exists between an offense, either military or non-military, and the state military forces. Courts-martial shall have primary jurisdiction of military offenses. A proper civilian court shall have primary jurisdiction of a non-military offense when an act or omission violates both this chapter and local criminal law, foreign or domestic. A court-martial may be initiated only after the civilian authority has declined to prosecute or dismissed the charge; provided that jeopardy has not attached. Jurisdiction over attempted crimes, conspiracy crimes, solicitation, and accessory crimes shall be determined by the underlying offense.

§ -3 Jurisdiction to try certain personnel. (a) Each person discharged from the state military forces who is later charged with having fraudulently obtained the person’s discharge shall be subject to:

- (1) Section -68;
- (2) Trial by court-martial on that charge; and
- (3) After apprehension, this chapter while in the custody of the state military forces for that trial.

Upon conviction of that charge, the person shall be subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(b) No person who has deserted from the state military forces shall be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

§ -4 Dismissal of commissioned officer. (a) If any commissioned officer, dismissed by order of the governor, makes a written application for trial by court-martial, setting forth, under oath or affirmation, that the officer has been wrongfully dismissed, the governor, as soon as practicable, shall convene a general court-martial to try that officer on the charges for which the officer was dismissed. A court-martial so convened shall have jurisdiction to try the dismissed officer on those charges, and the officer shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which the officer is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal; provided that if the court-martial acquits the accused or if the sentence adjudged, as finally approved, or affirmed, does not include dismissal, the adjutant general shall substitute for the dismissal ordered by the governor a form of discharge authorized for administrative issue.

(b) If the governor fails to convene a general court-martial within six months from the presentation of an application for trial under this chapter, the adjutant general shall substitute for the dismissal ordered by the governor a form of discharge authorized for administrative issue.

(c) If a discharge is substituted for a dismissal under this chapter, only the governor may reappoint the officer of the commissioned grade and with the rank as, in the opinion of the governor, that former officer would have attained

had the former officer not been dismissed. The reappointment of the former officer shall be made only if a vacancy is available under applicable tables of organization. All time between the dismissal and the reappointment shall be considered as actual service for all purposes.

(d) If an officer is discharged from the organized militia by administrative action or by withdrawal of federal recognition boards proceedings under law or is dropped from the rolls by order of the governor, the officer shall have no right to trial under this section.

§ -5 Territorial applicability. (a) This chapter shall have applicability at all times and in all places; provided that either the person subject to this chapter is in a duty status or, if not in a duty status, there is a nexus between the act or omission constituting the offense and the efficient functioning of the state military forces; provided further that this grant of military jurisdiction shall neither preclude nor limit civilian jurisdiction over an offense, which shall be limited only by the prohibition of double jeopardy.

(b) Courts-martial and courts of inquiry may be convened and held in units of the state military forces while those units are serving outside the State with the same jurisdiction and powers as to persons subject to this chapter as if the proceedings were held inside the State, and offenses committed outside the State may be tried and punished either inside or outside the State.

§ -6 Judge advocates. (a) The governor, on the recommendation of the adjutant general, shall appoint an officer of the state military forces as state judge advocate. To be eligible for appointment, an officer shall be a member of the bar of the highest court of the State and shall have been a member of the bar of the State for at least five years.

(b) The adjutant general may appoint as many assistant state judge advocates as the adjutant general considers necessary. To be eligible for appointment, assistant state judge advocates shall be officers of the state military forces and members of the bar of the highest court of the State.

(c) The state judge advocate, state judge advocate's assistants, or senior force judge advocates in each of the state military forces or that judge advocate's delegates shall make frequent inspections in the field in supervision of the administration of military justice.

(d) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officer in matters relating to the administration of military justice. The staff judge advocate or legal officer of any command may communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the state judge advocate.

(e) No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, or investigating officer, or who has been a witness for either the prosecution or defense, in any case shall later act as staff judge advocate or legal officer to any reviewing authority upon the same case.

§ -7 Rights of the victim of an offense under this chapter. A victim of an offense under this chapter shall retain all rights conferred under chapter 801D. Nothing in this chapter shall limit the rights of a victim of sexual assault that qualifies for representation by a special victims' counsel under title 10 United States Code section 1044e, as it applies to the National Guard.

PART II. APPREHENSION AND RESTRAINT

§ -11 Apprehension. (a) Any person authorized by this chapter or title 10 United States Code chapter 47, or by rules or regulations issued under either, any marshal of a court-martial appointed pursuant to this chapter, and any peace officer authorized by law, may apprehend persons subject to this chapter upon probable cause that an offense has been committed and that the person apprehended committed it.

(b) Commissioned officers, warrant officers, petty officers, and non-commissioned officers may quell quarrels, affrays, and disorders among persons subject to this chapter and apprehend persons subject to this chapter who take part therein.

(c) If an alleged offender is apprehended outside the State, the alleged offender's return to the State shall be in accordance with normal extradition procedures or by reciprocal agreement.

(d) No person authorized by this section to apprehend persons subject to this chapter or place where the alleged offenders are confined, restrained, held, or otherwise housed may require payment of any fee or charge for so receiving, apprehending, confining, restraining, holding, or otherwise housing the persons except as provided by law.

§ -12 Apprehension of deserters. Any civil officer having authority to apprehend alleged offenders under the laws of the United States or this State or of a state, territory, commonwealth, or possession, or the District of Columbia, may summarily apprehend an alleged deserter from the state military forces and deliver the alleged deserter into the custody of the state military forces. If an alleged offender is apprehended outside the State, the alleged offender's return to the State shall be in accordance with normal extradition procedures or reciprocal agreement.

§ -13 Imposition of restraint. (a) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter or through any person authorized by this chapter to apprehend persons. A commanding officer may authorize warrant officers, petty officers, or non-commissioned officers to order enlisted members of the commanding officer's command or subject to the commanding officer's authority into arrest or confinement.

(b) A commissioned officer or warrant officer may be ordered apprehended or into arrest or confinement only by a commanding officer to whose authority the commissioned officer or warrant officer is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order the persons apprehended or into arrest or confinement shall not be delegated.

(c) No person shall be ordered apprehended or into arrest or confinement except for probable cause.

(d) This section shall not limit the authority of persons authorized to apprehend an alleged offender to secure the custody of the alleged offender until the proper authority is notified.

§ -14 Restraint of persons charged with offenses. (a) Subject to subsection (b), any person subject to this chapter may be ordered into arrest or confinement as the circumstances require.

(b) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

(c) When any person subject to this chapter is placed in arrest or confinement before trial:

(1) Immediate steps shall be taken to inform the person of the specific charge or offense of which the person is accused; and

(2) Diligent steps shall be taken to try the person or to dismiss the charges and release the person.

(d) To facilitate compliance with subsection (c), the governor shall adopt rules setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if applicable, the preliminary hearing report submitted under section -54.

§ -15 Place of confinement; reports and receiving of prisoners. (a) If a person subject to this chapter is confined before, during, or after trial, confinement shall be in a state correctional facility designated by the governor, or by a person authorized by the governor to act, or a military confinement facility.

(b) No person authorized to receive prisoners pursuant to subsection (a) shall refuse to receive or keep any prisoner committed to the person's charge by a commissioned officer of the state military forces when the committing officer furnishes a statement signed by the officer of the offense charged against the prisoner, unless otherwise authorized by law.

(c) Every person authorized to receive prisoners pursuant to subsection (a) to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as the person is relieved from guard, report to the commanding officer of the prisoner the name of the prisoner, the offense charged against the prisoner, and the name of the person who ordered or authorized the commitment.

(d) State correctional facilities shall not charge the state military forces for the cost of receiving or detaining a person pursuant to this chapter.

§ -16 Punishment prohibited before trial. Subject to section -93, no person while being held for trial or awaiting a verdict shall be subjected to punishment or penalty other than arrest or confinement upon the charge pending against the person, nor shall the arrest or confinement imposed upon the person be any more rigorous than the circumstances require to insure the person's presence; provided that the person may be subjected to minor punishment during that period for infractions of discipline.

§ -17 Delivery of alleged offenders to civil authorities. (a) A person subject to this chapter accused of an offense against civil authority may be delivered upon request to the civil authority for trial or confinement.

(b) When delivery under this section is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for the offender's offense shall, upon the request of competent military authority, be returned to military custody for the completion of the offender's sentence.

PART III. NONJUDICIAL PUNISHMENT

§ -21 Commanding officer's nonjudicial punishment. (a) In accordance with rules adopted by the governor, any commanding officer may impose

disciplinary punishments for minor offenses without the intervention of a court-martial pursuant to this section. The governor, the adjutant general, or an officer of a general or flag rank in command may delegate the powers under this section to a principal assistant who is a member of the state military forces.

(b) Any commanding officer may impose upon enlisted members of the officer's command:

- (1) An admonition;
- (2) A reprimand;
- (3) The withholding of privileges for no more than six months that need not be consecutive;
- (4) The forfeiture of pay of no more than seven days' pay;
- (5) A fine of no more than seven days' pay;
- (6) A reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;
- (7) Extra duties for no more than fourteen days that need not be consecutive; and
- (8) Restriction to certain specified limits, with or without suspension from duty, for no more than fourteen days that need not be consecutive.

(c) Any commanding officer of the grade of O-4 or above may impose upon enlisted members of the officer's command:

- (1) Any punishment authorized in subsections (b)(1), (2), and (3);
- (2) The forfeiture of not more than one-half of one month's pay per month for two months;
- (3) A fine of no more than one month's pay;
- (4) A reduction to the lowest or any intermediate pay grade if the soldier or airmen is in the grade of E-6 or below; provided that an enlisted member in a pay grade above E-4 shall not be reduced more than two pay grades;
- (5) Extra duties for no more than fourteen days that need not be consecutive; and
- (6) Restriction to certain specified limits, with or without suspension from duty, for no more than sixty days that need not be consecutive.

(d) The governor, the adjutant general, an officer exercising general court-martial convening authority, or an officer of a general or flag rank in command may impose:

- (1) Upon officers of the officer's command:
 - (A) Any punishment authorized in subsections (c)(1), (2), (3), and (6); and
 - (B) Arrest in quarters for no more than thirty days that need not be consecutive; and
- (2) Upon enlisted members of the officer's command, any punishment authorized in subsection (c).

(e) Whenever any of those punishments are combined to run consecutively, the total length of the combined punishment shall not exceed the authorized duration of the longest punishment in the combination; provided that there shall be an apportionment of punishments so that no single punishment in the combination exceeds its authorized length under this section.

(f) Before the offer of nonjudicial punishment, the commanding officer shall determine whether arrest in quarters or restriction shall be considered as punishments; provided that if the commanding officer determines that the punishment options may include arrest in quarters or restriction, the accused

shall be notified of the right to demand trial by court-martial; provided further that if the commanding officer determines that the punishment options shall not include arrest in quarters or restriction, the accused shall be notified that there is no right to trial by courts-martial in lieu of nonjudicial punishment.

(g) The officer who imposes the punishment or the successor in command may at any time suspend, set aside, mitigate, or remit any part or amount of the punishment and restore all rights, privileges, and property affected. The officer may also mitigate:

- (1) Reduction in grade to forfeiture of pay;
- (2) Arrest in quarters to restriction; or
- (3) Extra duties to restriction.

The mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating reduction in grade to forfeiture of pay, the amount of the forfeiture shall not be greater than the amount that could have been imposed initially under this section by the officer who imposed the punishment mitigated. Reduction in grade shall be mitigated to forfeiture of pay only within four months after the date of execution.

(h) A person punished under this section who considers the punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority within fifteen days after the punishment is either announced or sent to the person punished, as the commander may determine. The appeal shall be promptly forwarded and decided; provided that the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (g) by the officer who imposed the punishment. Before acting on an appeal from a punishment, the authority that is to act on the appeal may refer the case to a judge advocate for consideration and advice.

(i) The imposition and enforcement of disciplinary punishment under this section for any act or omission shall not be a bar to trial by court-martial or a civilian court of competent jurisdiction for a serious crime or offense growing out of the same act or omission and not properly punishable under this section; provided that the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial and, when so shown, it shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(j) Whenever a punishment of forfeiture of pay is imposed under this section, the forfeiture may apply to pay accruing before, on, or after the date that punishment is imposed.

(k) Rules may prescribe the form of records to be kept of proceedings under this section and may prescribe that certain categories of those proceedings shall be in writing.

PART IV. COURT-MARTIAL JURISDICTION

§ -31 Courts-martial classified; general courts-martial; special courts-martial; summary courts-martial. (a) There shall be three kinds of courts-martial in each of the state military forces as follows:

- (1) General courts-martial, as described in subsection (b);
 - (2) Special courts-martial, as described in subsection (c); and
 - (3) Summary courts-martial, as described in subsection (d).
- (b) General courts-martial shall consist of:
- (1) A military judge and no less than eight members; or

- (2) A military judge alone, if before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed only of a military judge and the military judge approves the request.
- (c) Special courts-martial shall consist of:
 - (1) A military judge and no less than four members; or
 - (2) A military judge alone:
 - (A) If the case is so referred by the convening authority, subject to section -34; or
 - (B) If the case is referred under paragraph (1) and, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally or on the record or in writing, a court composed of a military judge alone and the military judge approves the request.
- (d) Summary courts-martial shall consist of one commissioned officer.

§ -32 Jurisdiction of courts-martial in general. Each component of the state military forces shall have court-martial jurisdiction over all members of the particular component who are subject to this chapter. Additionally, the Hawaii army and air national guard shall have court-martial jurisdiction over all members subject to this chapter.

§ -33 Jurisdiction of general courts-martial. Subject to section -32, general courts-martial shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, and may, under limitations as prescribed by the governor, adjudge any punishment not forbidden by this chapter.

§ -34 Jurisdiction of special courts-martial. (a) Subject to section -32, special courts-martial shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, and may, under limitations as prescribed by the governor, adjudge any punishment not forbidden by this chapter except dishonorable discharge, dismissal, confinement for more than one year, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year.

(b) Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone under section -31.

§ -35 Jurisdiction of summary courts-martial. (a) Subject to section -32, summary courts-martial shall have jurisdiction to try persons subject to this chapter, except officers, cadets, candidates, and midshipmen, for any offense made punishable by this chapter under limitations as prescribed by the governor.

(b) No person with respect to whom summary courts-martial have jurisdiction shall be brought to trial before a summary court-martial if that person objects thereto. If objection to trial by summary court-martial is made by an accused, trial by special or general court-martial may be ordered as appropriate. Summary courts-martial may, under limitations as prescribed by the governor, adjudge any punishment not forbidden by this chapter except dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, restric-

tion to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

(c) A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial shall not constitute a criminal conviction.

PART V. COMPOSITION OF COURTS-MARTIAL

§ -41 Who may convene general courts-martial. (a) General courts-martial may be convened by:

- (1) The governor;
- (2) The adjutant general;
- (3) The commanding officer of a force of the state military forces;
- (4) The commanding officer of a division or separate brigade; or
- (5) The commanding officer of a separate wing.

(b) If any commanding officer authorized under subsection (a) is an accuser, the court shall be convened by superior competent authority and may in any case be convened by the superior authority if considered desirable by the authority.

§ -42 Who may convene special courts-martial. (a) Special courts-martial may be convened by:

- (1) Any person who may convene a general court-martial;
- (2) The commanding officer of a garrison, fort, post, camp, station, or army or air national guard base;
- (3) The commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;
- (4) The commanding officer of a wing, group, separate squadron, or corresponding unit of the Air Force; or
- (5) The commanding officer or officer in charge of any other command when empowered by the adjutant general.

(b) If any officer authorized under subsection (a) is an accuser, the court shall be convened by superior competent authority and may, in any case, be convened by the superior authority if considered desirable by the authority.

§ -43 Who may convene summary courts-martial. (a) Summary courts-martial may be convened by:

- (1) Any person who may convene a general or special court-martial;
- (2) The commanding officer of a detached company or other detachment, or corresponding unit of the Army;
- (3) The commanding officer of a detached squadron or other detachment, or corresponding unit of the Air Force; or
- (4) The commanding officer or officer in charge of any other command when empowered by the adjutant general.

(b) When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may be convened in any case by superior competent authority if considered desirable by the authority.

§ -44 Who may serve on courts-martial. (a) Any commissioned officer of the state military forces shall be eligible to serve on all courts-martial for the trial of any person subject to this chapter.

(b) Any warrant officer of the state military forces shall be eligible to serve on general and special courts-martial for the trial of any person subject to this chapter, other than a commissioned officer.

(c) Any enlisted member of the state military forces who is not a member of the same unit as the accused shall be eligible to serve on general and special courts-martial for the trial of any enlisted member subject to this chapter; provided that the member shall serve as a member of a court only if before the conclusion of a session called by the military judge under section -64 before trial or, in the absence of a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After a request, the accused shall not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If the eligible enlisted members cannot be obtained, the court may be assembled and the trial held without the eligible enlisted members; provided that the convening authority shall make a detailed written statement to be appended to the record stating why eligible enlisted members could not be obtained.

(d) The accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members.

(e) When it can be avoided, no person subject to this chapter shall be tried by a court-martial of which any member is junior to the accused in rank or grade.

(f) When convening a court-martial, the convening authority shall detail as members of a court-martial members of the state military forces that in the convening authority's opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of the state military forces shall be eligible to serve as a member of a general or special court-martial when that member is the accuser or a witness, or has acted as investigating officer or as counsel in the same case.

(g) The convening authority shall detail no less than the number of members necessary to impanel the court-martial under section -49.

(h) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. The convening authority may delegate the authority under this subsection to a judge advocate or to any other principal assistant judge advocate.

(i) For purposes of this section, "unit" means any regularly organized body of the state military forces no larger than a company, squadron, division of the naval militia, or body corresponding to one of them.

§ -45 Military judge of a general or special court-martial. (a) A military judge shall be detailed to each general and special court-martial. The military judge shall preside over each open session of the court-martial to which the military judge has been detailed.

(b) A military judge shall be:

- (1) An active or retired commissioned officer of an organized state military force;
- (2) A member in good standing of the bar of the highest court of the State or member of the bar of a federal court for at least five years; and

(3) Certified as qualified for duty as a military judge by the senior force judge advocate.

(c) In the instance when a military judge is not a member of the bar of the highest court of the State, the military judge shall be deemed admitted pro hac vice, subject to filing a certificate with the senior force judge advocate, setting forth the certifications as provided in subsection (b)(3).

(d) The military judge of a general or special court-martial shall be designated by the senior force judge advocate or a designee, for detail by the convening authority. Neither the convening authority nor any staff member of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to performance of duty as a military judge.

(e) No person shall be eligible to act as military judge in a case if that person is the accuser or a witness or has acted as investigating officer or a counsel in the same case.

(f) The military judge of a court-martial shall not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel nor vote with the members of the court.

§ -46 Military magistrates. (a) A military magistrate shall be a commissioned officer of the state military forces who is:

- (1) A member of the bar of the highest court of this State; and
- (2) Certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the senior force judge advocate of the force that the officer is a member.

(b) In accordance with rules adopted by the governor or adjutant general, in addition to duties when designated under section -52, a military magistrate may be assigned to perform other duties of a nonjudicial nature.

§ -47 Detail of trial counsel and defense counsel. (a) For each general and special court-martial, the authority convening the court shall detail trial counsel and defense counsel, and their assistants as the convening authority considers appropriate.

(b) No person who has acted as investigating officer, military judge, or court member in any case shall act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, defense counsel, or assistant or associate defense counsel in the same case. No person who has acted for the prosecution shall act later in the same case for the defense, nor shall any person who has acted for the defense act later in the same case for the prosecution.

(c) Except as otherwise provided in subsection (d), trial counsel or defense counsel detailed for a general or special court-martial shall be:

- (1) A judge advocate; and
- (2) In the case of trial counsel, a member in good standing of the bar of the highest court of the state where the court-martial is held.

(d) In the instance when a defense counsel is not a member of the highest court of the State, the defense counsel shall be deemed admitted pro hac vice, subject to filing a certificate with the military judge setting forth the qualifications that counsel is:

- (1) A commissioned officer of the armed forces of the United States or a component thereof;
- (2) A member in good standing of the bar of the highest court of a state; and
- (3) Certified as a judge advocate.

§ -48 **Detail or employment of reporters and interpreters.** In accordance with rules adopted by the governor, the convening authority of a general or special court-martial or court of inquiry shall detail or employ qualified court reporters who shall record the proceedings of and testimony taken before that court. The convening authority of a military court may detail or employ interpreters who shall interpret for the court.

§ -49 **Assembly and impaneling of members; detail of new members and military judges.** (a) The military judge shall announce the assembly of a general or special court-martial with members. After a court-martial is assembled, no member shall be absent unless the member is excused:

- (1) As a result of a challenge;
- (2) Under subsection (b)(2); or
- (3) By order of the military judge or convening authority for disability or other good cause.

(b) In accordance with rules adopted by the governor or adjutant general, the military judge of a general or special court-martial with members shall:

- (1) After determination of challenges, impanel the court-martial; and
- (2) Excuse the members who, having been assembled, are not impaneled.

(c) In a general court-martial, the military judge shall impanel eight members. In a special court-martial, the military judge shall impanel four members.

(d) In addition to members under subsection (c), the military judge shall impanel alternate members, if the convening authority authorizes alternate members.

(e) If, after members are impaneled, the membership of the court-martial is reduced to:

- (1) Fewer than six members with respect to a general court-martial; or
- (2) Fewer than four members with respect to a special court-martial,

the trial shall not proceed unless the convening authority details new members and, from among the members so detailed, the military judge impanels new members sufficient in number to provide the membership specified in subsection (f).

(f) The membership referred to in subsection (e) shall be as follows:

- (1) At least six but not more than eight members with respect to a general court-martial; or
- (2) Four members with respect to a special court-martial.

(g) If the military judge is unable to proceed with the trial because of disability or otherwise, a new military judge shall be detailed to the court-martial.

(h) In the case of new members under subsection (e), the trial may proceed with new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played in the presence of the new members, the military judge, the accused, and counsel for both sides.

(i) In the case of a new military judge under subsection (g), the trial shall proceed as if no evidence had been introduced, unless the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played in the presence of the new military judge, the accused, and counsel for both sides.

PART VI. PRE-TRIAL PROCEDURE

§ -51 **Charges and specifications.** (a) Charges and specifications:

- (1) May be referred only by a person subject to this chapter; and

- (2) Shall be referred by presentment in writing, signed under oath or affirmation before a commissioned officer of the armed forces who is authorized to administer oaths or affirmations, and shall state that:
 - (A) The signer has personal knowledge of or has investigated the matters set forth in the charges and specifications; and
 - (B) The matters set forth in the charges and specifications are true, to the best of the knowledge and belief of the signer.
- (b) When charges and specifications are referred under subsection (a), the proper authority shall, as soon as practicable:
 - (1) Inform the person accused of the charges and specifications; and
 - (2) Determine what disposition should be made of the charges and specifications in the interest of justice and discipline.

§ -52 Certain proceedings conducted before referral. (a) Proceedings may be conducted to review, or otherwise act on, the following matters before referral of charges and specifications to court-martial for trial in accordance with rules adopted by the governor or adjutant general:

- (1) Pre-referral investigative subpoenas;
- (2) Pre-referral warrants or orders for electronic communications;
- (3) Pre-referral matters referred by an appellate court; and
- (4) Pre-referral matters subject to section -7 for victims of sexual assault qualifying for a special victims' counsel under title 10 United States Code section 1044e, as it applies to the national guard.
- (b) The rules adopted under subsection (a) shall:
 - (1) Include procedures for the review of rulings that may be ordered under this section as the governor or adjutant general considers appropriate; and
 - (2) Provide limitations on the relief that may be ordered under this section as the governor or adjutant general considers appropriate.
- (c) If any matter in a proceeding under this section becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter shall be transferred to the military judge detailed to the court-martial.
- (d) The governor or adjutant general shall adopt rules providing for the manner in which military judges shall be detailed to proceedings under subsection (a).
- (e) In accordance with rules adopted by the governor or adjutant general, a military judge detailed to a proceeding under subsection (a), other than a proceeding described in subsection (a)(2), may designate a military magistrate to preside over the proceeding.

§ -53 Compulsory self-incrimination prohibited. (a) No person subject to this chapter shall compel any person to incriminate the person's self or to answer any question the answer to which may tend to incriminate the person.

(b) No person subject to this chapter shall interrogate or request any statement from an accused or a person suspected of an offense without first informing the person of the nature of the accusation and advising the person that the person does not have to make any statement regarding the offense of which the person is accused or suspected and that any statement made by the person may be used as evidence against the person in a trial by court-martial.

(c) No person subject to this chapter shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade the person.

(d) No statement obtained from any person in violation of this section, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against the person in a trial by court-martial.

§ -54 Preliminary hearing required before referral to general court-martial. (a) Except as provided in subsection (b), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an impartial hearing officer, detailed by the convening authority in accordance with subsection (d).

(b) In accordance with rules adopted by the governor or adjutant general, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required.

(c) The purpose of the preliminary hearing shall be limited to determining the following:

- (1) Whether the specification alleges an offense under this chapter;
- (2) Whether there is probable cause to believe that the accused committed the offense charged;
- (3) Whether the convening authority has court-martial jurisdiction over the accused and over the offense; and
- (4) A recommendation as to the disposition that should be made of the case.

(d) A preliminary hearing under this section shall be conducted by an impartial hearing officer, who:

- (1) Whenever practicable, shall be a judge advocate who is certified under section -47; or
- (2) Is not a judge advocate so certified, when it is not practicable to appoint a judge advocate because of exceptional circumstances. In the case of a hearing officer under this paragraph, a judge advocate who is certified under section -47 shall be available to provide legal advice to the hearing officer.

Whenever practicable, the hearing officer shall be equal in grade or senior in grade to military counsel who are detailed to represent the accused or the government at the preliminary hearing.

(e) After a preliminary hearing under this section, the hearing officer shall submit to the convening authority a written report, accompanied by a recording of the preliminary hearing under subsection (i), that includes the following:

- (1) For each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (c), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial;
- (2) Recommendations for any necessary modifications to the form of the charges or specifications;
- (3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense that is relevant to a disposition under sections -51 and -54, in accordance with rules adopted by the governor or adjutant general; and
- (4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (j).

(f) The accused shall be advised of the charges against the accused and of the accused's right to be represented by counsel at the preliminary hearing

under this section. The accused shall have the right to be represented at the preliminary hearing as provided in section -63 and in rules adopted thereunder. The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence that is relevant to the issues for determination under subsection (c).

(g) A victim shall not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to not be available for purposes of the preliminary hearing. A declination under this subsection shall not serve as the sole basis for ordering a deposition under section -74.

(h) The presentation of evidence and examination, including cross-examination, of witnesses at a preliminary hearing shall be limited to the matters relevant to determinations under subsection (c).

(i) A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording in accordance with rules adopted by the governor or adjutant general.

(j) If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused is:

- (1) Present at the preliminary hearing;
- (2) Informed of the nature of each uncharged offense considered; and
- (3) Afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (f).

(k) The requirements of this section are binding on all persons administering this chapter; provided that failure to follow the requirements shall not constitute jurisdictional error. A defect in a report under subsection (e) shall not be a basis for relief if the report is in substantial compliance with that subsection.

- (l) For purposes of this section, the term "victim" means a person who is:
- (1) Alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and
 - (2) Named in one of the specifications.

§ -55 Advice to convening authority before referral to trial. (a) Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority shall not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that:

- (1) The specification alleges an offense under this chapter;
- (2) There is probable cause to believe that the accused committed the offense charged; and
- (3) A general court-martial would have jurisdiction over the accused and the offense.

(b) Together with the written advice provided under subsection (a), the staff judge advocate shall provide a written recommendation to the convening authority as to the disposition that should be made of the specification in the interest of justice and discipline.

(c) When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate under subsection (a) and the written recommendation of the staff judge advocate under subsection (b) with respect to each specification shall accompany the referral.

(d) Before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues.

(e) Before referral for trial by general or special court-martial, changes may be made to charges and specifications:

- (1) To correct errors in form; and
- (2) When applicable, to conform to the substance of the evidence contained in a report under section -54.

(f) For purposes of this section, "referral" means the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial.

§ -56 Service of charges; commencement of trial. (a) In general, trial counsel detailed for a court-martial under section -47 shall cause to be served upon the accused a copy of the charges and specifications referred for trial.

(b) Subject to subsection (c), no trial or other proceeding of a general or special court-martial, including any session under section -64, shall be held over the objection of the accused:

- (1) With respect to a general court-martial, from the time of service through the fifth day after the date of service; or
- (2) With respect to a special court-martial, from the time of service through the third day after the date of service.

(c) An objection under subsection (b) shall be raised only at the first session of the trial or other proceeding and only if the first session occurs before the end of the applicable period under subsection (b). If the first session occurs before the end of the applicable period, the military judge shall, at that session, inquire as to whether the defense objects under this subsection.

PART VII. TRIAL PROCEDURE

§ -61 Governor or the adjutant general; rulemaking authority. Additional pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial and other military tribunals, and procedures for courts of inquiry, shall be adopted by the governor or adjutant general by rule or as otherwise provided by law, and shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces that are not contrary to or inconsistent with this chapter.

§ -62 Unlawfully influencing action of court. (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer or officer serving on the staff thereof, shall censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court or with respect to any other exercise of its or their functions in the conduct of the proceeding. No person subject to this chapter shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to their judicial acts. This subsection shall not apply to:

- (1) General instructional or informational courses in military justice if the courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial; or

(2) Statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter shall, in preparing any report:

- (1) Consider or evaluate the performance of duty of any member as a member of a court-martial or witness therein; or
- (2) Give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which the member, as counsel, represented any accused before a court-martial.

§ -63 Duties of trial counsel and defense counsel. (a) The trial counsel of a general or special court-martial shall prosecute in the name of the State, and shall, under the direction of the court, prepare the record of the proceedings.

(b) The accused shall have the right to be represented in the accused's defense before a general or special court-martial or at a preliminary hearing under section -54 as provided in this section.

(c) The accused may be represented:

- (1) By military counsel detailed under section -47;
- (2) By military counsel of the accused's own selection if that counsel is reasonably available as determined under subsection (f); or
- (3) By civilian counsel if provided by the accused.

If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (1) or (2) shall act as associate counsel unless excused at the request of the accused.

(d) Except as provided under subsection (e), if the accused is represented by military counsel of the accused's own selection under subsection (c)(2), any military counsel detailed under subsection (c)(1) shall be excused.

(e) The accused shall not be entitled to be represented by more than one military counsel; provided that the person authorized under section -47 to detail counsel in their own discretion may:

- (1) Detail additional military counsel as assistant defense counsel; and
- (2) Approve a request from the accused that military counsel detailed under subsection (c)(1) act as assistant defense counsel, if the accused is represented by military counsel of the accused's own selection under subsection (c)(2).

(f) The senior force judge advocate shall determine whether the military counsel selected by the accused is reasonably available.

(g) In any court-martial proceeding resulting in a conviction, the defense counsel may:

- (1) Forward for attachment to the record of proceedings a brief of the matters that the defense counsel determines should be considered on behalf of the accused on review, including any objection to the contents of the record that the defense counsel considers appropriate;
- (2) Assist the accused in the submission of any matter under part IX; and
- (3) Take other actions authorized by this chapter.

(h) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when the assistant trial counsel is qualified to be a trial counsel as required by section -47, perform any duty imposed by

law, rule, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(i) An assistant defense counsel of a general or special court-martial may perform any duty imposed by law, rule, or the custom of the service upon counsel for the accused.

§ -64 Sessions. (a) At any time after the service of charges have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section -55, call the court into session without the presence of the members for the purpose of:

- (1) Hearing and determining motions raising defenses or objections that are capable of determination without trial of the issues raised by a plea of not guilty;
- (2) Hearing and ruling upon any matter that may be ruled upon by the military judge under this chapter, whether the matter is appropriate for later consideration or decision by the members of the court;
- (3) Holding the arraignment and receiving the pleas of the accused;
- (4) Conducting a sentencing proceeding and sentencing the accused under section -79; and
- (5) Performing any other procedural function that may be performed by the military judge under this chapter or rules adopted pursuant to section -61 that does not require the presence of the members of the court.

(b) Proceedings under subsection (a) shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section -49. If authorized by rule, and if at least one defense counsel is physically in the presence of the accused, the presence required by this subsection may otherwise be established by audiovisual technology, including video teleconferencing technology.

(c) When the members of a court-martial deliberate or vote, only the members shall be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and the military judge.

§ -65 Continuances. The military judge or a summary court-martial may for reasonable cause grant a continuance to any party for such time and as often as appears to be just.

§ -66 Challenges. (a) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge shall determine the relevancy and validity of challenges for cause and shall not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered. Notwithstanding section -31, if exercises of a challenge for cause reduces the court below the number of members required by section -49, all parties shall either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court; provided that peremptory challenges shall not be exercised at that time.

(b) Each accused and the trial counsel shall be entitled initially to one peremptory challenge of members of the court. The military judge shall not

be challenged except for cause. Notwithstanding section -31, if exercise of a peremptory challenge reduces the court below the number of members required by section -49, the parties shall either exercise or waive any remaining peremptory challenge not previously waived against the remaining members of the court before additional members are detailed to the court.

(c) Whenever additional members are detailed to the court, and after any challenges for cause against those members are presented and decided, each accused and the trial counsel shall be entitled to one peremptory challenge against members not previously subject to peremptory challenge.

§ -67 Oaths or affirmations. (a) Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters, and interpreters shall take an oath or affirmation in the presence of the accused to perform their duties faithfully. The form of the oath or affirmation, the time and place of the taking thereof, the manner of recording the same, and whether the oath or affirmation shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed by rule or as provided by law. The rules may provide that an oath or affirmation to perform faithfully duties as a military judge, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporter, or interpreter may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty; provided that if an oath or affirmation is taken it shall not again be taken at the time the judge advocate or other person is detailed to that duty.

(b) Each witness before a court-martial shall be examined on oath or affirmation.

§ -68 Statute of limitations. (a) A person charged with desertion or absence without leave in time of war, aiding the enemy, or mutiny may be tried and punished at any time without limitation.

(b) Except as otherwise provided in this section, a person charged with desertion in time of peace or with the offense punishable under section -139 shall not be liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(c) Except as otherwise provided in this section, a person charged with any offense shall not be liable to be tried by court-martial or punished under section -21 if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under section -21.

(d) Periods in which the accused was absent from territory in which the State has the authority to apprehend the accused, in the custody of civil authorities, or in the hands of the enemy shall be excluded in computing the period of limitation prescribed in this section.

(e) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter:

- (1) Involving fraud or attempted fraud against the United States, any state or territory, or any agency of either in any manner, whether by conspiracy or not;

- (2) Committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States or any state or territory; or
- (3) Committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement of any contract, subcontract, or purchase order that is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or government agency,

shall be suspended until two years after the termination of hostilities as proclaimed by the President of the United States or by a joint resolution of Congress.

(g) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations:

- (1) Has expired; or
- (2) Will expire within one hundred eighty days after the date of dismissal of the charges and specifications,

trial and punishment under new charges and specifications shall not be barred by the statute of limitations if the conditions specified in subsection (h) are met.

(h) New charges and specifications shall:

- (1) Be received by an officer exercising summary court-martial jurisdiction over the command within one hundred eighty days after the dismissal of the charges or specifications; and
- (2) Allege the same acts or omissions that were alleged in the dismissed charges or specifications or allege acts or omissions that were included in the dismissed charges or specifications.

§ -69 Former jeopardy. (a) No person shall without the person's consent be tried a second time in any military court of the State for the same offense.

(b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be a trial under this section until the finding of guilty has become final after review of the case has been fully completed.

(c) A court-martial with a military judge alone is a trial in the sense of this section if, without fault of the accused:

- (1) After introduction of evidence; and
- (2) Before announcement of findings under section -79,

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.

(d) A court-martial with a military judge and members is a trial in the sense of this section if, without fault of the accused:

- (1) After the members, having taken an oath or affirmation as members under section -67 and after completion of challenges under section -66, are impaneled; and
- (2) Before announcement of findings under section -79,

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.

§ -70 Pleas of the accused. (a) A plea of not guilty shall be entered in the record, and the court shall proceed as though an accused had pleaded not guilty if:

- (1) The accused after arraignment makes an irregular pleading;
- (2) The accused after a plea of guilty sets up matter inconsistent with the plea;

(3) It appears that the accused has entered the plea of guilty improvidently or through a lack of understanding of its meaning and effect;
or

(4) The accused fails or refuses to plead.

(b) With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn before announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

(c) A variance from the requirements of this section is harmless error if the variance does not materially prejudice the substantial rights of the accused.

§ -71 Opportunity to obtain witnesses and other evidence. (a) In a case referred for trial by court-martial, the trial counsel, defense counsel, and court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with rules adopted by the governor or adjutant general or as provided by law.

(b) Any subpoena or other process issued under this section shall:

(1) Except as otherwise permitted by the court for good cause, be in a form similar to the one that courts of the State having criminal jurisdiction may issue or properly accept;

(2) Be executed in accordance with rules adopted by the governor or adjutant general or as provided by law; and

(3) Run to any part of the State and shall be executed by civil officers as prescribed by the laws of the State.

(c) A subpoena or other process may be issued to compel a witness to appear and testify:

(1) Before a military court;

(2) At a deposition under section -74; or

(3) As otherwise authorized under this chapter.

(d) A subpoena or other process may be issued to compel the production of evidence:

(1) For a military court;

(2) For a deposition under section -74;

(3) For an investigation of an offense under this chapter; or

(4) As otherwise authorized under this chapter.

(e) An investigative subpoena under subsection (d)(3) may be issued before referral of charges to a court-martial only if a general court-martial convening authority has authorized counsel for the government to issue a subpoena or a military judge issues a subpoena pursuant to section -52.

(f) With respect to an investigation of an offense under this chapter, a military judge detailed in accordance with sections -41, -42, or -45 may issue warrants or court orders for contents of, and records concerning, wire or electronic communications in the same manner as warrants and orders may be issued by courts of the State under chapter 803, subject to limitations as prescribed by the governor or adjutant general by rule or as prescribed by law.

(g) If a person requests relief from a subpoena or other process under this section on grounds that compliance is unreasonable, oppressive, or prohibited by law, a military judge detailed in accordance with sections -41, -42, or -45 shall review the request and shall:

(1) Order that the subpoena or other process be modified or withdrawn, as appropriate; or

(2) Order the person to comply with the subpoena or other process.

§ -72 Refusal of person not subject to chapter to appear, testify, or produce evidence. Any person not subject to this chapter who:

- (1) Has been duly subpoenaed to appear as a witness or to produce records before a military court or before any military or civil officer designated to take a deposition to be read into evidence before a court;
- (2) Has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the circuit court; and
- (3) Wilfully neglects or refuses to appear, qualify as a witness, or testify or to produce any evidence that the person may have been legally subpoenaed to produce,

shall be guilty of an offense against the State and a military court may punish the person in the same manner as the civil courts of the State.

§ -73 Contempt; authority to punish; punishment. (a) With respect to any proceeding under this chapter:

- (1) A military judge detailed to a court-martial or any other proceeding under this chapter;
- (2) Any military magistrate designated to preside under section -46; or
- (3) The president of a court of inquiry,

may punish for contempt any person who conducts themselves in violation of section 710-1077.

(b) The punishment for contempt under subsection (a) shall be the same as the punishments permitted under civilian criminal contempt of court laws and rules.

(c) A punishment imposed under this section:

- (1) If imposed by a military judge or military magistrate, may be reviewed in the same manner as review from the circuit courts of the State; and
- (2) If imposed by a court of inquiry, shall be subject to review by the convening authority in accordance with rules adopted by the governor or adjutant general, or as provided by law.

§ -74 Depositions. (a) At any time after charges have been signed, as provided in section -51, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the State or by the laws of the place where the deposition is taken to administer oaths or affirmations.

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read into evidence before any court-martial or in any proceeding before a court of inquiry, if it appears that:

- (1) The witness resides or is beyond the county in which the court-martial or court of inquiry is ordered to sit;

- (2) The witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, non-amenability to process, or other reasonable cause is unable or refuses to appear and testify in person at the place of trial or hearing; or

- (3) The present whereabouts of the witness are unknown.

(e) Representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under section -47. In addition, the accused shall have the right to be represented by civilian or military counsel in the same manner as counsel are provided for in section -63.

§ -75 Admissibility of sworn testimony from records of courts of inquiry. (a) In any case not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained may, if otherwise admissible under the rules of evidence, be read into evidence by any party before a court-martial if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of the evidence.

(b) The sworn testimony admissible under subsection (a) may be read into evidence only by the defense in cases extending to the dismissal of a commissioned officer.

(c) The sworn testimony admissible under subsection (a) may be read into evidence before a court of inquiry or military board.

(d) Sworn testimony that is:

- (1) Recorded by audiotape, videotape, or similar method; and
- (2) Contained in the duly authenticated record of proceeding of a court of inquiry,

is admissible before a court-martial, court of inquiry, or military board, to the same extent as sworn testimony may be read into evidence before any body under subsections (a), (b), or (c).

§ -76 Lack of physical or mental responsibility; defense; commitment of accused for examination and treatment. (a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe physical or mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect shall not otherwise constitute a defense.

(b) The accused shall have the burden of proving the defense of lack of physical or mental responsibility by clear and convincing evidence.

(c) Whenever lack of physical or mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall follow the forms and procedures of chapter 704.

(d) Notwithstanding the provisions of section -78 and subsection (c), the accused shall be found not guilty by reason of lack of physical or mental responsibility if:

- (1) A majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of physical or mental responsibility has been established by clear and convincing evidence; or
- (2) In the case of a court-martial composed of a military judge only, the military judge determines that the defense of lack of physical or mental responsibility has been established by clear and convincing evidence.

(e) Whenever there is reason to doubt the accused's fitness to proceed, the court may immediately suspend all further proceedings in the trial and conduct an examination in accordance with section 704-404.

(f) Any general or special court-martial where a person may be found guilty by reason of lack of physical or mental responsibility shall follow the same substance and procedures found in sections 704-410.5 through 704-417.

§ -77 Voting and rulings. (a) Voting by members of a general or special court-martial upon questions of challenge, upon the findings, and upon the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge of a general or special court-martial shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of physical or mental responsibility of the accused is final and constitutes the ruling of the court; provided that the military judge may change a ruling at any time during trial.

(c) Before a vote is taken on the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge the court that:

- (1) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;
- (2) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;
- (3) If there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and
- (4) The burden of proof of establishing the guilt of the accused beyond reasonable doubt is upon the State.

(d) This section shall not apply to a court-martial composed of a military judge only. The military judge of a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

§ -78 Votes required for conviction, sentencing, and other matters. (a) No person shall be convicted of an offense in a general or special court-martial, other than:

- (1) After a plea of guilty under section -70;
- (2) By a military judge in a court-martial with a military judge alone under section -31; or
- (3) In a court-martial with members under section -31, by the concurrence of at least three-fourths of the members present when the vote is taken.

(b) Except as provided in subsections (a) and (c), all matters to be decided by members of a general or special court-martial shall be determined by a majority vote; provided that a reconsideration of a finding of guilty or reconsideration of a sentence with a view toward decreasing the sentence may be made

by any lesser vote that indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence.

(c) Sentences imposed by members shall be determined by the concurrence of at least three-fourths of the members present when the vote is taken.

(d) A tie vote on a challenge under section -66 shall disqualify the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity shall be a determination against the accused. A tie vote on any other question shall be a determination in favor of the accused.

§ -79 Findings and sentencing. (a) A court-martial shall announce its findings and sentence to the parties as soon as determined.

(b) Except as provided in subsection (c), if the accused is convicted of an offense in a trial, the military judge shall sentence the accused.

(c) If the accused is convicted of an offense by general or special court-martial consisting of a military judge and members and the accused elects sentencing by members under section -44, the members shall sentence the accused.

(d) If the accused is found guilty of an offense in a trial by summary court-martial, the court-martial shall sentence the accused.

§ -80 Plea agreements. (a) At any time before the announcement of findings under section -79, the convening authority and the accused may enter into a plea agreement with respect to the following matters:

- (1) The manner in which the convening authority will dispose of one or more charges and specifications; and
- (2) Limitations on the sentence that may be adjudged for one or more charges and specifications.

(b) The military judge of a general or special court-martial shall not participate in discussions between the parties concerning prospective terms and conditions of a plea agreement.

(c) The military judge of a general or special court-martial shall reject a plea agreement that:

- (1) Contains a provision that has not been accepted by both parties;
- (2) Contains a provision that is not understood by the accused;
- (3) Contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense prescribed by this chapter;
- (4) Is prohibited by law; or
- (5) Is contrary to or is inconsistent with rules adopted by the governor or adjutant general, or the Hawaii rules of penal procedure with respect to terms, conditions, or other aspects of plea agreements.

(d) Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the court-martial.

§ -81 Record of trial. (a) Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a recorder of the proceedings and authenticated by the signatures of the military judge and the senior member of the panel or military judge alone if presided by a judge alone. If the record cannot be authenticated by either the military judge or senior member of the panel, by reason of death, disability, or absence, it shall be signed by the next senior member of the panel in lieu of the military judge or senior officer. If both the military judge and

the senior member of the panel are unavailable, the record shall be authenticated by two members of the panel.

(b) Each summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be certified in the manner required by rules adopted by the governor or adjutant general or as required by this chapter.

(c) Except as provided in subsection (d), the record shall contain matters as prescribed by the governor or adjutant general by rule.

(d) In accordance with rules adopted by the governor or adjutant general, a complete record of proceedings and testimony shall be prepared in any case of a sentence of dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.

(e) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is certified.

(f) In the case of a general or special court-martial, upon request, a copy of all prepared records of the proceedings of the court-martial shall be given to the victim of the offense if the victim testified during the proceedings. The records of the proceedings shall be provided without charge and as soon as the records are certified. The victim shall be notified of the opportunity to receive the records of the proceedings.

PART VIII. SENTENCES

§ -91 Cruel and unusual punishments prohibited. Punishment by flogging; branding, marking, or tattooing on the body; or any other cruel or unusual punishment shall not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

§ -92 Sentencing. (a) The punishment directed by a court-martial for an offense shall not exceed limits as prescribed by the governor or adjutant general for that offense; provided that in no instance shall a sentence exceed more than ten years confinement. A conviction by general court-martial of any offense for which an accused may receive a sentence of confinement for more than one year is a felony offense. Except for convictions by a summary court-martial, all other offenses are misdemeanors. Any conviction by a summary court-martial shall not be a criminal conviction.

(b) Except as provided in section -80(a), punishment for the following offenses shall include dismissal or dishonorable discharge, as applicable:

- (1) Sexual assault in the first degree under section 707-730;
- (2) Continuous sexual assault of a minor under the age of fourteen years under section 707-733.6;
- (3) An attempt to commit an offense specified in paragraph (1) or (2) that is punishable under section -134; or
- (4) Conspiracy to commit an offense specified in paragraph (1) or (2) that is punishable under section -135.

(c) In sentencing an accused under section -79, a court-martial shall impose punishment that is sufficient but not greater than necessary to promote justice and to maintain good order and discipline in the state military forces, taking into consideration:

- (1) The nature and circumstances of the offense and the history and characteristics of the accused;
- (2) The impact of the offense on:
 - (A) The financial, social, psychological, or medical well-being of any victim of the offense; and

- (B) The mission, discipline, or efficiency of the command of the accused and any victim of the offense;
- (3) The need for the sentence to:
 - (A) Reflect the seriousness of the offense;
 - (B) Promote respect for the law;
 - (C) Provide just punishment for the offense;
 - (D) Promote adequate deterrence of misconduct;
 - (E) Protect others from further crimes by the accused;
 - (F) Rehabilitate the accused; and
 - (G) Provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service; and
- (4) The sentences available under this chapter.
- (d) In announcing the sentence in a general or special court-martial in which the accused is sentenced by military judge alone under section -79, the military judge shall, with respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of fine, if any. If the accused is sentenced to confinement for more than one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.
 - (e) In a general or special court-martial in which the accused has elected sentencing by members, the court-martial shall announce a single sentence for all of the offenses of which the accused was found guilty.
 - (f) With the approval of the senior force judge advocate concerned, and consistent with standards and procedures set forth in rules adopted by the governor or adjutant general, the State may appeal a sentence to the intermediate appellate court of the State on the grounds that:
 - (1) The sentence violates the law; or
 - (2) The sentence is plainly unreasonable as determined in accordance with standards and procedures adopted by the governor or adjutant general.
 - (g) An appeal under subsection (f) shall be filed within sixty days after the date on which the judgment of a court-martial is entered into the record under section -105.

§ -93 Effective date of sentences. (a) A court-martial sentence shall be executed and take effect as follows:

- (1) A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect. Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial shall take effect on the earlier of:
 - (A) The date that is fourteen days after the date on which the sentence is adjudged; or
 - (B) In the case of a summary court-martial, the date on which the sentence is approved by the convening authority;
- (2) Any period of confinement included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial; provided that periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement;
- (3) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal or in the case of an enlisted member, the sentence of a court-martial extends to a dishonorable discharge, that part of the sentence providing for dis-

missal shall not be executed until approved by the governor. The governor may commute, remit, or suspend the sentence, or any part of the sentence, as the governor sees fit. In a time of war or state of emergency the governor may commute a sentence of dismissal or dishonorable discharge to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter; and

- (4) Except as otherwise provided in this subsection, a general or special court-martial sentence shall be effective upon entry of judgment and a summary court-martial sentence shall be effective when the convening authority acts on the sentence.

(b) On application by an accused, the convening authority or, if the accused is no longer under that convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned may, in their sole discretion, defer the effective date of a sentence of confinement, reduction, or forfeiture. The deferment shall terminate upon entry of judgment or, in the case of a summary court-martial, when the convening authority acts on the sentence. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under that officer's jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

(c) In any case in which a court-martial sentences a person to confinement and review of the case under section -111 is pending, the governor may defer further service of the sentence to confinement while that review is pending.

(d) Appellate review is complete under this section when:

- (1) The time for the accused to file a petition for review by the Hawaii intermediate appellate court under section -111 has expired and the accused has not filed a timely petition for review and the case is not otherwise under review by that court; or
- (2) A review under section -111 is completed by the Hawaii intermediate appellate court and:
- (A) The time for the accused to file a petition for review by the Hawaii supreme court has expired and the accused has not filed a timely petition for the review and the case is not otherwise under review by that court;
- (B) The petition by the accused is rejected by the Hawaii supreme court; or
- (C) Review is completed in accordance with the judgment of the intermediate appellate court and review is completed in accordance with the judgment of the Hawaii supreme court.

(e) The completion of appellate review shall constitute a final judgment as to the legality of the proceedings.

§ -94 Execution of confinement. (a) A sentence of confinement adjudged by a military court, whether the sentence includes discharge or dismissal and whether the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the forces of the state military forces or in any state correctional facility designated for that purpose. Persons so confined in a state correctional facility are subject to the same discipline and treatment as persons confined or committed to a state correctional facility by the courts of the State.

(b) The omission of the words "hard labor" from any sentence or punishment of a court-martial adjudging confinement shall not deprive the author-

ity executing that sentence or punishment of the power to require hard labor as a part of the punishment.

(c) The keepers, officers, and wardens of state correctional facilities designated by the governor, or by a person authorized by the governor to act under part II shall receive persons ordered into confinement before trial and persons committed to confinement by a military court and shall confine them according to law. No keeper, officer, or warden shall require payment of any fee or charge for so receiving or confining a person.

§ -95 Sentences; reduction in enlisted grade upon approval. (a) A court-martial sentence of an enlisted member in a pay grade above E-1, as set forth in the judgment of the court-martial entered into the record under section -105, that includes:

- (1) A dishonorable or bad-conduct discharge; or
- (2) Confinement,

shall reduce that member to pay grade E-1, if the reduction is authorized by rules adopted by the governor or adjutant general. The reduction in pay grade shall take effect on the date on which the judgment is so entered.

(b) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or reduced, or as finally affirmed does not include any punishment named in subsection (a)(1) or (2), the rights and privileges of which the member was deprived because of that reduction shall be restored to the member and the member shall be entitled to the pay and allowances to which the member would have been entitled, for the period the reduction was in effect, had the member not been so reduced.

§ -96 Sentences; forfeiture of pay and allowances during confinement. (a) A court-martial sentence described in subsection (b) shall result in the forfeiture of pay or of pay and allowances due that member during any period of confinement or parole. The forfeiture pursuant to this section shall take effect on the date determined under section -93 and may be deferred as provided in that section. The pay and allowances forfeited in the case of a general court-martial shall be all pay and allowances due that member during the period and in the case of a special court-martial shall be two-thirds of all pay due that member during the period.

(b) A sentence covered by this section is any sentence that includes:

- (1) Confinement for more than six months; or
- (2) Confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal.

(c) In a case involving an accused who has dependents, the convening authority or other person acting under part IX may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid as the convening authority or other person taking action directs to the dependents of the accused.

(d) If the sentence of a member who forfeits pay and allowances under subsection (a) is set aside or disapproved or as finally approved does not provide for a punishment referred to in subsection (b), the member shall be paid the pay and allowances that the member would have been paid, except for the forfeiture, for the period during which the forfeiture was in effect.

**PART IX. POST-TRIAL PROCEDURES AND REVIEW OF
COURTS-MARTIAL**

§ -101 Error of law; lesser included offense. (a) A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm so much of the finding as includes a lesser included offense.

§ -102 Post-trial processing in general and special courts-martial. (a) The military judge of a general or special court-martial shall enter into the record of trial a document entitled "statement of trial results" that shall set forth:

- (1) Each plea and finding;
- (2) The sentence, if any; and
- (3) Other information as prescribed by the governor or adjutant general by rule.

(b) Copies of the statement of trial results shall be provided promptly to the convening authority, the accused, and any victim of the offense.

(c) In accordance with rules adopted by the governor or adjutant general, the military judge in a general or special court-martial shall address all post-trial motions and other post-trial matters that:

- (1) May affect a plea, a finding, the sentence, the statement of trial results, the record of trial, or any post-trial action by the convening authority; and
- (2) Are subject to resolution by the military judge before entry of judgment.

§ -103 Limited authority to act on sentence in specified post-trial circumstances. (a) The convening authority of a general or special court-martial described in subsection (b):

- (1) May act on the sentence of the court-martial only as provided in subsection (f), (g), (i), or (j); and
- (2) Shall not act on the findings of the court-martial.

(b) The courts-martial referred to subsection (a) are the following:

- (1) A general or special court-martial in which the maximum sentence of confinement for any offense of which the accused is found guilty is more than two years;
- (2) A general or special court-martial in which the total of the sentences of confinement imposed, running consecutively, is more than six months;
- (3) A general or special court-martial in which the sentence imposed includes a dismissal or dishonorable or bad-conduct discharge; and
- (4) A general or special court-martial in which the accused is found guilty of sexual assault in the first degree or continuous sexual assault of a minor under fourteen years of age or other offense as prescribed by the governor or adjutant general by rule.

(c) Except as provided in subsection (j), the convening authority shall act under this section only before entry of judgment.

(d) In accordance with rules adopted by the governor or adjutant general, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(e) Except as provided in subsection (g), (i), or (j), the convening authority shall not reduce, commute, or suspend any of the following sentences:

(1) A sentence of confinement, if the total period of confinement imposed for all offenses involved, running consecutively, is greater than six months; or

(2) A sentence of dismissal or dishonorable or bad-conduct discharge.

(f) The convening authority may reduce, commute, or suspend any sentence not specified in subsection (e).

(g) Upon recommendation of the military judge, as included in the statement of trial results, together with an explanation of the facts supporting the recommendation, the convening authority may suspend:

(1) A sentence of confinement, in whole or in part; or

(2) A sentence of dismissal or dishonorable or bad-conduct discharge.

(h) Except as provided in subsection (i) or (j), the convening authority under subsection (g) shall not suspend:

(1) A mandatory minimum sentence; or

(2) A sentence to an extent in excess of the suspension recommended by the military judge.

(i) Upon recommendation by the trial counsel, if the accused, after sentencing and before entry of judgment, provides substantial assistance in the investigation or prosecution of another person, the convening authority may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

(j) Upon a recommendation by a trial counsel designated in accordance with rules adopted by the governor or adjutant general, if the accused after entry of judgment provides substantial assistance in the investigation or prosecution of another person, a convening authority as designated by rules may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

(k) In evaluating whether the accused has provided substantial assistance under this section, the convening authority may consider the pre-sentence assistance of the accused.

(l) In determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of an offense in accordance with rules adopted by the governor or adjutant general. The rules shall include:

(1) Procedures for notice of the opportunity to make submissions;

(2) The deadlines for submissions; and

(3) Procedures for providing the accused and any victim of an offense with a copy of the recording of any open sessions of the court-martial and copies of or access to any admitted, unsealed exhibits.

(m) The convening authority shall not consider under this section any submitted matters that relate to the character of a victim unless the matters were presented as evidence at trial and not excluded at trial.

(n) The decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

(o) If the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall include a written explanation of the reasons for the action.

(p) If the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall be forwarded to the military judge for appropriate modification of the entry of judgment, which shall be transmitted to the senior force judge advocate for appropriate action.

§ -104 Post-trial actions in summary courts-martial and certain general and special courts-martial. (a) In a court-martial not specified in section -103(b), the convening authority may:

- (1) Dismiss any charge or specification by setting aside the finding of guilty;
- (2) Change a finding of guilty to a charge or specification to a finding of guilty to a lesser included offense;
- (3) Disapprove the findings and the sentence and dismiss the charges and specifications;
- (4) Disapprove the findings and the sentence and order a rehearing as to the findings and the sentence;
- (5) Disapprove, commute, or suspend the sentence, in whole or in part; or
- (6) Disapprove the sentence and order a rehearing as to the sentence.

(b) In a summary court-martial, the convening authority shall approve the sentence or take other action on the sentence under subsection (a).

(c) Except as provided in subsection (d), the convening authority may act under this section only before entry of judgment.

(d) The convening authority may act under this section after entry of judgment in a general or special court-martial in the same manner as the convening authority may act under section -103(j). The action shall be forwarded to the trial judge, who shall ensure appropriate modification of the entry of judgment and shall transmit the entry of judgment to the senior force judge advocate for appropriate action.

(e) In accordance with rules adopted by the governor or adjutant general, a commissioned officer commanding a successor in command or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(f) The convening authority shall not order a rehearing under this section:

- (1) As to the findings if there is insufficient evidence in the record to support the findings;
- (2) To reconsider a finding of not guilty of any specification or a ruling that amounts to a finding of not guilty; or
- (3) To reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge that sufficiently alleges a violation of law.

(g) In determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of the offense in accordance with rules adopted by the governor or adjutant general. The rules shall include the matter required by section -103(l).

(h) In a general or special court-martial, the decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

(i) If the convening authority acts on the findings or sentence under subsection (a), the decision of the convening authority shall include a written explanation of the reasons for the action.

§ -105 Entry of judgment. (a) In accordance with rules adopted by the governor or adjutant general, in a general or special court-martial the military judge shall enter into the record of trial the judgment of the court. The judgment of the court shall consist of the following:

- (1) The statement of trial results under section -102; and

- (2) Any modifications of, or supplements to, the statement of trial results by reason of:
 - (A) Any post-trial action by the convening authority; or
 - (B) Any ruling, order, or other determination of the military judge that affects a plea, a finding, or the sentence.
- (b) In accordance with rules adopted by the governor or adjutant general, the judgment under subsection (a) shall be:
 - (1) Provided to the accused and to any victim of the offense; and
 - (2) Made available to the public.
- (c) The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under section -104 shall constitute the judgment of the court-martial and shall be recorded and distributed in accordance with rules adopted by the governor or adjutant general.

§ -106 Waiver of right to appeal; withdrawal of appeal. (a) After entry of judgment in a general or special court-martial, in accordance with rules adopted by the governor or adjutant general, the accused may waive the right to appeal. A waiver shall be:

- (1) Signed by the accused and by defense counsel; and
- (2) Attached to the record of trial.
- (b) In a general or special court-martial, the accused may voluntarily request dismissal of an appeal at any time in accordance with the Hawaii rules of appellate procedure.
- (c) A waiver or voluntary dismissal under this section bars review under section -111.

§ -107 Appeal by the State. (a) In a trial by general or special court-martial or in a pretrial proceeding under section -52, the State may appeal the following:

- (1) An order or ruling of the military judge that terminates the proceedings with respect to a charge or specification;
- (2) An order or ruling that excludes evidence that is substantial proof of a fact material in the proceeding;
- (3) An order or ruling that directs the disclosure of classified information;
- (4) An order or ruling that imposes sanctions for nondisclosure of classified information;
- (5) A refusal of the military judge to issue a protective order sought by the State to prevent the disclosure of classified information;
- (6) A refusal by the military judge to enforce an order described in paragraph (5) that has previously been issued by appropriate authority; or
- (7) An order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.
- (b) An appeal of an order or ruling shall not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within seventy-two hours of the order or ruling. The notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one that excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding.
- (c) An appeal of an order or ruling shall not be taken when prohibited by section -69.

(d) An appeal under this section shall be diligently prosecuted by appellate government counsel.

(e) An appeal under this section shall be forwarded to the court as prescribed in section -111.

(f) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

(g) The State may appeal a ruling or order of a military magistrate in the same manner as if the ruling or order had been made by a military judge; provided that the issue shall first be presented to the military judge who designated the military magistrate or to a military judge detailed to hear the issue.

(h) This section shall be liberally construed to effectuate its purposes.

§ -108 Rehearings. (a) Each rehearing under this chapter shall take place before a court-martial composed of members that are not members of the court-martial that first heard the case. Upon a rehearing, the accused shall not be tried for any offense of which the accused was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be adjudged unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

(b) If the sentence adjudged by the first court-martial was in accordance with a plea agreement under section -80 and the accused at the rehearing does not comply with the agreement, or if a plea of guilty was entered for an offense at the first court-martial and a plea of not guilty was entered at the rehearing, the sentence as to those charges or specifications may include any punishment not in excess of the punishment that could have been adjudged at the first court-martial, subject to limitations as prescribed by the governor or adjutant general by rule.

(c) If, after appeal by the government under section -107, the sentence adjudged is set aside and a rehearing on sentence is ordered by the intermediate appellate court, the court-martial may impose any adjudged sentence, subject to limitations as prescribed by the governor or adjutant general by rule.

§ -109 Senior force judge advocate review of finding of guilty in summary court-martial. (a) In accordance with rules adopted by the governor or adjutant general, each summary court-martial in which there is a finding of guilty shall be reviewed by the senior force judge advocate or a judge advocate designated by the senior force judge advocate. A judge advocate shall not review a case under this subsection if the judge advocate has acted in the same case as an accuser, preliminary hearing officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate's review shall be in writing and shall contain the following:

- (1) Conclusions as to whether:
 - (A) The court had jurisdiction over the accused and the offense;
 - (B) The charge and specification stated an offense; and
 - (C) The sentence was within the limits prescribed by law or by rule;
- (2) A response to each allegation of error made in writing by the accused; and
- (3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the summary court-martial was convened or to that person's successor in command if:

- (1) The judge advocate who reviewed the case recommends corrective action; or
- (2) Corrective action is otherwise required by rules adopted by the governor or adjutant general.

(c) The person to whom the record of trial and related documents are sent under subsection (b) may:

- (1) Approve or disapprove the findings or sentence, in whole or in part;
- (2) Remit, commute, or suspend the sentence in whole or in part;
- (3) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, the sentence, or both; or
- (4) Dismiss the charges.

(d) Charges shall be dismissed if a rehearing is ordered but the convening authority finds a rehearing impracticable.

(e) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to the state judge advocate for review under this section.

§ -110 Transmittal and review of records. (a) If the judgment of a general or special court-martial entered under section -105 includes a finding of guilty, the record shall be transmitted to the state judge advocate for review.

(b) In all other cases not covered under subsection (a), records of trial by court-martial and related documents shall be transmitted and disposed of as the governor or adjutant general prescribe by rule or as required by law.

(c) The state judge advocate shall provide notice to the accused of the right to file an appeal under section -111 by means of depositing in the United States mail for delivery by first class certified mail to the accused at an address provided by the accused or, if no address has been provided by the accused at the latest address listed for the accused in the official service record of the accused.

(d) Subsection (c) shall not apply if the accused waives the right to appeal under section -106.

(e) A review shall be completed in each general and special court-martial appealed to the State's intermediate appellate court by the accused.

(f) A review conducted under this section shall be conducted by an attorney within the office of the judge advocate for the state military forces or by another attorney designated in accordance with rules adopted by the governor or adjutant general.

(g) A review shall include a written decision providing each of the following:

- (1) A conclusion as to whether the court had jurisdiction over the accused and the offense;
- (2) A conclusion as to whether the charge and specification stated an offense;
- (3) A conclusion as to whether the sentence was within the limits prescribed as a matter of law; and
- (4) A response to each allegation of error made in writing by the accused.

(h) A review shall be completed in each general and special court-martial if:

(1) The accused waives the right to appeal or voluntarily requests dismissal of appeal under section -106; or

(2) The accused does not file a timely appeal in a case eligible for appeal.

(i) A review shall include a written decision limited to providing conclusions on the matters specified in subsection (g)(1), (2), and (3).

(j) If after a review of record under subsection (f), the attorney conducting the review believes corrective action may be required, the record shall be forwarded to the state judge advocate, who may set aside the findings or sentence, in whole or in part.

(k) In setting aside the findings or sentence, the state judge advocate may order a rehearing; provided that a rehearing shall not be ordered in violation of section -69.

(l) If the state judge advocate sets aside the findings and sentence and does not order a rehearing, the state judge advocate shall dismiss the charges.

(m) If the state judge advocate sets aside the findings and orders a rehearing but the convening authority determines that a rehearing would be impracticable, the convening authority shall dismiss the charges.

§ -111 Review by state appellate authority. (a) An accused, who was tried by a special or general court-martial and is self aggrieved after the accused has exhausted all of the accused's rights of review under this part, shall be entitled to appeal the judgment or sentence of the special or general court-martial, as modified on review under this part before judicial review under this section, subject to chapter 602, in the manner provided for civil appeals from the circuit courts, and within the time provided by the rules of court.

(b) The filing of an appeal pursuant to subsection (a) shall not of itself stay the execution of the judgment or sentence appealed from; provided that the appellate court may stay the same upon motion and upon conditions as it deems proper, notwithstanding any law to the contrary relating to the effective date or execution of sentences.

(c) In reviewing the judgment or sentence of a special or general court-martial, as modified on review before judicial review, the appellate court may take any of the actions, and exercise any of the powers specified in section 641-16, as the court deems appropriate in reviewing a judgment or sentence of a military court-martial, and the court shall follow as appropriate or applicable the standards and requirements in section 641-16.

(d) Upon the request of the accused, the state judge advocate shall appoint appellate defense counsel in accordance with section -112, who is a member of the bar of the highest court of the State and who has been qualified as a judge advocate under section -47, to represent the accused in the accused's appeal of the court-martial judgment or sentence. If the accused wishes to be represented by civilian counsel rather than by appointed military counsel, the accused may do so at the accused's own expense.

§ -112 Appellate counsel. (a) The senior force judge advocate shall detail one or more judge advocates as appellate government counsel, and one or more judge advocates as appellate defense counsel, who are qualified under section -47.

(b) Appellate government counsel shall represent the State before the state intermediate appellate court or state supreme court when directed to do so by the senior force judge advocate. Appellate government counsel may represent

the State before federal courts in cases arising under this chapter when requested to do so by the state attorney general.

(c) Appellate defense counsel shall represent the accused before the state intermediate appellate court or state supreme court:

- (1) When requested by the accused;
- (2) When the State is represented by counsel; or
- (3) When the case is appealed under section -107.

(d) The accused shall have the right to be represented by civilian counsel if provided by the accused at no cost to the government.

(e) Military appellate counsel shall perform other functions in connection with the review of court-martial cases as the senior force judge advocate directs.

§ -113 Vacation of suspension. (a) Before the vacation of the suspension of a special court-martial sentence that includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The court-martial convening authority may detail a judge advocate, who is qualified under section -47, to conduct the hearing. The probationer shall be represented at the hearing by counsel if the probationer so desires.

(b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the governor in cases involving a general court-martial sentence and to the commanding officer of the force of the state military forces of which the probationer is a member in all other cases covered by subsection (a). If the governor or commanding officer vacates the suspension, any unexecuted part of the sentence except a dismissal shall be executed.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

§ -114 Petition for a new trial. At any time within two years after approval by the convening authority of a court-martial sentence that extends to dismissal or dishonorable or bad-conduct discharge, the accused may petition the governor for a new trial on the grounds of newly discovered evidence or fraud on the court-martial. If the accused's case is pending before the state intermediate appellate court or state supreme court, the state judge advocate shall refer the petition to the appropriate court for action. Otherwise, the state judge advocate shall act upon the petition.

§ -115 Remission and suspension. (a) The governor, the adjutant general, or a convening authority may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures.

(b) The governor may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

§ -116 Restoration. (a) In accordance with rules as the governor may adopt, all rights, privileges, and property affected by an executed part of a court-martial sentence that has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and the executed part is included in a sentence imposed upon the new trial or rehearing.

(b) If a previously executed sentence of dishonorable or bad-conduct discharge is not imposed on a new trial, the governor shall substitute a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of the accused's enlistment.

(c) If a previously executed sentence of dismissal is not imposed on a new trial, the governor shall substitute a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the governor alone to the commissioned grade and with the rank as in the opinion of the governor that former officer would have attained had the former officer not been dismissed. The reappointment of a former officer may be made if a position vacancy is available under the applicable tables of organization. All time between the dismissal and reappointment shall be considered as service for all purposes, including the right to pay and allowances.

(d) The governor or adjutant general shall adopt rules with limitations as the governor or adjutant general considers appropriate governing eligibility for pay and allowances for the period after the date on which an executed part of a court-martial is sentence¹ is set aside or disapproved.

§ -117 Finality of proceedings, findings, and sentences. The appellate review of records of trial provided under this chapter, the proceedings, findings, and sentences of courts-martial as reviewed and approved, as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following review and approval, as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all actions taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the State, subject only to action upon a petition for a new trial as provided in section -114 and to action taken under section -115.

§ -118 Leave required to be taken pending review of certain court-martial convictions. In accordance with rules adopted by the governor or adjutant general, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action under this part if the sentence includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The accused may be required to begin the leave on the date of the entry of judgment under section -105 or at any time after that date, and the leave may be continued until the date on which action under this part is completed or may be terminated at any earlier time.

PART X. PUNITIVE SECTIONS

§ -131 Principals. Any person punishable under this chapter who:

- (1) Commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
- (2) Causes an act to be done that, if directly performed by that person, would be punishable by this chapter,

is a principal.

§ -132 Accessory after the fact. Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent the offender's apprehension, trial, or punishment shall be punished as directed by a court-martial.

§ -133 Conviction of offense charged, lesser included offenses, and attempts. (a) An accused may be found guilty of any of the following:

- (1) The offense charged;
 - (2) A lesser included offense;
 - (3) An attempt to commit the offense charged; and
 - (4) An attempt to commit a lesser included offense if the attempt is an offense in its own right.
- (b) For purposes of this section, “lesser included offense” means:
- (1) An offense that is necessarily included in the offense charged; and
 - (2) Any lesser included offense so designated by rules adopted by the governor or adjutant general; provided that any designation of a lesser included offense shall be reasonably included in the greater offense.

§ -134 Attempts. (a) An act done with specific intent to commit an offense under this chapter that amounts to more than mere preparation and tending, even though failing to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as directed by a court-martial, unless otherwise specifically prescribed in this chapter.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

§ -135 Conspiracy. Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to affect the object of the conspiracy, be punished as directed by a court-martial.

§ -136 Soliciting commission of offenses. (a) Any person subject to this chapter who solicits or advises another to commit an offense under this chapter, other than an offense specified in subsection (b), shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who solicits or advises another to violate section -139, -151, or -157:

- (1) If the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and
- (2) If the offense solicited or advised is not attempted or committed, shall be punished as directed by a court-martial.

§ -137 Malingering. Any person subject to this chapter who, with the intent to avoid work, duty, or service:

- (1) Feigns illness, physical disability, mental lapse, or mental derangement; or
 - (2) Intentionally inflicts self-injury,
- shall be punished as directed by a court-martial.

§ -138 Breach of medical quarantine. Any person subject to this chapter:

- (1) Who is ordered into medical quarantine by a person authorized to issue the order; and

(2) Who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority, shall be punished as directed by a court-martial.

§ -139 **Desertion.** (a) Any member of the state military forces who:

- (1) Without authority goes or remains absent from the member's unit, organization, or place of duty with intent to remain away therefrom permanently;
- (2) Quits the member's unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or
- (3) Without being regularly separated from one of the state military forces enlists or accepts an appointment in the same or another one of the state military forces or in one of the armed forces of the United States without fully disclosing the fact that the member has not been regularly separated, or enters any foreign armed service except when authorized by the United States,

shall be guilty of desertion.

(b) Any commissioned officer of the state military forces who, after tender of the officer's resignation and before notice of its acceptance, quits the officer's post or proper duties without leave and with intent to remain away therefrom permanently shall be guilty of desertion.

(c) Any person found guilty of desertion or attempt to desert committed in a time of war shall be punished by confinement of no more than ten years or other punishment as directed by a court-martial; provided that if the desertion or attempt to desert occurs at any other time, punishment shall be as directed by a court-martial.

§ -140 **Absence without leave.** Any member of the state military forces who, without authority:

- (1) Fails to go to the member's appointed place of duty at the time prescribed;
- (2) Goes from that place; or
- (3) Absents the member's self or remains absent from the member's unit, organization, or place of duty at which the member is required to be at the time prescribed,

shall be punished as directed by a court-martial.

§ -141 **Missing movement; jumping from vessel.** (a) Any person subject to this chapter who, through neglect or design, misses the movement of a ship, aircraft, or unit with which the person is required in the course of duty to move shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who wrongfully and intentionally jumps into the water from a vessel in use by the state military forces shall be punished as directed by a court-martial.

§ -142 **Resistance, flight, breach of arrest, and escape.** Any person subject to this chapter who:

- (1) Resists apprehension;
- (2) Flees from apprehension;
- (3) Breaks arrest; or
- (4) Escapes from custody or confinement,

shall be punished as directed by a court-martial.

§ -143 Offenses against correctional custody and restriction. (a)

Any person subject to this chapter who:

- (1) Is placed in correctional custody by a person authorized to do so;
- (2) While in correctional custody, is under physical restraint; and
- (3) Escapes from the physical restraint before being released from the physical restraint by proper authority,

shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who:

- (1) Is placed in correctional custody by a person authorized to do so;
- (2) While in correctional custody, is under restraint other than physical restraint; and
- (3) Goes beyond the limits of the restraint before being released from the correctional custody or relieved of the restraint by proper authority,

shall be punished as directed by a court-martial.

(c) Any person subject to this chapter who:

- (1) Is ordered to be restricted to certain limits by a person authorized to do so; and
- (2) With knowledge of the limits of the restriction, goes beyond those limits before being released by proper authority,

shall be punished as directed by a court-martial.

§ -144 Contempt toward officials. Any commissioned officer who uses contemptuous words against the President or Vice President of the United States, the United States Congress, the United States Secretary of Defense, the secretary of a military department, the United States Secretary of Homeland Security, or the governor or legislature of the State shall be punished as directed by a court-martial.

§ -145 Disrespect toward superior commissioned officer; assault of superior commissioned officer. (a) Any person subject to this chapter who behaves with disrespect toward that person's superior commissioned officer shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who strikes that person's superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer's office shall be punished:

- (1) If the offense is committed in time of war, by confinement of no more than ten years or other punishment as directed by a court-martial; and
- (2) If the offense is committed at any other time, by punishment as directed by a court-martial.

§ -146 Wilfully disobeying superior commissioned officer. Any person subject to this chapter who wilfully disobeys a lawful command of that person's superior commissioned officer shall be punished:

- (1) If the offense is committed in time of war, by confinement of no more than ten years or other punishment as directed by a court-martial; and
- (2) If the offense is committed at any other time, by punishment as directed by a court-martial.

§ -147 Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer. Any warrant officer or enlisted member who:

- (1) Strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of that officer's office;
- (2) Wilfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or
- (3) Treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of that officer's office,

shall be punished as directed by a court-martial.

§ -148 Failure to obey order, regulation, or rule. Any person subject to this chapter who:

- (1) Violates or fails to obey any lawful general order, regulation, or rule;
- (2) Having knowledge of any other lawful order issued by a member of the state military forces, that it is that person's duty to obey, fails to obey the order; or
- (3) Is derelict in the performance of that person's duties,

shall be punished as directed by a court-martial.

§ -149 Cruelty and maltreatment. Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to that person's orders shall be punished as directed by a court-martial.

§ -150 Prohibited activities with a military recruit or trainee by a person in a position of special trust. (a) Any person subject to this chapter who:

- (1) Is an officer, a noncommissioned officer, or a petty officer;
- (2) Is in a training leadership position with respect to a specially protected junior member of the state military forces; and
- (3) Engages in prohibited sexual activity with the specially protected junior member of the state military forces,

shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who:

- (1) Is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or
- (2) Is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the state military forces who is enlisted under a delayed entry program,

shall be punished as directed by a court-martial.

(c) Consent shall not be a defense for any conduct at issue in a prosecution under this section.

(d) For purposes of this section:

"Applicant for military service" means a person who is an applicant for original enlistment or appointment in the state military forces under rules adopted by the Secretary concerned or the governor or adjutant general.

"Military recruiter" means a person who has the primary duty to recruit persons for military service under rules adopted by the Secretary concerned or the governor or adjutant general.

"Prohibited sexual activity" means inappropriate physical intimacy under circumstances as specified in rules adopted by the Secretary concerned or the governor or adjutant general.

"Specially protected junior member of the state military forces" means:

- (1) A member of the state military forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for

- training, including a member who is enlisted under a delayed entry program;
- (2) A member of the state military forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; or
 - (3) A member of the state military forces in any program that by regulation or rule adopted by the Secretary concerned or the governor or adjutant general, is identified as a training program for initial career qualification.

“Training leadership position” means, with respect to a specially protected junior member of the state military forces, any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers’ training corps unit, a training program for entry into the state military forces, or any program that, by rule adopted by the Secretary concerned or the governor or adjutant general, is identified as a training program for initial career qualification.

§ -151 **Mutiny or sedition.** (a) Any person subject to this chapter who:

- (1) With intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do that person’s duty or creates any violence or disturbance shall be guilty of mutiny;
- (2) With intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority shall be guilty of sedition; or
- (3) Fails to do that person’s utmost to prevent and suppress a mutiny or sedition being committed in the person’s presence or fails to take all reasonable means to inform the person’s superior commissioned officer or commanding officer of a mutiny or sedition that the person knows or has reason to believe is taking place shall be guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished as directed by a court-martial.

§ -152 **Offenses by sentinel or lookout.** (a) Any sentinel or lookout who is drunk on post, who sleeps on post, or who leaves post before being regularly relieved shall be punished:

- (1) If the offense is committed in time of war, by confinement of no more than ten years or other punishment as directed by a court-martial; and
- (2) If the offense is committed other than in time of war, by punishment as directed by a court-martial.

(b) Any sentinel or lookout who loiters or wrongfully sits down on post shall be punished as directed by a court-martial.

§ -153 **Disrespect toward sentinel or lookout.** Any person subject to this chapter who, knowing that another person is a sentinel or lookout:

- (1) Uses wrongful and disrespectful language that is directed toward and within the hearing of the sentinel or lookout, who is in the execution of duties as sentinel or lookout; or

(2) Behaves in a wrongful and disrespectful manner that is directed toward and within the sight of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout,
shall be punished as directed by a court-martial.

§ -154 Release of prisoner without authority; drinking with prisoner.

(a) Any person subject to this chapter who:

(1) Without authority to do so, releases a prisoner; or
(2) Through neglect or designs, allows a prisoner to escape,
shall be punished as directed by a court-martial regardless of whether the prisoner was committed in strict compliance with the law.

(b) Any person subject to this chapter who unlawfully drinks any alcoholic beverage with a prisoner shall be punished as directed by a court-martial.

§ -155 Unlawful detention. Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as directed by a court-martial.

§ -156 Misconduct as prisoner. Any person subject to this chapter who, while in the hands of the enemy in time of war:

(1) For the purpose of securing favorable treatment by the person's captors acts without proper authority in a manner contrary to law, custom, regulation, or rule to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or
(2) While in a position of authority over persons, maltreats the person without justifiable cause,
shall be punished as directed by a court-martial.

§ -157 Misbehavior before the enemy. Any member of the state military forces who before the presence of the enemy:

(1) Runs away;
(2) Shamefully abandons, surrenders, or delivers up any command, unit, place, or military property that it is that person's duty to defend;
(3) Through disobedience, neglect, or intentional misconduct endangers the safety of any command, unit, place, or military property;
(4) Casts away the person's arms or ammunition;
(5) Is guilty of cowardly conduct;
(6) Quits the person's place of duty to plunder or pillage;
(7) Causes false alarms in any command, unit, or place under control of the state military forces;
(8) Wilfully fails to do the person's utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing that it is the person's duty so to encounter, engage, capture, or destroy; or
(9) Does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the state military forces or the armed forces belonging to the State, the United States or their allies, or any other state, commonwealth, or territory when engaged in battle,
shall be punished as directed by a court-martial.

§ -158 Subordinate compelling surrender. Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the

state military forces or the armed forces of the United States, to give it up to an enemy or to abandon it, or who strikes the color or flag to an enemy without proper authority, shall be punished as directed by a court-martial.

§ **-159 Improper use of countersign.** Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to that person's knowledge, the person was authorized and required to give, shall be punished as directed by a court-martial.

§ **-160 Forcing a safeguard.** Any person subject to this chapter who forces a safeguard shall be punished as directed by a court-martial.

§ **-161 Spies.** Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of the state military forces or of the United States armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial and on conviction shall be punished as directed by a court-martial.

§ **-162 Espionage.** (a) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the State or the United States, or to another state, commonwealth, or territory of the United States, or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in subsection (b), either directly or indirectly, any thing described in subsection (c) shall be punished as directed by a court-martial.

(b) An entity referred to in subsection (a) is:

- (1) A foreign government;
- (2) A faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or
- (3) A representative, officer, agent, employee, subject, or citizen of a government, faction, party, or force.

(c) A thing referred to in subsection (a) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the State or national defense.

§ **-163 Aiding the enemy.** Any person who:

- (1) Aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
- (2) Without proper authority, knowingly harbors or protects, gives intelligence to, communicates or corresponds with, or holds any intercourse with the enemy, either directly or indirectly,

shall be punished as directed by a court-martial.

§ **-164 Public record offenses.** Any person subject to this chapter who, wilfully and unlawfully:

- (1) Alters, conceals, removes, mutilates, obliterates, or destroys a public record; or
- (2) Takes a public record with the intent to alter, conceal, remove, mutilate, obliterate, or destroy the public record,

shall be punished as directed by a court-martial.

§ -165 **Fraudulent enlistment, appointment, or separation.** Any person who:

- (1) Procures for that person's own enlistment or appointment in the state military forces by knowingly false representation or deliberate concealment as to that person's qualifications for that enlistment or appointment and receives pay or allowances thereunder; or
- (2) Procures for that person's own separation from the state military forces by knowingly false representation or deliberate concealment as to that person's eligibility for that separation,

shall be punished as directed by a court-martial.

§ -166 **Unlawful enlistment, appointment, or separation.** Any person subject to this chapter who effects an enlistment or appointment in or a separation from the state military forces of any person who is known to that person to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, rule, or order shall be punished as directed by a court-martial.

§ -167 **Forgery.** Any person subject to this chapter who, with intent to defraud:

- (1) Falsely makes or alters any signature to, or any part of, any writing that would, if genuine, impose a legal liability on another or change the person's legal right or liability to the person's prejudice; or
- (2) Utters, offers, issues, or transfers the writing, known by the person to be falsely made or altered,

shall be guilty of forgery and shall be punished as directed by a court-martial.

§ -168 **False or unauthorized pass offenses.** (a) Any person subject to this chapter who, wrongfully and falsely, makes, alters, counterfeits, or tampers with a military or official pass, permit, discharge certificate, or identification card shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who wrongfully sells, gives, lends, or disposes of a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as directed by a court-martial.

(c) Any person subject to this chapter who wrongfully uses or possesses a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as directed by a court-martial.

§ -169 **Impersonation of officer, noncommissioned or petty officer, or agent or official.** (a) Any person subject to this chapter who, wrongfully and wilfully, impersonates:

- (1) An officer, a noncommissioned officer, or a petty officer;
- (2) An agent of superior authority of one of the armed forces; or
- (3) An official of a government,

shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who, wrongfully and wilfully, and with intent to defraud, impersonates any person referred to in subsection (a)(1), (2), or (3) shall be punished as directed by a court-martial.

(c) Any person subject to this chapter who, wrongfully and wilfully, and without intent to defraud, impersonates an official of a government by commit-

ting an act that exercises or asserts the authority of the office that the person claims to have shall be punished as directed by a court-martial.

§ -170 Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button. Any person subject to this chapter who:

- (1) Is not authorized to wear an insignia, decoration, badge, ribbon, device, or lapel button; and
- (2) Wrongfully wears any insignia, decoration, badge, ribbon, device, or lapel button upon the person's uniform or civilian clothing,

shall be punished as directed by a court-martial.

§ -171 False official statements; false swearing. (a) Any person subject to this chapter who, with intent to deceive:

- (1) Signs any false record, return, regulation, order, or other official document, knowing it to be false; or
- (2) Makes any other false official statement knowing it to be false,

shall be punished as directed by a court-martial.

(b) Any person subject to this chapter:

- (1) Who takes an oath or affirmation that:
 - (A) Is administered in a matter in which the oath or affirmation is required or authorized by law; and
 - (B) Is administered by a person with authority to do so; and
- (2) Who, upon the oath or affirmation, makes or subscribes to a statement,

if the statement is false and at the time of taking the oath affirmation, the person does not believe the statement to be true, shall be punished as directed by a court-martial.

§ -172 Military property; loss, damage, destruction, or wrongful disposition. Any person subject to this chapter who, without proper authority:

- (1) Sells or otherwise disposes of;
- (2) Wilfully or through neglect damages, destroys, or loses; or
- (3) Wilfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of,

any military property of the State, the United States, or any of its states, territories, or commonwealths shall be punished as directed by a court-martial.

§ -173 Captured or abandoned property. (a) All persons subject to this chapter shall secure all public property taken from the enemy for the service of the United States or the State and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(b) Any person subject to this chapter who:

- (1) Fails to carry out the duties prescribed in subsection (a);
- (2) Buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby the person receives or expects any profit, benefit, or advantage to the person's self, or another directly or indirectly connected with the person's self; or
- (3) Engages in looting or pillaging,

shall be punished as directed by a court-martial.

§ -174 Property other than military property; waste, spoilage, or destruction. Any person subject to this chapter who wilfully or recklessly wastes, spoils, or otherwise wilfully and wrongfully destroys or damages any property

other than military property of the United States or of the State shall be punished as directed by a court-martial.

§ -175 Mail matter; wrongful taking; opening. (a) Any person subject to this chapter who, with the intent to obstruct the correspondence of, or to pry into the business or secrets of, any person or organization, wrongfully takes mail matter before the mail matter is delivered to or received by the addressee shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who wrongfully opens, secrets, destroys, or steals mail matter before the matter is delivered to or received by the addressee shall be punished as directed by a court-martial.

§ -176 Improper hazarding of vessel or aircraft. (a) Any person subject to this chapter who, wilfully and wrongfully, hazards or suffers to be hazarded any vessel or aircraft of the armed forces of the United States or any state military force shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel or aircraft of the armed forces of the United States or any state military force shall be punished as directed by a court-martial.

§ -177 Drunkenness and other incapacitation offenses. (a) Any person subject to this chapter who is drunk on duty shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who, as a result of indulgence in any alcoholic beverage or any drug, is incapacitated for the proper performance of duty shall be punished as directed by a court-martial.

(c) Any person subject to this chapter who is a prisoner and is drunk while the person is a prisoner shall be punished as directed by a court-martial.

§ -178 Wrongful use, possession, etc., of controlled substances. (a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces or any state military force a substance described in subsection (b) shall be punished as directed by a court-martial.

(b) The substances referred to in subsection (a) are the following:

- (1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana, and any compound or derivative of the substance;
- (2) Any substance not specified in paragraph (1) that is listed on a schedule of controlled substances prescribed by the President of the United States for the purposes of the Uniform Code of Military Justice of the armed forces of the United States as provided in title 10 United States Code sections 801 et. seq.; and
- (3) Any other substance not specified in paragraph (1) or contained on a list prescribed by the President of the United States under paragraph (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act as contained in title 21 United States Code section 812.

§ -179 Drunken or reckless operation of a vehicle, aircraft, or vessel. (a) Any person subject to this chapter who:

- (1) Operates or physically controls a vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section -178; or
- (2) Operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is equal to or exceeds the applicable limit under subsection (b),

shall be punished as directed by a court-martial.

(b) For purposes of subsection (a), the applicable limit on the alcohol concentration in a person's blood or breath is the lesser of:

- (1) The blood alcohol content limit under the law of the State, district, territory, or commonwealth of the United States in which the conduct occurred; except as provided under paragraph (3) for conduct on a military installation that is in more than one state, district, territory, or commonwealth;
- (2) The blood alcohol content limit specified in subsection (c); or
- (3) In the case of a military installation that is in more than one state, district, territory, or commonwealth, if those states, districts, territories, or commonwealths have different blood alcohol content limits under their respective state laws, the limit specified for the installation.

(c) For purposes of subsection (b), the blood alcohol content limit with respect to alcohol concentration in a person's blood is 0.08 grams of alcohol per one hundred milliliters of blood and with respect to alcohol concentration in a person's breath is 0.08 grams of alcohol per two hundred ten liters of breath, as shown by chemical analysis.

§ -180 Endangerment offenses. (a) Any person subject to this chapter who engages in conduct that:

- (1) Is wrongful and reckless or is wanton; and
- (2) Is likely to produce death or grievous bodily harm to another person,

shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who:

- (1) Fights or promotes a fight, or is concerned in or connives a fight; or
- (2) Having knowledge of a challenge to fight sent or about to be sent, fails to report the facts promptly to the proper authority,

shall be punished as directed by a court-martial.

(c) Any person subject to this chapter who, wilfully and wrongly, discharges a firearm under circumstances as to endanger human life shall be punished as directed by a court-martial.

(d) Any person subject to this chapter who unlawfully carries a dangerous weapon concealed on or about their person shall be punished as directed by a court-martial.

§ -181 Communicating threats. (a) Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as directed by a court-martial.

(b) Any person subject to this chapter who wrongfully communicates a threat to injure the person or property of another by use of:

- (1) An explosive;
- (2) A weapon of mass destruction;
- (3) A biological or chemical agent, substance, or weapon; or
- (4) A hazardous material,

shall be punished as directed by a court-martial.

(c) Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of:

- (1) An explosive;
- (2) A weapon of mass destruction;
- (3) A biological or chemical agent, substance, or weapon; or
- (4) A hazardous material,

shall be punished as directed by a court-martial.

(d) For purposes of this section, “false threat” means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.

§ **-182 Riot or breach of peace.** Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as directed by a court-martial.

§ **-183 Provoking speeches or gestures.** Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as directed by a court-martial.

§ **-184 Offenses concerning government computers.** (a) Any person subject to this chapter who:

- (1) Knowingly accesses a government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe the information could be used to the injury of the United States or State, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted the information to any person not entitled to receive it;
- (2) Intentionally accesses a government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any government computer; or
- (3) Knowingly causes the transmission of a program, information, code, or command, and as a result of the conduct, intentionally causes damage without authorization to a government computer,

shall be punished as directed by a court-martial.

(b) For purposes of this section:

“Computer” shall have the same meaning given that term as provided in title 18 United States Code section 1030.

“Damage” shall have the same meaning given that term as provided in title 18 United States Code section 1030.

“Government computer” means a computer owned or operated by or on behalf of the United States government or State, including the state military forces.

§ **-185 Fraud against the government.** Any person subject to this chapter:

- (1) Who, knowing it to be false or fraudulent:
 - (A) Makes any claim against the United States, the State, or any officer thereof; or
 - (B) Presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States, the State, or any officer thereof;

- (2) Who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States, the State, or any officer thereof:
 - (A) Makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;
 - (B) Makes any oath or affirmation to any fact or to any writing or other paper knowing the oath or affirmation to be false; or
 - (C) Forges or counterfeits any signature upon any writing or other paper, or uses any signature knowing it to be forged or counterfeited;
- (3) Who, having charge, possession, custody or control of any money, or other property of the United States or the State, furnished or intended for the armed forces of the United States or the state military forces, knowingly delivers to any person having authority to receive it, an amount thereof less than that for which a certificate or receipt is received; or
- (4) Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States or State furnished or intended for the armed forces thereof, makes or delivers to any person writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States or State,

shall upon conviction be punished as directed by a court-martial.

§ -186 Perjury. Any person subject to this chapter who in a judicial proceeding or in a course of justice conducted under this chapter wilfully and corruptly:

- (1) Upon a lawful oath or affirmation, or in any form allowed by law to be substituted for an oath or affirmation, gives any false testimony material to the issue or matter of inquiry; or
- (2) In any declaration, certificate, verification, or statement under penalty of perjury as permitted under title 28 United States Code section 1746, subscribes any false statement material to the issue or matter of inquiry,

shall be guilty of perjury and shall be punished as directed by a court-martial.

§ -187 Subornation of perjury. (a) Any person subject to this chapter who induces and procures another person to:

- (1) Take an oath or affirmation; and
- (2) Falsely testify, depose, or state upon the oath or affirmation,

shall, if the conditions specified in subsection (b) are satisfied, be punished as directed by a court-martial.

(b) The conditions referred to in subsection (a) are the following:

- (1) The oath or affirmation is administered with respect to a matter for which the oath or affirmation is required or authorized by law;
- (2) The oath or affirmation is administered by a person having authority to do so;
- (3) Upon the oath or affirmation, the other person wilfully makes or subscribes a statement;
- (4) The statement is material;
- (5) The statement is false; and
- (6) When the statement is made or subscribed, the person subject to this chapter and the other person do not believe that the statement is true.

§ -188 **Obstructing justice.** Any person subject to this chapter who engages in conduct in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending, with intent to influence, impede, or otherwise obstruct due administration of justice shall be punished as directed by a court-martial.

§ -189 **Misprision of serious offense.** Any person subject to this chapter:

- (1) Who knows that another person has committed a serious offense; and
- (2) Wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible,

shall be punished as directed by a court-martial.

§ -190 **Wrongful refusal to testify.** Any person subject to this chapter who, in the presence of a court-martial, a board of officers, a court of inquiry, preliminary hearing, or an officer taking a deposition, of or for the State or for the United States, wrongfully refuses to qualify as a witness or to answer a question after having been directed to do so by the person presiding shall be punished as directed by a court-martial.

§ -191 **Prevention of authorized seizure of property.** Any person subject to this chapter who, knowing that one or more persons authorized to make searches and seizures are seizing, are about to seize, or are endeavoring to seize property, destroys, removes, or otherwise disposes of the property with intent to prevent the seizure thereof shall be punished as directed by a court-martial.

§ -192 **Noncompliance with procedural rules.** Any person subject to this chapter who:

- (1) Is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or
- (2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused,

shall be punished as directed by a court-martial.

§ -193 **Wrongful interference with adverse administrative proceeding.** Any person subject to this chapter who, having reason to believe that an adverse administrative proceeding is pending against any person subject to this chapter, wrongfully acts with the intent to:

- (1) Influence, impede, or obstruct the conduct of the proceeding; or
- (2) Otherwise obstruct the due administration of justice,

shall be punished as directed by a court-martial.

§ -194 **Retaliation.** (a) Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or making or planning to make a protected communication, or with the intent to discourage any person from reporting a criminal offense or making or planning to make a protected communication wrongfully:

- (1) Takes or threatens to take an adverse personnel action against any person; or
- (2) Withholds or threatens to withhold a favorable personnel action with respect to any person,

shall be punished as directed by a court-martial.

(b) For purposes of this section:

“Covered individual or organization” means any recipient of a communication specified in title 10 United States Code section 1034(b)(1)(B)(i) through (vi).

“Inspector General” shall have the same meaning given that term in title 10 United States Code section 1034(j).

“Protected communication” means the following:

- (1) A lawful communication to a member of the United States Congress or an Inspector General; or
- (2) A communication to a covered individual or organization in which a member of the state military forces or the Armed Forces of the United States complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:
 - (A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination; or
 - (B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

§ -195 **Conduct unbecoming an officer.** Any commissioned officer who is convicted of conduct unbecoming an officer shall be punished as directed by a court-martial.

§ -196 **General article.** Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the state military forces, all conduct of a nature to bring discredit upon the state military forces, offenses prescribed by the governor or adjutant general by rule, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial according to the nature and degree of the offense and shall be punished at the discretion of that court. Where a crime constitutes an offense that violates both this chapter and the criminal laws of the state where the offense occurs or criminal laws of the United States, jurisdiction of the military court shall be determined in accordance with section -2(b).

PART XI. MISCELLANEOUS PROVISIONS

§ -231 **Courts of inquiry.** (a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the governor or adjutant general for that purpose, regardless of whether the persons involved have requested an inquiry.

(b) A court of inquiry shall consist of three or more commissioned officers. For each court of inquiry, the convening authority shall also appoint counsel for the court.

(c) Any person subject to this chapter whose conduct is subject to inquiry shall be designated as a party.

(d) Any person who is subject to this chapter or employed by the state department of defense, and who has a direct interest in the subject of the inquiry, shall have the right to be designated as a party upon request to the court.

(e) Any person designated as a party shall be given due notice and have the right to be present, to be represented by counsel, to cross examine witnesses, and to introduce evidence.

(f) Members of a court of inquiry may be challenged by a party only for cause stated to the court.

(g) The members, counsel, reporter, and interpreters of courts of inquiry shall take an oath or affirmation to faithfully perform their duties.

(h) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.

(i) Courts of inquiry shall make findings of fact but shall not express opinions or make recommendations unless required to do so by the convening authority.

(j) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel.

§ -232 Authority to administer oaths or affirmations. (a) The following members of the state military forces may administer oaths or affirmations for the purposes of military administration, including military justice, and affidavits may be taken for those purposes before persons having the general powers of a notary public:

- (1) All judge advocates;
- (2) All summary courts-martial;
- (3) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants;
- (4) All commanding officers;
- (5) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers;
- (6) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial;
- (7) The president and counsel for the court of any court of inquiry;
- (8) All officers designated to take a deposition;
- (9) All persons detailed to conduct an investigation; and
- (10) All other persons designated by regulations of the armed forces, rules adopted by the governor or adjutant general, or by law.

(b) Officers of the state military forces shall not be authorized to administer oaths or affirmations as provided in this section unless they are on active duty in or with those forces under orders of the governor as prescribed in this chapter.

(c) The signature without seal of any person, together with the title of the person's office, is prima facie evidence of the person's authority.

§ -233 Articles to be explained. (a) The procedures and provisions of this chapter shall be explained at least once every three years to each unit of the state military forces.

(b) The procedures and provisions of this chapter shall be carefully explained to every enlisted member at the time of the member's enlistment or transfer or induction into, or at the time of the member's order to duty in or with any of the state military forces or within ninety days thereafter.

(c) In accordance with rules adopted by the governor or adjutant general, officers with the authority to convene courts-martial or to impose non-judicial punishment shall receive periodic training regarding the purposes and administration of this chapter.

(d) A complete text of this chapter and of the rules adopted by the governor or adjutant general thereunder shall be made available in either hard copy or in an electronic format to any member of the state military forces by the member's commander, upon the member's request, for the member's personal examination.

§ -234 Complaints of wrongs. Any member of the state military forces who has a complaint against the member's commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of, and shall, as soon as possible, send to the governor or adjutant general a true statement of that complaint, with the proceedings had thereon.

§ -235 Redress of injuries to property. (a) Whenever a complaint is made to any commanding officer that wilful damage has been done to the property of any person or that the person's property has been wrongfully taken by members of the state military forces, the commanding officer may, in accordance with rules adopted by the governor or adjutant general, convene a board to investigate the complaint. The board shall consist of one to three commissioned officers, and, for the purpose of that investigation, shall have the power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and the amount approved by the commanding officer shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive, except as provided in subsection (c), on any disbursing officer for the payment by the disbursing officer to the injured parties of the damages so assessed and approved.

(b) If the offenders cannot be ascertained but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in a proportion as is considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board. Alternatively, if the offenders cannot be ascertained but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be paid to the injured parties from the military funds of the units of the state military forces to which the offenders belonged.

(c) Any person subject to this chapter who is accused of causing wilful damage to property shall have the right to be represented by counsel, to summon witnesses on the person's behalf, and to cross-examine those appearing against the person. The person shall have the right of appeal to the next higher commander.

§ -236 Delegation of authority by the governor; rulemaking authority of the governor. (a) The governor may delegate any authority vested in the governor under this chapter to the adjutant general and may provide for the sub-delegation of any authority as appropriate.

(b) The governor or adjutant general shall adopt rules in accordance with chapter 91 necessary to administer and implement this chapter. Chapter 91 shall apply notwithstanding section 121-5 or any other provision of law to the contrary.

§ -237 Case management; data collection and accessibility. The adjutant general shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of federal and state courts:

- (1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews;
- (2) Case processing and management;
- (3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system; and
- (4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.

§ -238 Execution of process and sentence. In the state military forces not in federal service, the processes and sentences of its courts-martial shall be executed by the civil officers prescribed by the laws of the State.

§ -239 Process of military courts. (a) Military courts may issue any process or mandate necessary to carry into effect their powers. Military courts may issue subpoenas and subpoenas duces tecum and enforce by attachment attendance of witnesses and production of books and records, when it is sitting within the State and the witnesses, books, and records sought are also located in the State.

(b) Process and mandates may be issued by summary courts-martial, military judges, or the president of other military courts and may be directed to and may be executed by the marshals of the military court or any peace officer and shall be in a form as prescribed by rules adopted under this chapter.

(c) All officers to whom process or mandates are directed shall execute them and make return of their acts thereunder according to the requirements of those documents. Except as otherwise specifically provided in this chapter, no officer shall demand or require payment of any fee or charge for receiving, executing, or returning a process or mandate or for any service in connection therewith.

§ -240 Payment of fines and disposition thereof. Fines imposed by a military court may be paid to it or to an officer executing its process. The amount of the fine may be noted upon any state roll or account for pay of the delinquent and deducted from any pay or allowance due or thereafter to become due the delinquent, until the fine is liquidated. Any sum deducted shall be returned to the military court that imposed the fine. The officer collecting a fine or penalty imposed by a military court upon an officer or enlisted person shall pay it within thirty days to the director of finance to the credit of the state general fund.

§ -241 Immunity for action of military courts or nonjudicial punishment. No accused shall bring an action or proceeding against:

- (1) The convening authority or a member of a military court or officer or person acting under its authority or reviewing its proceedings because of the approval, imposition, or execution of any sentence or the imposition or collection of a fine or penalty, or the execution of any process or mandate of a military court; or
- (2) A commanding officer for imposing any authorized nonjudicial punishment.

§ -242 **Presumption of jurisdiction.** The jurisdiction of the military courts and boards established by this chapter shall be presumed and the burden of proof rests on any person seeking to oust those courts or boards of jurisdiction in any action or proceeding.

§ -243 **Uniformity of interpretation.** This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states that enact it and, so far as practical, to make that law uniform with the law of the United States.

§ -244 **Severability.** If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.”

SECTION 3. Section 122A-6, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) When in the active service of the Hawaii state defense force, members of the Hawaii state defense force are subject to chapter [124A:] _____. Members are deemed to be in the active service of the Hawaii state defense force from the date and time specified in any order lawfully calling them into such service.”

SECTION 4. Section 122A-16, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§122A-16]]~~ **Courts-martial; nonjudicial punishment.** Any limitations in chapter [124A:] ____ to the contrary notwithstanding, whenever this chapter specifically authorizes an act to be punished by court-martial or nonjudicial punishment, the court-martial may be convened or nonjudicial punishment imposed and punishment administered as though the act complained of were a violation of the punitive articles of chapter [124A:] _____.”

SECTION 5. Section 657D-1, Hawaii Revised Statutes, is amended by amending the definition of “person in the military service” and “persons in the military service of the State” to read as follows:

““Person in the military service” and “persons in the military service of the State” include all members of any of the state military forces, as defined in section [124A-1:] _____-1.”

SECTION 6. Chapter 124A, Hawaii Revised Statutes, is repealed.

SECTION 7. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect on January 1, 2023.

(Approved July 12, 2022.)

Note

1. So in original.