
A BILL FOR AN ACT

RELATING TO THE HAWAII CODE OF MILITARY JUSTICE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

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

12 The purpose of the proposed Hawaii code of military justice
13 is to provide a comprehensive law setting forth military
14 judicial procedures, which will apply to all members of the
15 State's military forces, primarily the National Guard units,
16 while they are not in federal service. The Hawaii code is based
17 on the Uniform Code of Military Justice as contained in title 10
18 United States Code sections 801 et. seq. and the Model State

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1 Code of Military Justice that was proposed by the American Bar
2 Association in 2005. Authorization for states to enact their
3 codes of military justice is found in title 32 United States
4 Code sections 326-328, except for provisions not applicable to
5 or suitable for state military forces not in federal service.
6 The Hawaii code continues to include provisions relating to
7 apprehension, restraint and confinement of suspects, punishable
8 offenses, non-judicial punishment, state courts-martial
9 jurisdiction, composition, and trial procedures, and
10 confinement.

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

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

19 **"CHAPTER**

20 **HAWAII CODE OF MILITARY JUSTICE**

21 **PART I: GENERAL PROVISIONS**

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

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

7 "Adjutant general" means the adjutant general of the State
8 as defined in section 121-7.

9 "Apprehension" means the taking of a person into custody.

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

13 "Arrest in quarters" means the restraint involved is
14 enforced by a moral obligation rather than by physical means.
15 This punishment may be imposed only on officers. An officer
16 undergoing this punishment may be required to perform those
17 duties prescribed by the United States Secretary of the Armed
18 Service concerned. However, an officer so punished is required
19 to remain within that officer's quarters during the period of
20 punishment unless the limits of arrest are otherwise extended by
21 appropriate authority. The quarters of an officer may consist
22 of a military residence, whether a tent, stateroom, or other

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1 quarters assigned, or a private residence when government
2 quarters have not been provided.

3 "Cadet," "candidate," or "midshipman" means any person who
4 is enrolled in or attending a state military academy, a regional
5 training institute, or any other formal education program for
6 the purpose of becoming a commissioned officer in the state
7 military forces.

8 "Code" means this Act.

9 "Commanding officer" includes only commissioned officers of
10 the state military forces and shall include officers in charge
11 only when administering nonjudicial punishment under section -
12 21. The term "commander" has the same meaning as "commanding
13 officer" unless the context otherwise requires.

14 "Commissioned officer" includes a commissioned warrant
15 officer.

16 "Confinement" is the physical restraint of a person.

17 "Contemptuous words" means words or speech manifesting, or
18 expressing, deep hatred or disapproval.

19 "Convening authority" includes, in addition to the person
20 who convened the court, a commissioned officer commanding for
21 the time being, or a successor in command to the convening
22 authority.

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1 "Cowardly conduct" means conduct, committed by an accused,
2 while the accused was before or in the presence of the enemy,
3 that constitutes an act of cowardice that was the result of
4 fear.

5 "Day" means calendar day and is not synonymous with the
6 term "unit training assembly." Any punishment authorized by
7 this code, which is measured in terms of days shall, when served
8 in a status other than annual field training, be construed to
9 mean succeeding duty days.

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

21 "Duty status other than state active duty" includes any
22 time when members and units of the state military forces

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1 assemble for drill or other equivalent training, instruction, or
2 duty or participate in field training, encampments, maneuvers,
3 schools, conferences, cruises, or other similar duties as may be
4 prescribed by the laws of the United States (including but not
5 limited to title 32 of the United States Code) or of the State
6 and any regulations issued thereunder, and includes travel to
7 and from such duty.

8 "Enlisted member" means a person in an enlisted grade.

9 "Governor" means the governor of the State.

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

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

16 (1) Certified or designated as a judge advocate in the
17 Judge Advocate General's Corps of the Army, Air Force,
18 Navy, or the Marine Corps or designated as a law
19 specialist as an officer in the Coast Guard, or a
20 reserve component of one of these; or

21 (2) Certified as a non-federally recognized judge
22 advocate, under regulations promulgated pursuant to

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1 this provision, by the senior judge advocate of the
2 commander of the force in the state military forces of
3 which the accused is a member, as competent for
4 perform such military justice duties required by this
5 code. If there is no such judge advocate available,
6 then such certification may be made by such senior
7 judge advocate of the commander of another force in
8 the state military forces, as the convening authority
9 direct.

10 "Law specialist" means a commissioned officer of the
11 organized militia of the State designated for special duty.

12 "Legal officer" means any commissioned officer of the
13 organized militia of the State designated to perform legal
14 duties for a command.

15 "Military" refers to any or all of the armed forces.

16 "Military court" means a court-martial, or a court of
17 inquiry.

18 "Military judge" means an official of a general or special
19 court-martial detailed in accordance with part V of this
20 chapter.

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

4 "Officer" means a commissioned or warrant officer.

5 "Officer in charge" means a member of the state military
6 forces designated by such appropriate authority.

7 "President" means the detailed member senior in rank of a
8 court-martial then serving unless the context otherwise
9 requires.

10 "Rank" means the order of precedence among members of the
11 state military forces.

12 "Record," when used in connection with the proceedings of a
13 court-martial, means:

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

20 "Restriction" is the least severe form of deprivation of
21 liberty. Restriction involves moral rather than physical
22 restraint. The severity of this type of restraint depends on

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1 its duration and the geographical limits specified when the
2 punishment is imposed. A person undergoing restriction may be
3 required to report to a designated place at specified times if
4 reasonably necessary to ensure that the punishment is being
5 properly executed. Unless otherwise specified by the
6 nonjudicial punishment authority, a person in restriction may be
7 required to perform any military duty.

8 "Senior force commander" means the commander of the same
9 force of the state military forces as the accused.

10 "Senior force judge advocate" means the senior judge
11 advocate of the commander of the same force of the state
12 military forces as the accused and who is that commander's chief
13 legal advisor.

14 "State active duty" means full-time duty in the state
15 military forces under an order of the governor or otherwise
16 issued by authority of law, and paid by state funds, and
17 includes travel to and from such duty.

18 "State judge advocate" means the commissioned officer
19 responsible for supervising the administration of the military
20 justice in the state military forces.

21 "State military forces" means the National Guard of the
22 State, as defined in title 32 United States Code section 101(3),

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1 the organized naval militia of the State, and any other military
2 force organized under the laws of the State.

3 "Superior commissioned officer" means a commissioned
4 officer superior in rank or command.

5 **§ -2 Persons subject to this chapter; jurisdiction.** (a)

6 This chapter applies to all members of the state military forces
7 at all times.

8 (b) Subject matter jurisdiction is established if a nexus
9 exists between an offense, either military or non-military, and
10 the state military force. Courts-martial have primary
11 jurisdiction of military offenses as defined in this chapter. A
12 proper civilian court has primary jurisdiction of a non-military
13 offense when an act or omission violates both this chapter and
14 local criminal law, foreign or domestic. In such a case, a
15 court-martial may be initiated only after the civilian authority
16 has declined to prosecute or dismissed the charge, provided
17 jeopardy has not attached. Jurisdiction over attempted crimes,
18 conspiracy crimes, solicitation, and accessory crimes shall be
19 determined by the underlying offense.

20 **§ -3 Jurisdiction to try certain personnel.** (a) Each

21 person discharged from the state military forces who is later
22 charged with having fraudulently obtained the person's discharge

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1 is, subject to section -68, subject to trial by court-martial
2 on that charge and after apprehension is subject to this chapter
3 while in the custody of the military for that trial. Upon
4 conviction of that charge, the person is subject to trial by
5 court-martial for all offenses under this chapter committed
6 before the fraudulent discharge.

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

11 **§ -4 Dismissal of commissioned officer.** (a) If any
12 commissioned officer, dismissed by order of the governor, makes
13 a written application for trial by court-martial, setting forth,
14 under oath or affirmation, that the officer has been wrongfully
15 dismissed, the governor, as soon as practicable, shall convene a
16 general court-martial to try that officer on the charges on
17 which the officer was dismissed. A court-martial so convened
18 has jurisdiction to try the dismissed officer on those charges,
19 and the officer shall be considered to have waived the right to
20 plead any statute of limitations applicable to any offense with
21 which the officer is charged. The court-martial may, as part of
22 its sentence, adjudge the affirmance of the dismissal, but if

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1 the court-martial acquits the accused or if the sentence
2 adjudged, as finally approved, or affirmed, does not include
3 dismissal, the adjutant general shall substitute for the
4 dismissal ordered by the governor a form of discharge authorized
5 for administrative issue.

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

11 (c) If a discharge is substituted for a dismissal under
12 this chapter, the governor alone may reappoint the officer of
13 the commissioned grade and with the rank as, in the opinion of
14 the governor, that former officer would have attained had the
15 former officer not been dismissed. The reappointment of the
16 former officer may be made only if a vacancy is available under
17 applicable tables of organization. All time between the
18 dismissal and the reappointment shall be considered as actual
19 service for all purposes.

20 (d) If an officer is discharged from the organized militia
21 by administrative action or by board proceedings under law or is

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1 dropped from the rolls by order of the governor, the officer has
2 no right to trial under this section.

3 **§ -5 Territorial applicability.** (a) This chapter has
4 applicability at all times and in all places, provided that
5 either the person subject to the chapter is in a duty status or,
6 if not in a duty status, that there is a nexus between the act
7 or omission constituting the offense and the efficient
8 functioning of the state military forces; however, this grant of
9 military jurisdiction shall neither preclude nor limit civilian
10 jurisdiction over an offense, which is limited only by the
11 prohibition of double jeopardy.

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

19 **§ -6 Judge advocates.** (a) The governor, on the
20 recommendation of the adjutant general, shall appoint an officer
21 of the state military forces as state judge advocate. To be
22 eligible for appointment, an officer shall be a member of the

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1 bar of the highest court of the State and shall have been a
2 member of the bar of the State for at least five years.

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

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

13 (d) Convening authorities shall at all times communicate
14 directly with their staff judge advocates or legal officer in
15 matters relating to the administration of military justice; and
16 the staff judge advocate or legal officer of any command may
17 communicate directly with the staff judge advocate or legal
18 officer of a superior or subordinate command, or with the state
19 judge advocate.

20 (e) No person who has acted as member, military judge,
21 trial counsel, assistant trial counsel, defense counsel,
22 assistant defense counsel, or investigating officer, or who has

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1 been a witness for either the prosecution or defense, in any
2 case may later act as staff judge advocate or legal officer to
3 any reviewing authority upon the same case.

4 § -6a (Reserved).

5 § -6b Rights of the victim of an offense under this
6 chapter. A victim of an offense under this chapter has all
7 rights conferred by state law under chapter 801D. Nothing in
8 this chapter shall limit the rights of a victim of sexual
9 assault that qualifies for representation by a special victims'
10 counsel under title 10 United States Code section 1044e, as it
11 applies to the National Guard.

12 **PART II. APPREHENSION AND RESTRAINT**

13 § -11 Apprehension. (a) Any person authorized by this
14 chapter, title 10 United States Code chapter 47, or by rules or
15 regulations issued under either, to apprehend persons subject to
16 this chapter, any marshal of a court-martial appointed pursuant
17 to this chapter, and any peace officer authorized to do so by
18 law, may do so upon probable cause that an offense has been
19 committed and that the person apprehended committed it.

20 (b) Commissioned officers, warrant officers, petty
21 officers, and noncommissioned officers may quell quarrels,

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1 affrays, and disorders among persons subject to this chapter and
2 apprehend persons subject to this chapter who take part therein.

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

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

13 **§ -12 Apprehension of deserters.** Any civil officer
14 having authority to apprehend alleged offenders under the laws
15 of the United States or this State or of a state, territory,
16 commonwealth, or possession, or the District of Columbia may
17 summarily apprehend an alleged deserter from the state military
18 forces and deliver the alleged deserter into the custody of the
19 state military forces. If an alleged offender is apprehended
20 outside the State, the alleged offender's return to the area
21 shall be in accordance with normal extradition procedures or
22 reciprocal agreement.

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1 **§ -13 Imposition of restraint.** (a) An enlisted member
2 may be ordered into arrest or confinement by any commissioned
3 officer by an order, oral or written, delivered in person or
4 through other persons subject to this chapter or through any
5 person authorized by this chapter to apprehend persons. A
6 commanding officer may authorize warrant officers, petty
7 officers, or noncommissioned officers to order enlisted members
8 of the commanding officer's command or subject to the commanding
9 officer's authority into arrest or confinement.

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

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

19 (d) This section does not limit the authority of persons
20 authorized to apprehend an alleged offender to secure the
21 custody of the alleged offender until proper authority may be
22 notified.

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1 **§ -14 Restraint of persons charged with offenses.** (a)

2 Subject to subsection (b), any person subject to this chapter
3 may be ordered into arrest or confinement as the circumstances
4 require.

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

8 (c) When any person subject to this chapter is placed in
9 arrest or confinement prior to trial, immediate steps shall be
10 taken:

11 (1) To inform the person of the specific charge or offense
12 of which the person is accused; and

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

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

20 **§ -15 Place of confinement; reports and receiving of**

21 **prisoners.** (a) If a person subject to this chapter is confined
22 before, during, or after trial, confinement shall be in a state

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1 correctional facility designated by the governor or by such
2 person as the governor may authorize to act or military
3 confinement facility.

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

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

17 (d) Civilian confinement facilities may not charge the
18 state military forces for the cost of receiving or detaining the
19 person.

20 § -16 (Reserved).

21 § -17 Punishment prohibited before trial. Subject to
22 section -93, no person, while being held for trial or awaiting

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1 a verdict, may be subjected to punishment or penalty other than
2 arrest or confinement upon the charge pending against the
3 person, nor shall the arrest or confinement imposed upon the
4 person be any more rigorous than the circumstances require to
5 insure the person's presence, but the person may be subjected to
6 minor punishment during that period for infractions of
7 discipline.

8 **§ -18 Delivery of alleged offenders to civil authorities.**

9 (a) A person subject to this chapter accused of an offense
10 against civil authority may be delivered, upon request, to the
11 civil authority for trial or confinement.

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

20 **PART III. NON-JUDICIAL PUNISHMENT**

21 **§ -21 Commanding officer's non-judicial punishment. (a)**

22 Under such rules as the governor may prescribe, any commanding

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1 officer (and for purposes of this section, officers-in-charge)
2 may impose disciplinary punishments for minor offenses without
3 the intervention of a court-martial pursuant to this section.

4 The governor, the adjutant general, or an officer of a general
5 or flag rank in command may delegate the powers under this
6 section to a principal assistant who is a member of the state
7 military forces.

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

- 10 (1) An admonition;
- 11 (2) A reprimand;
- 12 (3) The withholding of privileges for not more than six
13 months that need not be consecutive;
- 14 (4) The forfeiture of pay of not more than seven days'
15 pay;
- 16 (5) A fine of not more than seven days' pay;
- 17 (6) A reduction to the next inferior pay grade, if the
18 grade from which demoted is within the promotion
19 authority of the officer imposing the reduction or any
20 officer subordinate to the one who imposes the
21 reduction;

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- 1 (7) Extra duties for not more than fourteen days that need
2 not be consecutive; and
- 3 (8) Restriction to certain specified limits, with or
4 without suspension from duty, for not more than
5 fourteen days that need not be consecutive.
- 6 (c) Any commanding officer of the grade of O-4 or above
7 may impose upon enlisted members of the officer's command:
- 8 (1) Any punishment authorized in subsection (b) (1), (2),
9 and (3);
- 10 (2) The forfeiture of not more than one-half of one
11 month's pay per month for two months;
- 12 (3) A fine of not more than one month's pay;
- 13 (4) A reduction to the lowest or any intermediate pay
14 grade, if the soldier or airmen is in the grade of E-6
15 or below, but an enlisted member in a pay grade above
16 E-4 may not be reduced more than two pay grades;
- 17 (5) Extra duties for not more than fourteen days that need
18 not be consecutive; and
- 19 (6) Restriction to certain specified limits, with or
20 without suspension from duty, for not more than sixty
21 days that need not be consecutive.

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(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 subsection (c) (1), (2), (3), and (6); and

(B) Arrest in quarters for not more than thirty days that need not be consecutive.

(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 may not exceed the authorized duration of the longest punishment in the combination, and there shall be an apportionment of punishments so that no single punishment in the combination exceeds its authorized length under this section.

(f) Prior to the offer of non-judicial punishment, the commanding officer shall determine whether arrest in quarters or restriction shall be considered as punishments. Should the commanding officer determine 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. Should

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1 the commanding officer determine that the punishment options may
2 not include arrest in quarters or restriction, the accused shall
3 be notified that there is no right to trial by courts-martial in
4 lieu of non-judicial punishment.

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

- 10 (1) Mitigate reduction in grade to forfeiture of pay;
11 (2) Mitigate arrest in quarters to restriction; or
12 (3) Mitigate extra duties to restriction.

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

21 (h) A person punished under this section who considers the
22 punishment unjust or disproportionate to the offense may,

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1 through the proper channel, appeal to the next superior
2 authority within fifteen days after the punishment is either
3 announced or sent to the accused, as the commander may
4 determine. The appeal shall be promptly forwarded and decided,
5 but the person punished may in the meantime be required to
6 undergo the punishment adjudged. The superior authority may
7 exercise the same powers with respect to the punishment imposed
8 as may be exercised under subsection (g) by the officer who
9 imposed the punishment. Before acting on an appeal from a
10 punishment, the authority that is to act on the appeal may refer
11 the case to a judge advocate for consideration and advice.

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

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

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

7 **PART IV. COURT-MARTIAL JURISDICTION**

8 **§ -31 Courts-martial classified; general courts-martial;**
9 **special courts-martial; summary courts-martial.** (a) The three
10 kinds of courts-martial in each of the state military forces are
11 the following:

12 (1) General courts-martial, as described in subsection

13 (b);

14 (2) Special courts-martial, as described in subsection

15 (c); and

16 (3) Summary courts-martial, as described in subsection

17 (d).

18 (b) General courts-martial consists of:

19 (1) A military judge and not less than eight members; or

20 (2) A military judge alone, if before the court is
21 assembled, the accused, knowing the identity of the
22 military judge and after consultation with defense

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1 counsel, requests orally on the record or in writing a
2 court composed only of a military judge and the
3 military judge approves the request.

4 (c) Special courts-martial consists of:

5 (1) A military judge and not less than four members; or

6 (2) A military judge alone:

7 (A) If the case is so referred by the convening
8 authority, subject to section -34; or

9 (B) If the case is referred under paragraph (1) and,
10 before the court is assembled, the accused,
11 knowing the identity of the military judge and
12 after consultation with defense counsel,
13 requests, orally or on the record or in writing,
14 a court composed of a military judge alone and
15 the military judge approves the request.

16 (d) Summary courts-martial consists of one commissioned
17 officer.

18 § -32 **Jurisdiction of courts-martial in general.** Each
19 component of the state military forces has court-martial
20 jurisdiction over all members of the particular component who
21 are subject to this chapter. Additionally, the Hawaii Army and

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1 Hawaii Air National Guard have court-martial jurisdiction over
2 all members subject to this chapter.

3 **§ -33 Jurisdiction of general courts-martial.** Subject to
4 section -32, general courts-martial have jurisdiction to try
5 persons subject to this chapter for any offense made punishable
6 by this chapter, and may, under such limitations as the governor
7 may prescribe, adjudge any punishment not forbidden by this
8 chapter.

9 **§ -34 Jurisdiction of special courts-martial.** (a)
10 Subject to section -32, special courts-martial have
11 jurisdiction to try persons subject to this chapter for any
12 offense made punishable by this chapter, and may, under such
13 limitations as the governor may prescribe, adjudge any
14 punishment not forbidden by this chapter except dishonorable
15 discharge, dismissal, confinement for more than one year,
16 forfeiture of pay exceeding two-thirds pay per month, or
17 forfeiture of pay for more than one year.

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

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1 **§ -35 Jurisdiction of summary courts-martial. (a)**

2 Subject to section -32, summary courts-martial have
3 jurisdiction to try persons subject to this chapter, except
4 officers, cadets, candidates, and midshipmen, for any offense
5 made punishable by this chapter under such limitations as the
6 governor may prescribe.

7 (b) No person with respect to whom summary courts-martial
8 have jurisdiction may be brought to trial before a summary
9 court-martial if that person objects thereto. If objection to
10 trial by summary court-martial is made by an accused, trial by
11 special or general court-martial may be ordered, as may be
12 appropriate. Summary courts-martial may, under such limitations
13 as the governor may prescribe, adjudge any punishment not
14 forbidden by this chapter except dismissal, dishonorable or bad-
15 conduct discharge, confinement for more than one month,
16 restriction to specified limits for more than two months, or
17 forfeiture of more than two-thirds of one month's pay.

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

21 **§ -36 (Reserved).**

22 **PART V. COMPOSITION OF COURTS-MARTIAL**

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1 **§ -41 Who may convene general courts-martial. (a)**

2 General courts-martial may be convened by:

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

10 (b) If any commanding officer authorized under subsection

11 (a) is an accuser, the court shall be convened by superior

12 competent authority and may in any case be convened by the

13 superior authority if considered desirable by such authority.

14 **§ -42 Who may convene special courts-martial. (a)**

15 Special courts-martial may be convened by:

- 16 (1) Any person who may convene a general court-martial;
- 17 (2) The commanding officer of a garrison, fort, post,
- 18 camp, station, or Army or Air National Guard base;
- 19 (3) The commanding officer of a brigade, regiment,
- 20 detached battalion, or corresponding unit of the Army;
- 21 (4) The commanding officer of a wing, group, separate
- 22 squadron, or corresponding unit of the Air Force; or

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1 (5) The commanding officer or officer in charge of any
2 other command when empowered by the adjutant general.

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

7 **§ -43 Who may convene summary courts-martial. (a)**

8 Summary courts-martial may be convened by:

9 (1) Any person who may convene a general or special court-
10 martial;

11 (2) The commanding officer of a detached company or other
12 detachment, or corresponding unit of the Army;

13 (3) The commanding officer or a detached squadron or other
14 detachment, or corresponding unit of the Air Force; or

15 (4) The commanding officer or officer in charge of any
16 other command when empowered by the adjutant general.

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

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1 **§ -44 Who may serve on courts-martial.** (a) Any

2 commissioned officer of the state military forces is eligible to
3 serve on all courts-martial for the trial of any person subject
4 to this chapter.

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

9 (c) Any enlisted member of the state military forces who
10 is not a member of the same unit as the accused is eligible to
11 serve on general and special courts-martial for the trial of any
12 enlisted member subject to this chapter, but that member shall
13 serve as a member of a court only if, before the conclusion of a
14 session called by the military judge under section -64 prior
15 to trial or, in the absence of such a session, before the court
16 is assembled for the trial of the accused, the accused
17 personally has requested orally on the record or in writing that
18 enlisted members serve on it. After such a request, the accused
19 may not be tried by a general or special court-martial the
20 membership of which does not include enlisted members in a
21 number comprising at least one-third of the total membership of
22 the court, unless eligible enlisted members cannot be obtained

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1 on account of physical conditions or military exigencies. If
2 the eligible enlisted members cannot be obtained, the court may
3 be assembled and the trial held without them, but the convening
4 authority shall make a detailed written statement, to be
5 appended to the record, stating why they could not be obtained.

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

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

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

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1 (g) The convening authority shall detail not less than the
2 number of members necessary to impanel the court-martial under
3 section -50.

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

9 (i) In this section, "unit" means any regularly organized
10 body of the state military forces not larger than a company, a
11 squadron, a division of the naval militia, or a body
12 corresponding to one of them.

13 § -45 (Reserved).

14 § -46 **Military judge of a general or special court-**
15 **martial.** (a) A military judge shall be detailed to each
16 general and special court-martial. The military judge shall
17 preside over each open session of the court-martial to which the
18 military judge has been detailed.

19 (b) A military judge shall be:

20 (1) An active or retired commissioned officer of an
21 organized state military force;

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1 (2) A member in good standing of the bar of the highest
2 court of the State or a member of the bar of a federal
3 court for at least five years; and

4 (3) Certified as qualified for duty as a military judge by
5 the senior force judge advocate that is in the same
6 force as the accused.

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

13 (d) The military judge of a general or special court-
14 martial shall be designated by the senior force judge advocate
15 that is in the same force as the accused, or a designee, for
16 detail by the convening authority. Neither the convening
17 authority nor any staff member of the convening authority shall
18 prepare or review any report concerning the effectiveness,
19 fitness, or efficiency of the military judge so detailed, which
20 relates to performance of duty as a military judge.

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(e) No person is 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 may 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.

§ -47 Military magistrates. (a) A military magistrate shall be a commissioned officer of the state military forces who:

(1) Is a member of the bar of the highest court of this State; and

(2) Is 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 prescribed by the governor or the 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.

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1 **§ -48 Detail of trial counsel and defense counsel.** (a)

2 For each general and special court-martial, the authority
3 convening the court shall detail trial counsel and defense
4 counsel, and their assistants as the convening authority
5 considers appropriate.

6 (b) No person who has acted as investigating officer,
7 military judge, or court member in any case may act later as
8 trial counsel, assistant trial counsel, or, unless expressly
9 requested by the accused, as defense counsel, or assistant
10 defense counsel in the same case. No person who has acted for
11 the prosecution may act later in the same case for the defense,
12 nor may any person who has acted for the defense act later in
13 the same case for the prosecution.

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

17 (1) A judge advocate as defined in section -1; and

18 (2) In the case of trial counsel, a member in good
19 standing of the bar of the highest court of the state
20 where the court-martial is held.

21 (d) In the instance when a defense counsel is not a member
22 of the highest court of the State, the defense counsel shall be

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1 deemed admitted pro hac vice, subject to filing a certificate
2 with the military judge setting forth the qualifications that
3 counsel is:

4 (1) A commissioned officer of the armed forces of the
5 United States or a component thereof;

6 (2) A member in good standing of the bar of the highest
7 court of a state; and

8 (A) Certified as a judge advocate in the Judge
9 Advocate General's Corps of the Army, Air Force,
10 Navy, or the Marine Corps; or

11 (B) Certified as a judge advocate as defined in
12 section -1.

13 **§ -49 Detail or employment of reports and interpreters.**

14 Under such rules as the governor may adopt, the convening
15 authority of a general or special court-martial or court of
16 inquiry shall detail or employ qualified court reporters, who
17 shall record the proceedings of, and testimony taken before that
18 court. Under like rules the convening authority of a military
19 court may detail or employ interpreters who shall interpret for
20 the court.

21 **§ -50 Assembly and impaneling of members; detail of new**

22 **members and military judges.** (a) The military judge shall

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1 announce the assembly of a general or special court-martial with
2 members. After such a court-martial is assembled, no member may
3 be absent, unless the member is excused:

4 (1) As a result of a challenge;

5 (2) Under subsection (b) (2); or

6 (3) By order of the military judge or the convening
7 authority for disability or other good cause.

8 (b) Under rules prescribed by the governor or the adjutant
9 general, the military judge of a general or special court-
10 martial with members shall:

11 (1) After determination of challenges, impanel the court-
12 martial; and

13 (2) Excuse the members who, having been assembled, are not
14 impaneled.

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

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

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

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

3 (2) Fewer than four members with respect to a special
4 court-martial,

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

9 (f) The membership referred to in subsection (e) is as
10 follows:

11 (1) At least six but not more than eight members with
12 respect to a general court-martial; or

13 (2) Four members with respect to a special court-martial.

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

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

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(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.

(b) The writing under subsection (a) shall state that:

(1) The signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

(2) The matters set forth in the charges and specifications are true, to the best of the knowledge and belief of the signer.

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1 (c) When charges and specifications are referred under
2 subsection (a), the proper authority shall, as soon as
3 practicable:

4 (1) Inform the person accused of the charges and
5 specifications; and

6 (2) Determine what disposition should be made of the
7 charges and specifications in the interest of justice
8 and discipline.

9 **§ -52 Certain proceedings conducted before referral. (a)**

10 Proceedings may be conducted to review, or otherwise act on the
11 following matters before referral of charges and specifications
12 to court-martial for trial in accordance with rules prescribed
13 by the governor or the adjutant general:

14 (1) Pre-referral investigative subpoenas;

15 (2) Pre-referral warrants or orders for electronic
16 communications;

17 (3) Pre-referral matters referred by an appellate court;
18 and

19 (4) Pre-referral matters subject to section -6b for
20 victims of sexual assault qualifying for a special
21 victims' counsel under title 10 United States Code
22 section 1044e as it applies to the National Guard.

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1 (b) The rules prescribed under subsection (a) shall:

2 (1) Include procedures for the review of such rulings that
3 may be ordered under this section as the governor, or
4 the adjutant general considers appropriate; and

5 (2) Provide such limitations on the relief that may be
6 ordered under this section as the governor, or the
7 adjutant general considers appropriate.

8 (c) If any matter in a proceeding under this section
9 becomes a subject at issue with respect to charges that have
10 been referred to a general or special court-martial, the matter
11 shall be transferred to the military judge detailed to the
12 court-martial.

13 (d) The governor or the adjutant general shall prescribe
14 rules providing for the manner in which military judges are
15 detailed to proceedings under subsection (a).

16 (e) In accordance with rules prescribed by the governor or
17 the adjutant general, a military judge detailed to a proceeding
18 under subsection (a), other than a proceeding described in
19 paragraph (2) of that subsection, may designate a military
20 magistrate to preside over the proceeding.

21 **§ -53 Compulsory self-incrimination prohibited.** (a) No
22 person subject to this chapter may compel any person to

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1 incriminate the person's self or to answer any question the
2 answer to which may tend to incriminate the person.

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

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

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

19 **§ -54 Preliminary hearing required before referral to**
20 **general court-martial.** (a) Except as provided in subsection
21 (b), a preliminary hearing shall be held before referral of
22 charges and specifications for trial by general court-martial.

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1 The preliminary hearing shall be conducted by an impartial
2 hearing officer, detailed by the convening authority in
3 accordance with subsection (d).

4 (b) Under rules prescribed by the governor or the adjutant
5 general, a preliminary hearing need not be held if the accused
6 submits a written waiver to the convening authority and the
7 convening authority determines that a hearing is not required.

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

10 (1) Whether or not the specification alleges an offense
11 under this chapter;

12 (2) Whether or not there is probable cause to believe that
13 the accused committed the offense charged;

14 (3) Whether or not the convening authority has court-
15 martial jurisdiction over the accused and over the
16 offense; and

17 (4) A recommendation as to the disposition that should be
18 made of the case.

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

21 (1) Whenever practicable, shall be a judge advocate who is
22 certified under section -48; or

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(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 -48 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;

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(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 under such rules as the governor or the adjutant general may prescribe, is relevant to disposition under sections -51 and -56; 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 has the right to be represented at the preliminary hearing as provided in section -63 and in rules prescribed under that section. 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 may 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

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1 hearing. A declination under this subsection may not serve as
2 the sole basis for ordering a deposition under section -74.

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

7 (i) A preliminary hearing under subsection (a) shall be
8 recorded by a suitable recording device. The victim may request
9 the recording and shall have access to the recording under such
10 rules as the governor or the adjutant general may prescribe.

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

- 16 (1) Is present at the preliminary hearing;
17 (2) Is informed of the nature of each uncharged offense
18 considered; and
19 (3) Is afforded the opportunities for representation,
20 cross-examination, and presentation consistent with
21 subsection (f).

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1 (k) The requirements of this section are binding on all
2 persons administering this chapter, but failure to follow the
3 requirements does not constitute jurisdictional error. A defect
4 in a report under subsection (e) is not a basis for relief if
5 the report is in substantial compliance with that subsection.

6 (1) In this section, the term "victim" means a person who:

7 (1) Is alleged to have suffered a direct physical,
8 emotional, or pecuniary harm as a result of the
9 matters set forth in a charge or specification being
10 considered; and

11 (2) Is named in one of the specifications.

12 (m) Under rules prescribed by subsection (b), a
13 preliminary hearing need not be held if the accused submits a
14 written waiver to the convening authority and the convening
15 authority determines that a hearing is not required.

16 § -55 (Reserved).

17 § -56 **Advice to convening authority before referral to**
18 **trial.** (a) Before referral of charges and specifications to a
19 general court-martial for trial, the convening authority shall
20 submit the matter to the staff judge advocate for advice, which
21 the staff judge advocate shall provide to the convening
22 authority in writing. The convening authority may not refer a

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1 specification under a charge to a general court-martial unless
2 the staff judge advocate advises the convening authority in
3 writing that:

4 (1) The specification alleges an offense under this
5 chapter;

6 (2) There is probable cause to believe that the accused
7 committed the offense charged; and

8 (3) A court-martial would have jurisdiction over the
9 accused and the offense.

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

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

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

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(e) Before referral for trial by general court-martial 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) In this section, the term "referral" means the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial.

§ -57 Service of charges; commencement of trial. (a) In general, trial counsel detailed for a court-martial under section -48 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 court-martial or a special court-martial (including any session under section -64) may 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

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(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) may 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 may prescribe rules. 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 prescribed by the governor or the adjutant general by rules, or as otherwise provided by law, which shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces, but which may not be contrary to or inconsistent with this chapter.

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1 § -62 Unlawfully influencing action of court. (a) No
2 authority convening a general, special, or summary court-
3 martial, nor any other commanding officer, or officer serving on
4 the staff thereof, may censure, reprimand, or admonish the court
5 or any member, military judge, or counsel thereof, with respect
6 to the findings or sentence adjudged by the court, or with
7 respect to any other exercise of its or their functions in the
8 conduct of the proceeding. No person subject to this chapter
9 may attempt to coerce or, by any unauthorized means, influence
10 the action of a court-martial or any other military tribunal or
11 any member thereof, in reaching the findings or sentence in any
12 case, or the action of any convening, approving, or reviewing
13 authority with respect to their judicial acts. The foregoing
14 provisions of the subsection may not apply with respect to:

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

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

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(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 may, in preparing any such report:

(1) Consider or evaluate the performance of duty of any such 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 such 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 has the right to be represented in the accused's defense before a general or special court-martial or

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1 at a preliminary hearing under section -54 as provided in this
2 section.

3 (c) The accused may be represented:

4 (1) By military counsel detailed under section -48;

5 (2) By military counsel of the accused's own selection if
6 that counsel is reasonably available as determined
7 under subsection (f); or

8 (3) By civilian counsel if provided by the accused.

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

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

17 (e) The accused is not entitled to be represented by more
18 than one military counsel. However, the person authorized under
19 section -48 to detail counsel, in their own discretion:

20 (1) May detail additional military counsel as assistant
21 defense counsel; and

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1 (2) If the accused is represented by military counsel of
2 the accused's own selection under subsection (c) (2),
3 may approve a request from the accused that military
4 counsel detailed under subsection (c) (1) act as
5 assistant defense counsel.

6 (f) The senior force judge advocate of the same force of
7 which the accused is a member, shall determine whether the
8 military counsel selected by an accused is reasonably available.

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

11 (1) May forward for attachment to the record of
12 proceedings a brief of such matters as the defense
13 counsel determines should be considered in behalf of
14 the accused on review (including any objection to the
15 contents of the record that the defense counsel
16 considers appropriate);

17 (2) May assist the accused in the submission of any matter
18 under part IX; and

19 (3) May take other actions authorized by this chapter.

20 (h) An assistant trial counsel of a general court-martial
21 may, under the direction of the trial counsel or when the
22 assistant trial counsel is qualified to be a trial counsel as

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1 required by section -48, perform any duty imposed by law,
2 rule, or the custom of the service upon the trial counsel of the
3 court. An assistant trial counsel of a special court-martial
4 may perform any duty of the trial counsel.

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

8 **§ -64 Sessions.** (a) At any time after the service of
9 charges that have been referred for trial to a court-martial
10 composed of a military judge and members, the military judge
11 may, subject to section -57, call the court into session
12 without the presence of the members for the purpose of:

13 (1) Hearing and determining motions raising defenses or
14 objections that are capable of determination without
15 trial of the issues raised by a plea of not guilty;

16 (2) Hearing and ruling upon any matter that may be ruled
17 upon by the military judge under this chapter, whether
18 or not the matter is appropriate for later
19 consideration or decision by the members of the court;

20 (3) Holding the arraignment and receiving the pleas of the
21 accused;

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1 (4) Conducting a sentencing proceeding and sentencing the
2 accused under section -79; and

3 (5) Performing any other procedural function that may be
4 performed by the military judge under this chapter or
5 under rules prescribed pursuant to section -61 and
6 that does not require the presence of the members of
7 the court.

8 (b) Proceedings under subsection (a) shall be conducted in
9 the presence of the accused, the defense counsel, and the trial
10 counsel and shall be made a part of the record. These
11 proceedings may be conducted notwithstanding the number of
12 members of the court and without regard to section -50. If
13 authorized by rule, and if at least one defense counsel is
14 physically in the presence of the accused, the presence required
15 by this subsection may otherwise be established by audiovisual
16 technology (such as video teleconferencing technology).

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

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1 **§ -65 Continuances.** The military judge or a summary
2 court-martial may, for reasonable cause, grant a continuance to
3 any party for such time, and as often, as may appear to be just.

4 **§ -66 Challenges.** (a) The military judge and members of
5 a general or special court-martial may be challenged by the
6 accused or the trial counsel for cause stated to the court. The
7 military judge shall determine the relevancy and validity of
8 challenges for cause and may not receive a challenge to more
9 than one person at a time. Challenges by the trial counsel
10 shall ordinarily be presented and decided before those by the
11 accused are offered. Notwithstanding section -31, if
12 exercises of a challenge for cause reduces the court below the
13 number of members required by section -50, all parties shall
14 either exercise or waive any challenge for cause then apparent
15 against the remaining members of the court before additional
16 members are detailed to the court. However, preemptory
17 challenges may not be exercised at that time.

18 (b) Each accused and the trial counsel are entitled
19 initially to one preemptory challenge of members of the court.
20 The military judge may not be challenged except for cause.
21 Notwithstanding section -31, if exercise of a preemptory
22 challenge reduces the court below the number of members required

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1 by section -50, the parties shall either exercise or waive any
2 remaining peremptory challenge not previously waived against the
3 remaining members of the court before additional members are
4 detailed to the court.

5 (c) Whenever additional members are detailed to the court,
6 and after any challenges for cause against such members are
7 presented and decided, each accused and the trial counsel are
8 entitled to one peremptory challenge against members not
9 previously subject to peremptory challenge.

10 § -67 Oaths or affirmations. (a) Before performing
11 their respective duties, military judges, members of general and
12 special courts-martial, trial counsel, assistant trial counsel,
13 defense counsel, assistant defense counsel, reporters, and
14 interpreters shall take an oath or affirmation in the presence
15 of the accused to perform their duties faithfully. The form of
16 the oath or affirmation, the time and place of the taking
17 thereof, the manner of recording the same, and whether the oath
18 or affirmation shall be taken for all cases in which these
19 duties are to be performed or for a particular case, shall be as
20 prescribed by rule or as provided by law. These rules may
21 provide that an oath or affirmation to perform faithfully duties
22 as a military judge, trial counsel, assistant trial counsel,

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1 defense counsel, or assistant or associate defense counsel may
2 be taken at any time by any judge advocate or other person
3 certified to be qualified or competent for the duty, and if such
4 an oath or affirmation is taken it need not again be taken at
5 the time the judge advocate or other person is detailed to that
6 duty.

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

9 **§ -68 Statute of limitations.** (a) A person charged with
10 desertion or absence without leave in time of war, or with
11 aiding the enemy or with mutiny, may be tried and punished at
12 any time without limitation.

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

20 (c) Except as otherwise provided in this section, a person
21 charged with any offense is not liable to be tried by court-
22 martial or punished under section -21 if the offense was

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1 committed more than two years before the receipt of sworn
2 charges and specifications by an officer exercising summary
3 court-martial jurisdiction over the command or before the
4 imposition of punishment under section -21.

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

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

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

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

19 (2) Committed in connection with the acquisition, care,
20 handling, custody, control, or disposition of any real
21 or personal property of the United States or any state
22 or territory; or

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1 (3) Committed in connection with the negotiation,
2 procurement, award, performance, payment, interim
3 financing, cancellation, or other termination or
4 settlement, of any contract, subcontract, or purchase
5 order that is connected with or related to the
6 prosecution of the war, or with any disposition of
7 termination inventory by any war contractor or
8 Government agency,
9 is suspended until two years after the termination of
10 hostilities as proclaimed by the President of the United States
11 or by a joint resolution of Congress.

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

15 (1) Has expired; or
16 (2) Will expire within one hundred eighty days after the
17 date of dismissal of the charges and specifications,
18 trial and punishment under new charges and specifications are
19 not barred by the statute of limitations if the conditions
20 specified in subsection (h) are met.

21 (h) The conditions referred to in subsection (g) are that
22 new charges and specifications shall:

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(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 may, 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 is a trial in the sense of 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,

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

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

7 (1) After the members, having taken an oath or affirmation
8 as members under section -67 and after completion of
9 challenges under section -66, are impaneled; and

10 (2) Before announcement of findings under section -79,
11 the case is dismissed or terminated by the convening authority
12 or on motion of the prosecution for failure of available
13 evidence or witnesses.

14 **§ -70 Pleas of the accused.** (a) If an accused after
15 arraignment makes an irregular pleading, or after a plea of
16 guilty sets up matter inconsistent with the plea, or if it
17 appears that the accused has entered the plea of guilty
18 improvidently or through a lack of understanding of its meaning
19 and effect, or if the accused fails or refuses to plead, a plea
20 of not guilty shall be entered in the record, and the court
21 shall proceed as though the accused had pleaded not guilty.

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

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

12 **§ -71 Opportunity to obtain witnesses and other evidence.**

13 (a) In a case referred for trial by court-martial, the trial
14 counsel, the defense counsel, and the court-martial shall have
15 equal opportunity to obtain witnesses and other evidence in
16 accordance with such rules as the governor or the adjutant
17 general may prescribe or as provided by law.

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

20 (1) Shall, except as otherwise permitted by the court for
21 good cause, be in a form similar to the one that

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1 courts of the State of Hawaii having criminal
2 jurisdiction may issue or properly accept;
3 (2) Shall be executed in accordance with rules as the
4 governor or the adjutant general may prescribe or as
5 provided by law; and
6 (3) Shall run to any part of the State and shall be
7 executed by civil officers as prescribed by the laws
8 of the State.

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

- 11 (1) Before a court-martial or court of inquiry;
12 (2) At a deposition under section -74; or
13 (3) As otherwise authorized under this chapter.

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

- 16 (1) For a court-martial or court of inquiry;
17 (2) For a deposition under section -74;
18 (3) For an investigation of an offense under this chapter;
19 or
20 (4) As otherwise authorized under this chapter.

21 (e) An investigative subpoena under subsection (d) (3) may
22 be issued before referral of charges to a court-martial only if

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1 a general court-martial convening authority has authorized
2 counsel for the government to issue such a subpoena or a
3 military judge issues such a subpoena pursuant to section -51.

4 (f) With respect to an investigation of an offense under
5 this chapter, a military judge detailed in accordance with
6 sections -41, -42, or -74 may issue warrants or court
7 orders for contents of, and records concerning, wire or
8 electronic communications in the same manner as such warrants
9 and orders may be issued by courts of the State under chapter
10 803, subject to such limitations as the governor or the adjutant
11 general may prescribe by rule, or as prescribed by law.

12 (g) If a person requests relief from a subpoena or other
13 process under this section on grounds that compliance is
14 unreasonable or oppressive or is prohibited by law, a military
15 judge detailed in accordance with sections -41, -42, or -
16 74 shall review the request and shall:

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

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

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1 **§ -72 Refusal of person not subject to chapter to appear,**
2 **testify, or produce evidence.** Any person not subject to this
3 chapter who:

4 (1) Has been duly subpoenaed to appear as a witness or to
5 produce records before a military court or before any
6 military or civil officer designated to take a
7 deposition to be read in evidence before such a court;

8 (2) Has been duly paid or tendered the fees and mileage of
9 a witness at the rates allowed to witnesses attending
10 the circuit court; and

11 (3) Willfully neglects or refuses to appear, or refuses to
12 qualify as a witness or to testify or to produce any
13 evidence that the person may have been legally
14 subpoenaed to produce,

15 is guilty of an offense against the State and a military court
16 may punish the person in the same manner as the civil courts of
17 the State.

18 **§ -73 Contempts; authority to punish; punishment.** (a)

19 With respect to any proceeding under this chapter:

20 (1) A military judge detailed to a court-martial or any
21 other proceeding under this chapter;

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(2) Any military magistrate designated to preside under section -47; 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 such 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 prescribed by the governor or the 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, such an authority may designate

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1 commissioned officers to represent the prosecution and the
2 defense and may authorize those officers to take the deposition
3 of any witness.

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

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

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

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

19 (2) That the witness by reason of death, age, sickness,
20 bodily infirmity, imprisonment, military necessity,
21 non-amenability to process, or other reasonable cause,

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1 is unable or refuses to appear and testify in person
2 at the place of trial or hearing; or

3 (3) That the present whereabouts of the witness is
4 unknown.

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

11 **§ -75 Admissibility of sworn testimony from records of**
12 **courts of inquiry.** (a) In any case not extending to the
13 dismissal of a commissioned officer, the sworn testimony,
14 contained in the duly authenticated record of proceedings of a
15 court of inquiry, of a person whose oral testimony cannot be
16 obtained, may, if otherwise admissible under the rules of
17 evidence, be read in evidence by any party before a court-
18 martial if the accused was a party before the court of inquiry
19 and if the same issue was involved or if the accused consents to
20 the introduction of the evidence.

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

(d) Sworn testimony that:

(1) Is recorded by audiotape, videotape, or similar method; and

(2) Is 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 in evidence before any such body under subsections (a), (b), or (c).

§ -76 Defense of lack of physical or mental

responsibility. (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 does not otherwise constitute a defense.

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(b) The accused has 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.

§ -77 Voting and rulings. (a) Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written

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1 ballot. The junior member of the court shall in each case count
2 the votes. The count shall be checked by the president, who
3 shall forthwith announce the result of the ballot to the members
4 of the court.

5 (b) The military judge of a general or special court-
6 martial shall rule upon all questions of law and all
7 interlocutory questions arising during the proceedings. Any
8 such ruling made by the military judge upon any question of law
9 or any interlocutory question other than the factual issue of
10 mental responsibility of the accused is final and constitutes
11 the ruling of the court, except that the military judge may
12 change a ruling at any time during trial.

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

17 (1) That the accused must be presumed to be innocent until
18 the accused's guilt is established by legal and
19 competent evidence beyond reasonable doubt;

20 (2) That in the case being considered, if there is a
21 reasonable doubt as to the guilt of the accused, the

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1 doubt must be resolved in favor of the accused and the
2 accused must be acquitted;

3 (3) That, if there is a reasonable doubt as to the degree
4 of guilt, the finding must be in a lower degree as to
5 which there is no reasonable doubt; and

6 (4) That the burden of proof of establishing the guilt of
7 the accused beyond reasonable doubt is upon the State.

8 (d) Subsections (a), (b), and (c) do not apply to a court-
9 martial composed of a military judge only. The military judge
10 of such a court-martial shall determine all questions of law and
11 fact arising during the proceedings and, if the accused is
12 convicted, adjudge an appropriate sentence. The military judge
13 of such a court-martial shall make a general finding and shall
14 in addition on request find the facts specially. If an opinion
15 or memorandum of decision is filed, it will be sufficient if the
16 findings of fact appear therein.

17 **§ -78 Votes required for conviction, sentencing, and**
18 **other matters.** (a) No person may be convicted of an offense in
19 a general or special court-martial, other than:

20 (1) After a plea of guilty under section -70;

21 (2) By a military judge in a court-martial with a military
22 judge alone under section -31; or

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1 (3) In a court-martial with members under section -31,
2 by the concurrence of at least three-fourths of the
3 members present when the vote is taken.

4 (b) Except as provided in subsections (a) and (c), all
5 matters to be decided by members of a general or special court-
6 martial shall be determined by a majority vote, but a
7 reconsideration of a finding of guilty or reconsideration of a
8 sentence, with a view toward decreasing the sentence, may be
9 made by any lesser vote that indicates that the reconsideration
10 is not opposed by the number of votes required for that finding
11 or sentence.

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

15 (d) A tie vote on a challenge disqualifies the member
16 challenged. A tie vote on a motion for a finding of not guilty
17 or on a motion relating to the question of the accused's sanity
18 is a determination against the accused. A tie vote on any other
19 question is a determination in favor of the accused.

20 **§ -79 Findings and sentencing.** (a) A court-martial
21 shall announce its findings and sentence to the parties as soon
22 as determined.

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

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

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

11 **§ -80 Plea agreements.** (a) At any time before the
12 announcement of findings under section -79, the convening
13 authority and the accused may enter into a plea agreement with
14 respect to such matters as:

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

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

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(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 prescribed by the governor, the adjutant general, or the Hawaii rules of penal procedures 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

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1 of the military judge and the senior officer of the panel or
2 military judge alone if presided by a judge alone. If the
3 record cannot be authenticated by either the military judge or
4 senior officer of the panel, by reason of death, disability, or
5 absence, it shall be signed by the next senior member of the
6 panel in lieu of the military judge or senior officer. If both
7 the military judge and the senior member of the panel are
8 unavailable, the record shall be authenticated by two members of
9 the panel.

10 (b) Each summary court-martial shall keep a separate
11 record of the proceedings in each case, and the record shall be
12 certified in the manner required by such rules as the governor
13 or the adjutant general may prescribe or as required by this
14 chapter.

15 (c) Except as provided in subsection (d), the record shall
16 contain such matters as the governor or the adjutant general may
17 prescribe by rules.

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

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

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

11 **PART VIII. SENTENCES**

12 **§ -91 Cruel and unusual punishments prohibited.**

13 Punishment by flogging, or by branding, marking, or tattooing on
14 the body, or any other cruel or unusual punishment may not be
15 adjudged by any court-martial or inflicted upon any person
16 subject to this chapter. The use of irons, single or double,
17 except for the purpose of safe custody, is prohibited.

18 **§ -92 Sentencing.** (a) The punishment that a court-
19 martial may direct for an offense may not exceed such limits as
20 the governor or the adjutant general may prescribe for that
21 offense, but in no instance may a sentence exceed more than ten
22 years confinement. A conviction by general court-martial of any

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1 offense for which an accused may receive a sentence of
2 confinement for more than one year is a felony offense. Except
3 for convictions by a summary court-martial, all other offenses
4 are misdemeanors. Any conviction by a summary-court martial is
5 not a criminal conviction.

6 (b) Except as provided in subsection (a) of section -80,
7 punishment for the following offense shall include dismissal or
8 dishonorable discharge, as applicable:

9 (1) Sexual assault in the first degree under section 707-
10 730;

11 (2) Continuous sexual assault of a minor under the age of
12 fourteen years under section 707-733.6;

13 (3) An attempt to commit an offense specified in paragraph
14 (1) or (2) that is punishable under section -134; or

15 (4) Conspiracy to commit an offense specified in paragraph
16 (1) or (2) that is punishable under
17 section -135.

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

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- 1 (1) The nature and circumstances of the offense and the
- 2 history and characteristics of the accused;
- 3 (2) The impact of the offense on:
 - 4 (A) The financial, social, psychological, or medical
 - 5 well-being of any victim of the offense; and
 - 6 (B) The mission, discipline, or efficiency of the
 - 7 command of the accused and any victim of the
 - 8 offense;
- 9 (3) The need for the sentence:
 - 10 (A) To reflect the seriousness of the offense;
 - 11 (B) To promote respect for the law;
 - 12 (C) To provide just punishment for the offense;
 - 13 (D) To promote adequate deterrence of misconduct;
 - 14 (E) To protect others from further crimes by the
 - 15 accused;
 - 16 (F) To rehabilitate the accused; and
 - 17 (G) To provide, in appropriate cases, the opportunity
 - 18 for retraining and return to duty to meet the
 - 19 needs of the service; and
- 20 (4) The sentences available under this chapter.
- 21 (d) In announcing the sentence in a general or special
- 22 court-martial in which the accused is sentenced by military

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1 judge alone under section -79, the military judge shall, with
2 respect to each offense of which the accused is found guilty,
3 specify the term of confinement, if any, and the amount of fine,
4 if any. If the accused is sentenced to confinement for more
5 than one offense, the military judge shall specify whether the
6 terms of confinement are to run consecutively or concurrently.

7 (e) In a general or special court-martial in which the
8 accused has elected sentencing by members, the court-martial
9 shall announce a single sentence for all of the offenses of
10 which the accused was found guilty.

11 (f) With the approval of the senior judge advocate
12 concerned, and consistent with standards and procedures set
13 forth in rules prescribed by the governor or the adjutant
14 general, the State may appeal a sentence to the intermediate
15 court of appeals of the State, on the grounds that:

16 (1) The sentence violates the law; or
17 (2) The sentence is plainly unreasonable as determined in
18 accordance with standards and procedures prescribed by
19 the governor or the adjutant general.

20 (g) An appeal under subsection (f) shall be filed within
21 sixty days after the date on which the judgment of a court-
22 martial is entered into the record under section -105.

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1 **§ -93 Effective date of sentences.** (a) A court-martial
2 sentence shall be executed and take effect as follows:

3 (1) A forfeiture of pay or allowances shall be applicable
4 to pay and allowances accruing on and after the date
5 on which the sentence takes effect. Any forfeiture of
6 pay or allowances or reduction in grade that is
7 included in a sentence of a court-martial takes effect
8 on the earlier of:

9 (A) The date that is fourteen days after the date on
10 which the sentence is adjudged; or

11 (B) In the case of a summary court-martial, the date
12 on which the sentence is approved by the
13 convening authority;

14 (2) Any period of confinement included in a sentence of a
15 court-martial begins to run from the date the sentence
16 is adjudged by the court-martial, but periods during
17 which the sentence to confinement is suspended or
18 deferred shall be excluded in computing the service of
19 the term of confinement;

20 (3) If in the case of a commissioned officer, cadet, or
21 midshipman, the sentence of a court-martial extends to
22 dismissal or in the case of an enlisted member, the

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sentence of a court-martial extends to a dishonorable discharge, that part of the sentence providing for dismissal may not be executed until approved by the governor. In such a case, the governor may commute, remit, or suspend the sentence, or any part of the sentence as the governor sees fit. In the 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 is effective upon entry of judgment and a summary court-martial sentence is 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.

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1 The deferment shall terminate upon entry of judgment or, in the
2 case of a summary court-martial, when the convening authority
3 acts on the sentence. The deferment may be rescinded at any
4 time by the officer who granted it or, if the accused is no
5 longer under that officer's jurisdiction, by the officer
6 exercising general court-martial jurisdiction over the command
7 to which the accused is currently assigned.

8 (c) In any case in which a court-martial sentences a
9 person to confinement, but in which review of the case under
10 section -113 is pending, the governor may defer further
11 service of the sentence to confinement while that review is
12 pending.

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

14 (1) The time for the accused to file a petition for review
15 by the Hawaii intermediate court of appeals under
16 section -113 has expired and the accused has not
17 filed a timely petition for such review and the case
18 is not otherwise under review by that court; or

19 (2) A review under section -113 is completed by the
20 Hawaii intermediate court of appeals and:

21 (A) The time for the accused to file a petition for
22 review by the Hawaii supreme court has expired

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1 and the accused has not filed a timely petition
2 for the review and the case is not otherwise
3 under review by that court;

4 (B) The petition by the accused is rejected by the
5 Hawaii supreme court; or

6 (C) Review is completed in accordance with the
7 judgment of the intermediate court of appeals and
8 review is completed in accordance with the
9 judgment of the Hawaii supreme court.

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

12 **§ -94 Execution of confinement.** (a) A sentence of
13 confinement adjudged by a military court, whether or not the
14 sentence includes discharge or dismissal, and whether or not the
15 discharge or dismissal has been executed, may be carried into
16 execution by confinement in any place of confinement under the
17 control of any of the forces of the state military forces or in
18 any state correctional facility designated for that purpose.
19 Persons so confined in a state correctional facility are subject
20 to the same discipline and treatment as persons confined or
21 committed to a state correctional facility by the courts of the
22 State.

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1 (b) The omission of the words "hard labor" from any
2 sentence or punishment of a court-martial adjudging confinement
3 does not deprive the authority executing that sentence or
4 punishment of the power to require hard labor as a part of the
5 punishment.

6 (c) The keepers, officers, and wardens of state
7 correctional facilities designated by the governor, or by such
8 person as the governor may authorize to act under part II of
9 this chapter, shall receive persons ordered into confinement
10 before trial and persons committed to confinement by a military
11 court and shall confine them according to law. No such keeper,
12 officer, or warden may require payment of any fee or charge for
13 so receiving or confining a person.

14 **§ -95 Sentences; reduction in enlisted grade upon**
15 **approval.** (a) A court-martial sentence of an enlisted member
16 in a pay grade above E-1, as set forth in the judgment of the
17 court-martial entered into the record under section -105, that
18 includes:

19 (1) A dishonorable or bad-conduct discharge; or
20 (2) Confinement,
21 reduces that member to pay grade E-1, if such reduction is
22 authorized by rule prescribed by the governor or the adjutant

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1 general. The reduction in pay grade shall take effect on the
2 date on which the judgment is so entered.

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

12 **§ -96 Sentences; forfeiture of pay and allowances during**
13 **confinement.** (a) A court-martial sentence described in
14 subsection (b) shall result in the forfeiture of pay, or of pay
15 and allowances, due that member during any period of confinement
16 or parole. The forfeiture pursuant to this section shall take
17 effect on the date determined under section -93 and may be
18 deferred as provided in that section. The pay and allowances
19 forfeited, in the case of a general court-martial, shall be all
20 pay and allowances due that member during such period and, in
21 the case of a special court-martial, shall be two-thirds of all
22 pay due that member during such period.

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

3 (1) Confinement for more than six months; or

4 (2) Confinement for six months or less and a dishonorable
5 or bad-conduct discharge or dismissal.

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

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

21 **Part IX. POST-TRIAL PROCEDURES AND REVIEW OF COURTS-**

22 **MARTIAL**

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1 **§ -101 Error of law; lesser included offense.** (a) A
2 finding or sentence of a court-martial may not be held incorrect
3 on the ground of an error of law unless the error materially
4 prejudices the substantial rights of the accused.

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

8 **§ -102 Post-trial processing in general and special**
9 **courts-martial.** (a) The military judge of a general or special
10 court-martial shall enter into the record of trial a document
11 entitled "statement of trial results" that shall set forth:

- 12 (1) Each plea and finding;
13 (2) The sentence, if any; and
14 (3) Such other information as the governor or the adjutant
15 general may prescribe by rule.

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

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

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

6 **§ -103 Limited authority to act on sentence in specified**
7 **post-trial circumstances.** (a) The convening authority of a
8 general or special court-martial described in subsection (b):

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

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

- 14 (1) A general or special court-martial in which the
15 maximum sentence of confinement for any offense of
16 which the accused is found guilty is more than two
17 years;
18 (2) A general or special court-martial in which the total
19 of the sentences of confinement imposed, running
20 consecutively, is more than six months;

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1 (3) A general or special court-martial in which the
2 sentence imposed includes a dismissal, dishonorable
3 discharge, or bad-conduct discharge; and

4 (4) A general or special court-martial in which the
5 accused is found guilty of sexual assault in the first
6 degree or continuous sexual assault of a minor under
7 fourteen years of age or such other offense as the
8 governor or the adjutant general may specify by rule.

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

12 (d) Under rules prescribed by the governor or the adjutant
13 general, a commissioned officer commanding for the time being, a
14 successor in command, or any person exercising general court-
15 martial jurisdiction may act under this section in place of the
16 convening authority.

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

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

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

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

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

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

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

12 (h) Except as provided in subsection (i) or (j), the
13 convening authority may not, under subsection (g):

14 (1) Suspend a mandatory minimum sentence; or

15 (2) Suspend a sentence to an extent in excess of the
16 suspension recommended by the military judge.

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

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1 (j) Upon a recommendation by a trial counsel, designated
2 in accordance with rules prescribed by the governor or the
3 adjutant general, if the accused, after entry of judgment,
4 provides substantial assistance in the investigation or
5 prosecution of another person, a convening authority, designated
6 under such rules, may reduce, commute, or suspend a sentence, in
7 whole or in part, including any mandatory minimum sentence.

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

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

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

19 (2) The deadlines for such submissions; and

20 (3) Procedures for providing the accused and any victim of
21 an offense with a copy of the recording of any open

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1 sessions of the court-martial and copies of, or access
2 to, any admitted, unsealed exhibits.

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

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

10 (o) If, under this section, the convening authority
11 reduces, commutes, or suspends the sentence, the decision of the
12 convening authority shall include a written explanation of the
13 reasons for such action.

14 (p) If, under subsection (j), the convening authority
15 reduces, commutes, or suspends the sentence, the decision of the
16 convening authority shall be forwarded to the military judge for
17 appropriate modification of the entry of judgment, which shall
18 be transmitted to the senior force judge advocate for
19 appropriate action.

20 § -104 Post-trial actions in summary courts-martial and
21 certain general and special courts-martial. (a) In a court-

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1 martial not specified in subsection (b) of section -103, the
2 convening authority may:

3 (1) Dismiss any charge or specification by setting aside
4 the finding of guilty;

5 (2) Change a finding of guilty to a charge or
6 specification to a finding of guilty to a lesser
7 included offense;

8 (3) Disapprove the findings and the sentence and dismiss
9 the charges and specifications;

10 (4) Disapprove the findings and the sentence and order a
11 rehearing as to the findings and the sentence;

12 (5) Disapprove, commute, or suspend the sentence, in whole
13 or in part; or

14 (6) Disapprove the sentence and order a rehearing as to
15 the sentence.

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

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

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

9 (e) Under rules prescribed by the governor or the adjutant
10 general, a commissioned officer commanding for the time being, a
11 successor in command, or any person exercising general court-
12 martial jurisdiction may act under this section in place of the
13 convening authority.

14 (f) The convening authority may not order a rehearing
15 under this section:

16 (1) As to the findings if there is insufficient evidence
17 in the record to support the findings;

18 (2) To reconsider a finding of not guilty of any
19 specification or a ruling that amounts to a finding of
20 not guilty; or

21 (3) To reconsider a finding of not guilty of any charge,
22 unless there has been a finding of guilty under a

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1 specification laid under that charge that sufficiently
2 alleges a violation of a section.

3 (g) In accordance with rules prescribed by the governor or
4 the adjutant general, in determining whether to act under this
5 section, the convening authority shall consider matters
6 submitted in writing by the accused or any victim of the
7 offense. Such rules shall include the matter required by
8 subsection (1) of section -103.

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

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

17 **§ -105 Entry of judgment.** (a) In accordance with rules
18 prescribed by the governor or the adjutant general, in a general
19 or special court-martial, the military judge shall enter into
20 the record of trial the judgment of the court. The judgment of
21 the court shall consist of the following:

22 (1) The statement of trial results under section -102.

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1 (2) Any modifications of, or supplements to, the statement
2 of trial results by reason of:

3 (A) Any post-trial action by the convening authority;
4 or

5 (B) Any ruling, order, or other determination of the
6 military judge that affects a plea, a finding, or
7 the sentence.

8 (b) Under rules prescribed by the governor or the adjutant
9 general, the judgment under subsection (a) shall be:

10 (1) Provided to the accused and to any victim of the
11 offense; and

12 (2) Made available to the public.

13 (c) The findings and sentence of a summary court-martial,
14 as modified by any post-trial action by the convening authority
15 under section -104, constitutes the judgment of the court-
16 martial and shall be recorded and distributed under rules
17 prescribed by the governor or the adjutant general.

18 **§ -106 Waiver of right to appeal; withdrawal of appeal.**

19 (a) After entry of judgment in a general or special court-
20 martial, under rules prescribed by the governor or the adjutant
21 general, the accused may waive the right to appeal. Such a
22 waiver shall be:

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1 (1) Signed by the accused and by defense counsel; and

2 (2) Attached to the record of trial.

3 (b) In a general or special court-martial, the accused may
4 voluntarily request dismissal of an appeal at any time in
5 accordance with the Hawaii rules of appellate procedure.

6 (c) A waiver or voluntary dismissal under this section
7 bars review under section -113.

8 **§ -107 Appeal by the state.** (a) In a trial by general
9 or special court-martial or in a pretrial proceeding under
10 section -52, the State may appeal the following:

11 (1) An order or ruling of the military judge that
12 terminates the proceedings with respect to a charge or
13 specification;

14 (2) An order or ruling that excludes evidence that is
15 substantial proof of a fact material in the
16 proceeding;

17 (3) An order or ruling that directs the disclosure of
18 classified information;

19 (4) An order or ruling that imposes sanctions for
20 nondisclosure of classified information;

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1 (5) A refusal of the military judge to issue a protective
2 order sought by the State to prevent the disclosure of
3 classified information;

4 (6) A refusal by the military judge to enforce an order
5 described in paragraph (5) that has previously been
6 issued by appropriate authority; or

7 (7) An order or ruling of the military judge entering a
8 finding of not guilty with respect to a charge or
9 specification following the return of a finding of
10 guilty by the members.

11 (b) An appeal of an order or ruling may not be taken
12 unless the trial counsel provides the military judge with
13 written notice of appeal from the order or ruling within
14 seventy-two hours of the order or ruling. Such notice shall
15 include a certification by the trial counsel that the appeal is
16 not taken for the purpose of delay and, if the order or ruling
17 appealed is one that excludes evidence, that the evidence
18 excluded is substantial proof of a fact material in the
19 proceeding.

20 (c) An appeal of an order or ruling may not be taken when
21 prohibited by section -69.

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

3 (e) An appeal under this section shall be forwarded to the
4 court prescribed in section -113. In ruling on an appeal
5 under this section, the appeals court may act only with respect
6 to matters of law.

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

13 (g) The State may appeal a ruling or order of a military
14 magistrate in the same manner as had the ruling or order been
15 made by a military judge, except that the issue shall first be
16 presented to the military judge who designated the military
17 magistrate or to a military judge detailed to hear the issue.

18 (h) The provisions of this section shall be liberally
19 construed to affect its purposes.

20 **§ -108 Rehearings.** (a) Each rehearing under this
21 chapter shall take place before a court-martial composed of
22 members that are not members of the court-martial that first

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1 heard the case. Upon a rehearing the accused may not be tried
2 for any offense of which he was found not guilty by the first
3 court-martial, and no sentence in excess of, or more severe
4 than, the original sentence may be adjudged, unless the sentence
5 is based upon a finding of guilty of an offense not considered
6 upon the merits in the original proceedings, or unless the
7 sentence prescribed for the offense is mandatory.

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

18 (c) If, after appeal by the government under section -
19 107, the sentence adjudged is set aside and a rehearing on
20 sentence is ordered by the intermediate court of appeals, the
21 court-martial may impose any adjudged sentence, subject to such

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1 limitations as the governor or the adjutant general may
2 prescribe by rules.

3 **§ -109 Senior force judge advocate review of finding of**
4 **guilty in summary court-martial.** (a) Under rules prescribed by
5 the governor or the adjutant general, each summary court-martial
6 in which there is a finding of guilty shall be reviewed by the
7 senior force judge advocate or a judge advocate designated by
8 the senior force judge advocate. A judge advocate may not
9 review a case under this subsection if the judge advocate has
10 acted in the same case as an accuser, preliminary hearing
11 officer, member of the court, military judge, or counsel or has
12 otherwise acted on behalf of the prosecution or defense. The
13 judge advocate's review shall be in writing and shall contain
14 the following:

15 (1) Conclusions as to whether:

16 (A) The court had jurisdiction over the accused and
17 the offense;

18 (B) The charge and specification stated an offense;
19 and

20 (C) The sentence was within the limits prescribed by
21 law or by rule;

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1 (2) A response to each allegation of error made in writing
2 by the accused; and

3 (3) If the case is sent for action under subsection (b), a
4 recommendation as to the appropriate action to be
5 taken and an opinion as to whether corrective action
6 is required as a matter of law.

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

12 (1) The judge advocate who reviewed the case recommends
13 corrective action; or

14 (2) Such action is otherwise required by rules adopted by
15 the governor or the adjutant general.

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

18 (1) Disapprove or approve the findings or sentence, in
19 whole or in part;

20 (2) Remit, commute, or suspend the sentence in whole or in
21 part;

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(3) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(4) Dismiss the charges.

(d) If a rehearing is ordered but the convening authority finds a rehearing impracticable, charges shall be dismissed.

(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.

(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 the adjutant general prescribe by rule or as required by law.

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1 (c) The state judge advocate shall provide notice to the
2 accused of the right to file an appeal under section -113 by
3 means of depositing in the United States mails for delivery by
4 first class certified mail to the accused at an address provided
5 by the accused or, if no such address has been provided by the
6 accused, at the latest address listed for the accused in the
7 official service record of the accused.

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

10 (e) A review conducted under this section may be conducted
11 by an attorney within the office of the judge advocate for the
12 state military forces or by another attorney designated under
13 rules prescribed by the governor or the adjutant general.

14 (f) A review referred to in subsection (g) shall be
15 completed in each general and special court-martial appealed to
16 the State's intermediate court of appeals by the accused.

17 (g) A review referred to in subsection (f) shall include a
18 written decision providing each of the following:

19 (1) A conclusion as to whether the court had jurisdiction
20 over the accused and the offense;

21 (2) A conclusion as to whether the charge and
22 specification stated an offense;

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1 (3) A conclusion as to whether the sentence was within the
2 limits prescribed as a matter of law; and

3 (4) A response to each allegation of error made in writing
4 by the accused.

5 (h) A review under subsection (i) shall be completed in
6 each general and special court-martial if:

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

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

11 (i) A review referred to in subsection (h) shall include a
12 written decision limited to providing conclusions on the matters
13 specified in paragraphs (1), (2), and (3) of subsection (g).

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

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

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

4 (m) If the state judge advocate sets aside findings and
5 orders a rehearing and the convening authority determines that a
6 rehearing would be impractical, the convening authority shall
7 dismiss the charges.

8 § -111 (Reserved).

9 § -112 (Reserved).

10 § -113 **Review by state appellate authority.** (a) An
11 accused, who was tried by a special or general court-martial and
12 who deems the accused is self aggrieved after the accused has
13 exhausted all of the accused's rights of review under this part,
14 shall be entitled to appeal the judgment or sentence of the
15 special or general court-martial, as may have been modified on
16 review under this part prior to judicial review under this
17 section, subject to chapter 602, in the manner provided for
18 civil appeals from the circuit courts, and within the time
19 provided by the rules of court.

20 (b) The filing of an appeal pursuant to subsection (a) may
21 not of itself stay the execution of the judgment or sentence
22 appealed from, but the appellate court may stay the same upon

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1 motion upon such conditions as it may deem proper,
2 notwithstanding any conflicting or contrary provision in this
3 chapter relating to the effective date or execution of sentences
4 or any other contrary provision of law.

5 (c) In reviewing the judgment or sentence of a special or
6 general court-martial, as may have been modified on review prior
7 to judicial review, the appellate court may take any of the
8 actions, and exercise any of the powers specified in section
9 641-16 as the court may deem appropriate in reviewing a judgment
10 or sentence of a military court-martial, and the court shall
11 follow as appropriate or applicable the standards and
12 requirements in section 641-16.

13 (d) Upon the request of the accused, the state judge
14 advocate shall appoint a lawyer in accordance with section -
15 116, who is a member of the bar of the highest court of the
16 State and who has been qualified as a judge advocate, as defined
17 in section -1 and section -48, to represent the accused in
18 the accused's appeal of the court-martial judgment or sentence.
19 If the accused wishes to be represented by civilian counsel,
20 rather than by appointed military counsel, the accused may do so
21 at the accused's own expense.

22 § -114 (Reserved).

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1 § -115 (Reserved) .

2 § -116 **Appellate counsel.** (a) The senior force judge
3 advocate shall detail one or more judge advocates as appellate
4 government counsel, and one or more judge advocates as appellate
5 defense counsel, who are qualified under section -48.

6 (b) Appellate government counsel shall represent the State
7 before the state intermediate court of appeals or the state
8 supreme court when directed to do so by the senior force judge
9 advocate. Appellate government counsel may represent the State
10 before federal courts in cases arising under this chapter when
11 requested to do so by the state attorney general.

12 (c) Appellate defense counsel shall represent the accused
13 before the state intermediate court of appeals or the state
14 supreme court:

15 (1) When requested by the accused;
16 (2) When the State is represented by counsel; or
17 (3) When the state judge advocate has sent the case for
18 appeal under section -107.

19 (d) The accused has the right to be represented by
20 civilian counsel if provided by the accused at no cost to the
21 government.

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

4 § -117 (Reserved).

5 § -118 **Vacation of suspension.** (a) Before the vacation
6 of the suspension of a special court-martial sentence, which as
7 approved includes a bad-conduct discharge, or of any general
8 court-martial sentence, the officer having special court-martial
9 jurisdiction over the probationer shall hold a hearing on the
10 alleged violation of probation. The court-martial convening
11 authority may detail a judge advocate, who is qualified under
12 section -48, to conduct the hearing. The probationer shall be
13 represented at the hearing by counsel if the probationer so
14 desires.

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

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1 unexecuted part of the sentence except a dismissal shall be
2 executed.

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

7 § -119 **Petition for a new trial.** At any time within two
8 years after approval by the convening authority of a court-
9 martial sentence that extends to dismissal, dishonorable or bad-
10 conduct discharge, the accused may petition the governor for a
11 new trial on ground of newly discovered evidence or fraud on the
12 court-martial. If the accused's case is pending before the
13 state intermediate court of appeals or state supreme court, the
14 state judge advocate shall refer the petition to the appropriate
15 court for action. Otherwise, the state judge advocate shall act
16 upon the petition.

17 § -120 **Remission and suspension.** (a) The governor, the
18 adjutant general, or a convening authority may remit or suspend
19 any part or amount of the unexecuted part of any sentence,
20 including all uncollected forfeitures.

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

4 **§ -121 Restoration.** (a) Under the rules as the governor
5 may adopt, all rights, privileges, and property affected by an
6 executed part of a court-martial sentence that has been set
7 aside or disapproved, except an executed dismissal or discharge,
8 shall be restored unless a new trial or rehearing is ordered,
9 and such executed part is included in a sentence imposed upon
10 the new trial or rehearing.

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

16 (c) If a previously executed sentence of dismissal is not
17 imposed on a new trial, the governor shall substitute therefor a
18 form of discharge authorized for administrative issue, and the
19 commissioned officer dismissed by that sentence may be
20 reappointed by the governor alone to such commissioned grade and
21 with such rank as in the opinion of the governor that former
22 officer would have attained had the former officer not been

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1 dismissed. The reappointment of such a former officer shall be
2 without regard to the existence of a vacancy and shall affect
3 the promotion status of other officers only insofar as the
4 governor may direct. All time between the dismissal and
5 reappointment shall be considered as service for all purposes,
6 including the right to pay and allowances.

7 (d) The governor or the adjutant general shall prescribe
8 rules, with such limitations as the governor or the adjutant
9 general considers appropriate, governing eligibility for pay and
10 allowances for the period after the date on which an executed
11 part of a court-martial is sentence is set aside.

12 **§ -122 Finality of proceedings, findings, and sentences.**

13 The appellate review of records of trial provided under this
14 chapter, the proceedings, findings, and sentences of courts-
15 martial as reviewed and approved, as required by this chapter,
16 and all dismissals and discharges carried into execution under
17 sentences by courts-martial following review and approval, as
18 required by this chapter, are final and conclusive. Orders
19 publishing the proceedings of courts-martial and all actions
20 taken pursuant to those proceedings are binding upon all
21 departments, courts, agencies, and officers of the State,
22 subject only to action upon a petition for a new trial as

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1 provided in section -119 and to action taken under section -
2 120.

3 **§ -123 Leave required to be taken pending review of**
4 **certain court-martial convictions.** Under rules prescribed by
5 the governor or the adjutant general, an accused who has been
6 sentenced by a court-martial may be required to take leave
7 pending completion of action under part IX if the sentence
8 includes an unsuspended dismissal or an unsuspended dishonorable
9 or bad-conduct discharge. The accused may be required to begin
10 such leave on the date of the entry of judgment under section
11 -105 at any time after such date, and such leave may be
12 continued until the date on which action under part IX is
13 completed or may be terminated at any earlier time.

14 **§ -124 Lack of physical or mental capacity or**
15 **responsibility; commitment of accused for examination and**
16 **treatment.** (a) Whenever there is reason to doubt the accused's
17 fitness to proceed, the court may immediately suspend all
18 further proceedings in the trial and conduct an examination in
19 accordance with section 704-404.

20 (b) Any general or special court-martial where a person
21 may be found guilty by reason of lack of mental or physical

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1 responsibility shall follow the same substance and procedures
2 found in sections 704-410.5 through 704-417.

3 **PART X. PUNITIVE SECTIONS**

4 **§ -131 Principals.** Any person punishable under this
5 chapter who:

6 (1) Commits an offense punishable by this chapter, or
7 aids, abets, counsels, commands, or procures its
8 commission; or

9 (2) Causes an act to be done that, if directly performed
10 by that person, would be punishable by this chapter,
11 is a principal.

12 **§ -132 Accessory after the fact.** Any person subject to
13 this chapter who, knowing that an offense punishable by this
14 chapter has been committed, receives, comforts, or assists the
15 offender in order to hinder or prevent the offender's
16 apprehension, trial, or punishment shall be punished as a court-
17 martial may direct.

18 **§ -133 Conviction of offense charged, lesser included**
19 **offenses, and attempts.** (a) An accused may be found guilty of
20 any of the following:

21 (1) The offense charged;

22 (2) A lesser included offense;

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1 (3) An attempt to commit the offense charged; and

2 (4) An attempt to commit a lesser included offense if the
3 attempt is an offense in its own right.

4 (b) In this section, the term "lesser included offense"
5 means:

6 (1) An offense that is necessarily included in the offense
7 charged; and

8 (2) Any lesser included offense so designated by rules
9 prescribed by the governor or the adjutant general.

10 (c) Any designation of a lesser included offense in a rule
11 referred to in subsection (b) shall be reasonably included in
12 the greater offense.

13 **§ -134 Attempts.** (a) An act, done with specific intent
14 to commit an offense under this chapter, amounting to more than
15 mere preparation and tending, even though failing, to affect its
16 commission, is an attempt to commit that offense.

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

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(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 a court-martial may direct.

§ -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 a court-martial may direct.

(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 a court martial may direct.

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1 **§ -137 Malingering.** Any person subject to this chapter
2 who, with the intent to avoid work, duty, or service:

3 (1) Feigns illness, physical disability, mental lapse, or
4 mental derangement; or

5 (2) Intentionally inflicts self-injury,
6 shall be punished as a court-martial may direct.

7 **§ -138 Breach of medical quarantine.** Any person subject
8 to this chapter:

9 (1) Who is ordered into medical quarantine by a person
10 authorized to issue such order; and

11 (2) Who, with knowledge of the quarantine and the limits
12 of the quarantine, goes beyond those limits before
13 being released from the quarantine by proper
14 authority,

15 shall be punished as a court-martial may direct.

16 **§ -139 Desertion.** (a) Any member of the state military
17 forces who:

18 (1) Without authority goes or remains absent from the
19 member's unit, organization, or place of duty with
20 intent to remain away therefrom permanently;

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1 (2) Quits the member's unit, organization, or place of
2 duty with intent to avoid hazardous duty or to shirk
3 important service; or

4 (3) Without being regularly separated from one of the
5 state military forces enlists or accepts an
6 appointment in the same or another one of the state
7 military forces or in one of the armed forces of the
8 United States without fully disclosing the fact that
9 the member has not been regularly separated, or enters
10 any foreign armed service except when authorized by
11 the United States,

12 is guilty of desertion.

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

18 (c) Any person found guilty of desertion or attempt to
19 desert shall be punished, if the offense is committed in a time
20 of war, by confinement of not more than ten years or such other
21 punishment as a court-martial may direct, but if the desertion

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1 or attempt to desert occurs at any other time, by such
2 punishment as a court-martial may direct.

3 **§ -140 Absence without leave.** Any member of the state
4 military forces who, without authority:

5 (1) Fails to go to the member's appointed place of duty at
6 the time prescribed;

7 (2) Goes from that place; or

8 (3) Absents the member's self or remains absent from the
9 member's unit, organization, or place of duty at which
10 the member is required to be at the time prescribed,
11 shall be punished as a court-martial may direct.

12 **§ -141 Missing movement; jumping from vessel.** (a) Any
13 person subject to this chapter who, through neglect or design,
14 misses the movement of a ship, aircraft, or unit with which the
15 person is required in the course of duty move shall be punished
16 as a court-martial may direct.

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

21 **§ -142 Resistance, flight, breach of arrest, and escape.**

22 Any person subject to this chapter who:

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- 1 (1) Resists apprehension;
- 2 (2) Flees from apprehension;
- 3 (3) Breaks arrest; or
- 4 (4) Escapes from custody or confinement,
- 5 shall be punished as a court-martial may direct.

6 **§ -143 Offenses against correctional custody and**

7 **restriction.** (a) Any person subject to this chapter who:

- 8 (1) Is placed in correctional custody by a person
- 9 authorized to do so;
- 10 (2) While in correctional custody, is under physical
- 11 restraint; and
- 12 (3) Escapes from the physical restraint before being
- 13 released from the physical restraint by proper
- 14 authority,
- 15 shall be punished as a court-martial may direct.

16 (b) Any person subject to this chapter who:

- 17 (1) Is placed in correctional custody by a person
- 18 authorized to do so;
- 19 (2) While in correctional custody, is under restraint
- 20 other than physical restraint; and

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1 (3) Goes beyond the limits of the restraint before being
2 released from the correctional custody or relieved of
3 the restraint by proper authority,
4 shall be punished as a court-martial may direct.

5 (c) Any person subject to this chapter who:

6 (1) Is ordered to be restricted to certain limits by a
7 person authorized to do so; and

8 (2) With knowledge of the limits of the restriction, goes
9 beyond those limits before being released by proper
10 authority,

11 shall be punished as a court-martial may direct.

12 **§ -144 Contempt toward officials.** Any commissioned
13 officer who uses contemptuous words against the President, the
14 Vice President, Congress, the Secretary of Defense, the
15 secretary of a military department, the Secretary of Homeland
16 Security, or the governor or legislature of the State shall be
17 punished as a court-martial may direct.

18 **§ -145 Disrespect toward superior commissioned officer;**
19 **assault of superior commissioned officer.** (a) Any person
20 subject to this chapter who behaves with disrespect toward that
21 person's superior commissioned officer shall be punished as a
22 court-martial may direct.

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

6 (1) If the offense is committed in time of war, by
7 confinement of not more than ten years or such other
8 punishment as a court-martial may direct; and

9 (2) If the offense is committed at any other time, by such
10 punishment as a court-martial may direct.

11 **§ -146 Willfully disobeying superior commissioned**
12 **officer.** Any person subject to this chapter who willfully
13 disobeys a lawful command of that person's superior commissioned
14 officer shall be punished:

15 (1) If the offense is committed in time of war, by
16 confinement of not more than ten years or such other
17 punishment as a court-martial may direct; and

18 (2) If the offense is committed at any other time, by such
19 punishment as a court-martial may direct.

20 **§ -147 Insubordinate conduct toward warrant officer,**
21 **noncommissioned officer, or petty officer.** Any warrant officer
22 or enlisted member who:

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1 (1) Strikes or assaults a warrant officer, noncommissioned
2 officer, or petty officer, while that officer is in
3 the execution of that officer's office;
4 (2) Willfully disobeys the lawful order of a warrant
5 officer, noncommissioned officer, or petty officer; or
6 (3) Treats with contempt or is disrespectful in language
7 or deportment toward a warrant officer,
8 noncommissioned officer, or petty officer, while that
9 officer is in the execution of that officer's office,
10 shall be punished as a court-martial may direct.

11 **§ -148 Failure to obey order, regulation, or rule.** Any
12 person subject to this chapter who:

13 (1) Violates or fails to obey any lawful general order,
14 regulation, or rule;
15 (2) Having knowledge of any other lawful order issued by a
16 member of the state military forces, that it is that
17 person's duty to obey, fails to obey the order; or
18 (3) Is derelict in the performance of that person's
19 duties,
20 shall be punished as a court-martial may direct.

21 **§ -149 Cruelty and maltreatment.** Any person subject to
22 this chapter who is guilty of cruelty toward, or oppression or

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1 maltreatment of, any person subject to that person's orders
2 shall be punished as a court-martial may direct.

3 **§ -150 Prohibited activities with military recruit or**
4 **trainee by person in position of special trust.** (a) Any person
5 subject to this chapter who:

6 (1) Is an officer, a noncommissioned officer, or a petty
7 officer;

8 (2) Is in a training leadership position with respect to a
9 specially protected junior member of the state
10 military forces; and

11 (3) Engages in prohibited sexual activity with the
12 specially protected junior member of the state
13 military forces,

14 shall be punished as a court-martial may direct.

15 (b) Any person subject to this chapter who:

16 (1) Is a military recruiter and engages in prohibited
17 sexual activity with an applicant for military
18 service; or

19 (2) Is a military recruiter and engages in prohibited
20 sexual activity with a specially protected junior
21 member of the state military forces who is enlisted
22 under a delayed entry program,

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1 shall be punished as a court-martial may direct.

2 (c) Consent is not a defense for any conduct at issue in a
3 prosecution under this section.

4 (d) In this section:

5 (1) The term "specially protected junior member of the
6 state military forces" means:

7 (A) A member of the state military forces who is
8 assigned to, or is awaiting assignment to, basic
9 training or other initial active duty for
10 training, including a member who is enlisted
11 under a delayed entry program;

12 (B) A member of the state military forces who is a
13 cadet, a midshipman, an officer candidate, or a
14 student in any other officer qualification
15 program; or

16 (C) A member of the state military forces in any
17 program that by regulation or rule prescribed by
18 the Secretary concerned or the governor or the
19 adjutant general, is identified as a training
20 program for initial career qualification.

21 (2) The term "training leadership position" means, with
22 respect to a specially protected junior member of the

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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 regulation or rule prescribed by the Secretary concerned or the governor or the adjutant general, is identified as a training program for initial career qualification.

(3) The term "applicant for military service" means a person who, under regulations or rules prescribed by the Secretary of concerned or the governor or the adjutant general, is an applicant for original enlistment or appointment in the state military forces.

(4) The term "military recruiter" means, a person who, under regulations or rules prescribed by the Secretary of concerned or the governor or the adjutant general, has the primary duty to recruit persons for military service.

(5) The term "prohibited sexual activity" means, as specified in regulations or rules prescribed by the

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1 Secretary of concerned or the governor or the adjutant
2 general, inappropriate physical intimacy under
3 circumstances described in the regulations or rules.

4 § -151 **Mutiny or sedition.** (a) Any person subject to
5 this chapter who:

6 (1) With intent to usurp or override lawful military
7 authority, refuses, in concert with any other person,
8 to obey orders or otherwise do that person's duty or
9 creates any violence or disturbance is guilty of
10 mutiny;

11 (2) With intent to cause the overthrow or destruction of
12 lawful civil authority, creates, in concert with any
13 other person, revolt, violence, or other disturbance
14 against that authority is guilty of sedition; or

15 (3) Fails to do that person's utmost to prevent and
16 suppress a mutiny or sedition being committed in the
17 person's presence or fails to take all reasonable
18 means to inform the person's superior commissioned
19 officer or commanding officer of a mutiny or sedition
20 that the person knows or has reason to believe is
21 taking place is guilty of a failure to suppress or
22 report a mutiny or sedition.

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(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 a court-martial may direct.

§ -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 not more than ten years or other punishment as a court-martial may direct; and

(2) If the offense is committed other than in time of war, by such punishment as a court-martial may direct.

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

§ -153 Disrespect toward sentinel or lookout. (a) Any person subject to this chapter who, knowing that another person is a sentinel or lookout, 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, shall be punished as a court-martial may direct.

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(b) Any person subject to this chapter who, knowing that another person is a sentinel or lookout, 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 a court-martial may direct.

§ -154 Release of prisoner without authority; drinking with prisoner. (a) Any person subject to this chapter:

(1) Who, without authority to do so, releases a prisoner;

or

(2) Who, through neglect or designs, allows a prisoner to escape,

shall be punished as a court-martial may direct, whether or not 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 a court-martial may direct.

§ -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 a court-martial may direct.

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1 **§ -156 Misconduct as prisoner.** Any person subject to
2 this chapter who, while in the hands of the enemy in time of
3 war:

4 (1) For the purpose of securing favorable treatment by the
5 person's captors acts without proper authority in a
6 manner contrary to law, custom, regulation, or rule to
7 the detriment of others of whatever nationality held
8 by the enemy as civilian or military prisoners; or

9 (2) While in a position of authority over such persons
10 maltreats them without justifiable cause,
11 shall be punished as a court-martial may direct.

12 **§ -157 Misbehavior before the enemy.** Any member of the
13 state military forces who before the presence of the enemy:

14 (1) Runs away;

15 (2) Shamefully abandons, surrenders, or delivers up any
16 command, unit, place, or military property that it is
17 that person's duty to defend;

18 (3) Through disobedience, neglect, or intentional
19 misconduct endangers the safety of any such command,
20 unit, place, or military property;

21 (4) Casts away the person's arms or ammunition;

22 (5) Is guilty of cowardly conduct;

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- 1 (6) Quits the person's place of duty to plunder or
2 pillage;
- 3 (7) Causes false alarms in any command, unit, or place
4 under control of the state military forces;
- 5 (8) Willfully fails to do the person's utmost to
6 encounter, engage, capture, or destroy any enemy
7 troops, combatants, vessels, aircraft, or any other
8 thing that it is the person's duty so to encounter,
9 engage, capture, or destroy; or
- 10 (9) Does not afford all practicable relief and assistance
11 to any troops, combatants, vessels, or aircraft of the
12 state military forces or the armed forces belonging to
13 the State, the United States or their allies, or any
14 other state, commonwealth, or territory when engaged
15 in battle,
- 16 shall be punished as a court-martial may direct.

17 § -158 **Subordinate compelling surrender.** Any person
18 subject to this chapter who compels or attempts to compel the
19 commander of any place, vessel, aircraft, or other military
20 property, or of any body of members of the state military forces
21 or the armed forces of the United States to give it up to an
22 enemy or to abandon it, or who strikes the color or flag to an

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1 enemy without proper authority, shall be punished as a court-
2 martial may direct.

3 **§ -159 Improper use of countersign.** Any person subject
4 to this chapter who in time of war discloses the parole or
5 countersign to any person not entitled to receive it or who
6 gives to another who is entitled to receive and use the parole
7 or countersign a different parole or countersign from that
8 which, to that person's knowledge, the person was authorized and
9 required to give, shall be punished as a court-martial may
10 direct.

11 **§ -160 Forcing a safeguard.** Any person subject to this
12 chapter who forces a safeguard shall be punished as a court-
13 martial may direct.

14 **§ -161 Spies.** Any person who in time of war is found
15 lurking as a spy or acting as a spy in or about any place,
16 vessel, or aircraft, within the control or jurisdiction of the
17 state military forces or of the United States armed forces, or
18 in or about any shipyard, any manufacturing or industrial plant,
19 or any other place or institution engaged in work in aid of the
20 prosecution of the war by the United States, or elsewhere, shall
21 be tried by a general court-martial and on conviction shall be
22 punished as a court-martial may direct.

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1 § -162 **Espionage.** (a) Any person subject to this
2 chapter who, with intent or reason to believe that it is to be
3 used to the injury of the State or the United States, or to
4 another state, commonwealth, or territory of the United States,
5 or to the advantage of a foreign nation, communicates, delivers,
6 or transmits, or attempts to communicate, deliver, or transmit,
7 to any entity described in subsection (b), either directly or
8 indirectly, anything described in subsection (c) shall be
9 punished as a court-martial may direct.

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

11 (1) A foreign government;

12 (2) A faction or party or military or naval force within a
13 foreign country, whether recognized or unrecognized by
14 the United States; or

15 (3) A representative, officer, agent, employee, subject,
16 or citizen of such government, faction, party, or
17 force.

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

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1 **§ -163 Aiding the enemy.** Any person who:

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

8 shall be punished as a court-martial may direct.

9 **§ -164 Public record offenses.** Any person subject to
10 this chapter who, willfully and unlawfully:

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

16 shall be punished as a court-martial may direct.

17 **§ -165 Fraudulent enlistment, appointment, or separation.**

18 Any person who:

- 19 (1) Procures for that person's own enlistment or
20 appointment in the state military forces by knowingly
21 false representation or deliberate concealment as to
22 that person's qualifications for that enlistment or

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1 appointment and receives pay or allowances thereunder;
2 or
3 (2) Procures for that person's own separation from the
4 state military forces by knowingly false
5 representation or deliberate concealment as to that
6 person's eligibility for that separation,
7 shall be punished as a court-martial may direct.

8 **§ -166 Unlawful enlistment, appointment, or separation.**

9 Any person subject to this chapter who effects an enlistment or
10 appointment in or a separation from the state military forces of
11 any person who is known to that person to be ineligible for that
12 enlistment, appointment, or separation because it is prohibited
13 by law, regulation, rule, or order shall be punished as a court-
14 martial may direct.

15 **§ -167 Forgery.** Any person subject to this chapter who,
16 with intent to defraud:

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

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1 is guilty of forgery and shall be punished as a court-martial
2 may direct.

3 **§ -168 False or unauthorized pass offenses.** (a) Any
4 person subject to this chapter who, wrongfully and falsely,
5 makes, alters, counterfeits, or tampers with a military or
6 official pass, permit, discharge certificate, or identification
7 card shall be punished as a court-martial may direct.

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

14 (c) Any person subject to this chapter who wrongfully uses
15 or possesses a false or unauthorized military or official pass,
16 permit, discharge certificate, or identification card, knowing
17 that the pass, permit, discharge certificate, or identification
18 card is false or unauthorized, shall be punished as a court-
19 martial may direct.

20 **§ -169 Impersonation of officer, noncommissioned or petty**
21 **officer, or agent or official.** (a) Any person subject to this
22 chapter who, wrongfully and willfully, impersonates:

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1 (1) An officer, a noncommissioned officer, or a petty
2 officer;

3 (2) An agent of superior authority of one of the armed
4 forces; or

5 (3) An official of a government,
6 shall be punished as a court-martial may direct.

7 (b) Any person subject to this chapter who, wrongfully and
8 willfully, and with intent to defraud, impersonates any person
9 referred to in paragraph (1), (2), or (3) of subsection (a)
10 shall be punished as a court-martial may direct.

11 (c) Any person subject to this chapter who wrongfully and
12 willfully, and without intent to defraud, impersonates an
13 official of a government by committing an act that exercises or
14 asserts the authority of the office that the person claims to
15 have shall be punished as a court-martial may direct.

16 § -170 **Wearing unauthorized insignia, decoration, badge,**
17 **ribbon, device, or lapel button.** Any person subject to this
18 chapter who:

19 (1) is not authorized to wear an insignia, decoration,
20 badge, ribbon, device, or lapel button; and

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1 (2) wrongfully wears such insignia, decoration, badge,
2 ribbon, device, or lapel button upon the person's
3 uniform or civilian clothing,
4 shall be punished as a court-martial may direct.

5 **§ -171 False official statements; false swearing. (a)**

6 Any person subject to this chapter who, with intent to deceive:

7 (1) Signs any false record, return, regulation, order, or
8 other official document, knowing it to be false; or

9 (2) Makes any other false official statement knowing it to
10 be false,

11 shall be punished as a court-martial may direct.

12 (b) Any person subject to this chapter:

13 (1) Who takes an oath or affirmation that:

14 (A) Is administered in a matter in which the oath or
15 affirmation is required or authorized by law; and

16 (B) Is administered by a person with authority to do
17 so; and

18 (2) Who, upon the oath or affirmation, makes or subscribes
19 to a statement,

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

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1 § -172 (Reserved).

2 § -173 **Military property; loss, damage, destruction, or**
3 **wrongful disposition.** Any person subject to this chapter who,
4 without proper authority::

5 (1) Sells or otherwise disposes of;

6 (2) Willfully or through neglect damages, destroys, or
7 loses; or

8 (3) Willfully or through neglect suffers to be lost,

9 damaged, destroyed, sold, or wrongfully disposed of,

10 any military property of the State, the United States, or any of
11 its states, territories, or commonwealths, shall be punished as
12 a court-martial may direct.

13 § -174 **Captured or abandoned property.** (a) All persons
14 subject to this chapter shall secure all public property taken
15 from the enemy for the service of the United States or the State
16 and shall give notice and turn over to the proper authority
17 without delay all captured or abandoned property in their
18 possession, custody, or control.

19 (b) Any person subject to this chapter who:

20 (1) Fails to carry out the duties prescribed in subsection

21 (a);

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(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 a court-martial may direct.

§ -175 Property other than military property - waste, spoilage, or destruction. Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States or of the State shall be punished as a court-martial may direct.

§ -176 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 a court-martial may direct.

(b) Any person subject to this chapter who wrongfully opens, secrets, destroys, or steals mail matter before the

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1 matter is delivered to or received by the addressee shall be
2 punished as a court-martial may direct.

3 **§ -177 Improper hazarding of vessel or aircraft. (a)**

4 Any person subject to this chapter who, willfully and
5 wrongfully, hazards or suffers to be hazarded any vessel or
6 aircraft of the armed forces of the United States or any state
7 military force shall be punished as a court-martial may direct.

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

12 **§ -178 (Reserved).**

13 **§ -179 Drunkenness and other incapacitation offenses.**

14 (a) Any person subject to this chapter who is drunk on duty
15 shall be punished as a court-martial may direct.

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

20 (c) Any person subject to this chapter who is a prisoner
21 and, while in such status, is drunk shall be punished as a
22 court-martial may direct.

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1 § -180 Wrongful use, possession, etc., of controlled
2 substances. (a) Any person subject to this chapter who
3 wrongfully uses, possesses, manufactures, distributes, imports
4 into the customs territory of the United States, exports from
5 the United States, or introduces into an installation, vessel,
6 vehicle, or aircraft used by or under the control of the armed
7 forces or any state military force a substance described in
8 subsection (b) shall be punished as a court-martial may direct.

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

11 (1) Opium, heroin, cocaine, amphetamine, lysergic acid
12 diethylamide, methamphetamine, phencyclidine,
13 barbituric acid, and marijuana and any compound or
14 derivative of any such substance.

15 (2) Any substance not specified in paragraph (1) that is
16 listed on a schedule of controlled substances
17 prescribed by the President for the purposes of the
18 Uniform Code of Military Justice of the armed forces
19 of the United States as provided in title 10 United
20 States Code sections 801 et. seq.

21 (3) Any other substance not specified in paragraph (1) or
22 contained on a list prescribed by the President under

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paragraph (2) that is listed in schedules I through V of article 202 of the Controlled Substances Act as contained in title 21 United States Code section 812).

§ -181 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 -180; 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 a court martial may direct.

(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

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1 may be provided under paragraph (3) for conduct on a
2 military installation that is in more than one state,
3 district, territory, or commonwealth;

4 (2) The blood alcohol content limit specified in
5 subsection (c); or

6 (3) In the case of a military installation that is in more
7 than one state, district, territory, or commonwealth,
8 if those states, districts, territories, or
9 commonwealths have different blood alcohol content
10 limits under their respective state laws, the limit
11 specified for the installation.

12 (c) For purposes of subsection (b), the blood alcohol
13 content limit with respect to alcohol concentration in a
14 person's blood is 0.08 grams of alcohol per 100 milliliters of
15 blood and with respect to alcohol concentration in a person's
16 breath is 0.08 grams of alcohol per 210 liters of breath, as
17 shown by chemical analysis.

18 § -182 **Endangerment offenses.** (a) Any person subject to
19 this chapter who engages in conduct that:

20 (1) Is wrongful and reckless or is wanton; and

21 (2) Is likely to produce death or grievous bodily harm to
22 another person,

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1 shall be punished as a court-martial may direct.

2 (b) Any person subject to this chapter who:

3 (1) Fights or promotes a fight, or is concerned in or
4 connives a fight; or

5 (2) Having knowledge of a challenge sent or about to be
6 sent, fails to report the facts promptly to the proper
7 authority,

8 shall be punished as a court-martial may direct.

9 (c) Any person subject to this chapter who, willfully and
10 wrongly, discharges a firearm, under circumstances such as to
11 endanger human life shall be punished as a court-martial may
12 direct.

13 (d) Any person subject to this chapter who unlawfully
14 carries a dangerous weapon concealed on or about his person
15 shall be punished as a court-martial may direct.

16 **§ -183 Communicating threats.** (a) Any person subject to
17 this chapter who wrongfully communicates a threat to injure the
18 person, property, or reputation of another shall be punished as
19 a court-martial may direct.

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

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- 1 (1) An explosive;
- 2 (2) A weapon of mass destruction;
- 3 (3) A biological or chemical agent, substance, or weapon;
- 4 or
- 5 (4) A hazardous material,
- 6 shall be punished as a court-martial may direct.

7 (c) Any person subject to this chapter who maliciously

8 communicates a false threat concerning injury to the person or

9 property of another by use of:

- 10 (1) An explosive;
- 11 (2) A weapon of mass destruction;
- 12 (3) a biological or chemical agent, substance, or weapon;
- 13 or
- 14 (4) A hazardous material,
- 15 shall be punished as a court-martial may direct.

16 (d) As used in this section, the term "false threat" means

17 a threat that, at the time the threat is communicated, is known

18 to be false by the person communicating the threat.

19 **§ -184 Riot or breach of peace.** Any person subject to

20 this chapter who causes or participates in any riot or breach of

21 the peace shall be punished as a court-martial may direct.

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1 § -185 **Provoking speeches or gestures.** Any person
2 subject to this chapter who uses provoking or reproachful words
3 or gestures towards any other person subject to this chapter
4 shall be punished as a court-martial may direct.

5 § -186 (Reserved) .

6 § -187 (Reserved) .

7 § -188 (Reserved) .

8 § -189 (Reserved) .

9 § -190 (Reserved) .

10 § -191 (Reserved) .

11 § -192 (Reserved) .

12 § -193 (Reserved) .

13 § -194 (Reserved) .

14 § -195 (Reserved) .

15 § -196 (Reserved) .

16 § -197 (Reserved) .

17 § -198 (Reserved) .

18 § -199 (Reserved) .

19 § -200 **Offenses concerning government computers.** (a)

20 Any person subject to this chapter who:

21 (1) Knowingly accesses a government computer, with an
22 unauthorized purpose, and by doing so obtains

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1 classified information, with reason to believe such
2 information could be used to the injury of the United
3 States, or to the advantage of any foreign nation, and
4 intentionally communicates, delivers, transmits, or
5 causes to be communicated, delivered, or transmitted
6 such information to any person not entitled to receive
7 it;

8 (2) Intentionally accesses a government computer, with an
9 unauthorized purpose, and thereby obtains classified
10 or other protected information from any such
11 government computer; or

12 (3) Knowingly causes the transmission of a program,
13 information, code, or command, and as a result of such
14 conduct, intentionally causes damage without
15 authorization, to a government computer,

16 shall be punished as a court-martial may direct.

17 (b) In this section:

18 (1) The term "computer" has the meaning given that term as
19 provided in title 18 United States Code section 1030.

20 (2) The term "government computer" means a computer owned
21 or operated by or on behalf of the United States
22 Government, including the state military forces.

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(3) The term "damage" has the meaning given that term as provided in title 18 United States Code section 1030.

§ -201 (Reserved) .

§ -202 Frauds 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 such

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1 signature knowing it to be forged or

2 counterfeited;

3 (3) Who, having charge, possession, custody or control of
4 any money, or other property of the United States or
5 the State, furnished or intended for the armed forces
6 of the United States or the state military forces,
7 knowingly delivers to any person having authority to
8 receive it, an amount thereof less than that for which
9 a certificate or receipt is received; or

10 (4) Who, being authorized to make or deliver any paper
11 certifying the receipt of any property of the United
12 States furnished or intended for the armed forces
13 thereof, makes or delivers to any person such writing
14 without having full knowledge of the truth of the
15 statements therein contained and with intent to
16 defraud the United States or the State,

17 shall, upon conviction, be punished as a court-martial may
18 direct.

19 § -203 (Reserved) .

20 § -204 (Reserved) .

21 § -205 (Reserved) .

22 § -206 (Reserved) .

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1 § -207 (Reserved) .

2 § -208 (Reserved) .

3 § -209 (Reserved) .

4 § -210 (Reserved) .

5 § -211 (Reserved) .

6 § -212 (Reserved) .

7 § -213 **Perjury.** Any person subject to this chapter who
8 in a judicial proceeding or in a course of justice conducted
9 under this chapter willfully and corruptly:

10 (1) Upon a lawful oath or affirmation, or in any form
11 allowed by law to be substituted for an oath or
12 affirmation, gives any false testimony material to the
13 issue or matter of inquiry; or

14 (2) In any declaration, certificate, verification, or
15 statement under penalty of perjury as permitted under
16 title 28 United States Code section 1746, subscribes
17 any false statement material to the issue or matter of
18 inquiry,

19 is guilty of perjury and shall be punished as a court-martial
20 may direct.

21 § -214 **Subornation of perjury.** (a) Any person subject
22 to this chapter who induces and procures another person:

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1 (1) To take an oath or affirmation; and
2 (2) Falsely testify, depose, or state upon the oath or
3 affirmation,
4 shall, if the conditions specified in subsection (b) are
5 satisfied, be punished as a court-martial may direct.

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

- 8 (1) The oath or affirmation is administered with respect
9 to a matter for which such oath or affirmation is
10 required or authorized by law;
11 (2) The oath or affirmation is administered by a person
12 having authority to do so;
13 (3) Upon the oath or affirmation, the other person
14 willfully makes or subscribes a statement;
15 (4) The statement is material;
16 (5) The statement is false; and
17 (6) When the statement is made or subscribed, the person
18 subject to this chapter and the other person do not
19 believe that the statement is true.

20 § -215 **Obstructing justice.** Any person subject to this
21 chapter who engages in conduct in the case of a certain person
22 against whom the accused had reason to believe there were or

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1 would be criminal or disciplinary proceedings pending, with
2 intent to influence, impede, or otherwise obstruct due
3 administration of justice shall be punished as a court-martial
4 may direct.

5 **§ -216 Misprision of serious offense.** Any person subject
6 to this chapter:

7 (1) Who knows that another person has committed a serious
8 offense; and

9 (2) Wrongfully conceals the commission of the offense and
10 fails to make the commission of the offense known to
11 civilian or military authorities as soon as possible,
12 shall be punished as a court-martial may direct.

13 **§ -217 Wrongful refusal to testify.** Any person subject
14 to this chapter who, in the presence of a court-martial, a board
15 of officers, a court of inquiry, preliminary hearing, or an
16 officer taking a deposition, of or for the State or for the
17 United States, wrongfully refuses to qualify as a witness or to
18 answer a question after having been directed to do so by the
19 person presiding shall be punished as a court-martial may
20 direct.

21 **§ -218 Prevention of authorized seizure of property.** Any
22 person subject to this chapter who, knowing that one or more

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1 persons authorized to make searches and seizures are seizing,
2 are about to seize, or are endeavoring to seize property,
3 destroys, removes, or otherwise disposes of the property with
4 intent to prevent the seizure thereof shall be punished as a
5 court-martial may direct.

6 **§ -219 Noncompliance with procedural rules.** Any person
7 subject to this chapter who:

8 (1) Is responsible for unnecessary delay in the
9 disposition of any case of a person accused of an
10 offense under this chapter; or

11 (2) Knowingly and intentionally fails to enforce or comply
12 with any provision of this chapter regulating the
13 proceedings before, during, or after trial of an
14 accused,

15 shall be punished as a court-martial may direct.

16 **§ -220 Wrongful interference with adverse administrative**
17 **proceeding.** Any person subject to this chapter who, having
18 reason to believe that an adverse administrative proceeding is
19 pending against any person subject to this chapter, wrongfully
20 acts with the intent:

21 (1) To influence, impede, or obstruct the conduct of the
22 proceeding; or

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1 (2) Otherwise obstruct the due administration of justice,
2 shall be punished as a court-martial may direct.

3 **§ -221 Retaliation.** (a) Any person subject to this
4 chapter who, with the intent to retaliate against any person for
5 reporting or planning to report a criminal offense, or making or
6 planning to make a protected communication, or with the intent
7 to discourage any person from reporting a criminal offense or
8 making or planning to make a protected communication:

9 (1) Wrongfully takes or threatens to take an adverse
10 personnel action against any person; or

11 (2) Wrongfully withholds or threatens to withhold a
12 favorable personnel action with respect to any person,
13 shall be punished as a court-martial may direct.

14 (b) In this section:

15 (1) The term "protected communication" means the
16 following:

17 (A) A lawful communication to a Member of Congress or
18 an Inspector General; or

19 (B) A communication to a covered individual or
20 organization in which a member of the state
21 military forces, or the Armed Forces of the
22 United States complains of, or discloses

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1 information that the member reasonably believes
2 constitutes evidence of, any of the following:

3 (i) A violation of law or regulation, including
4 a law or regulation prohibiting sexual
5 harassment or unlawful discrimination; or

6 (ii) Gross mismanagement, a gross waste of funds,
7 an abuse of authority, or a substantial and
8 specific danger to public health or safety;

9 (2) The term "Inspector General" has the meaning given
10 that term in title 10 United States Code section
11 1034(j); and

12 (3) The term "covered individual or organization" means
13 any recipient of a communication specified in clauses
14 (i) through (vi) of title 10 United States Code
15 section 1034(b)(1)(B).

16 § -222 **Conduct unbecoming an officer.** Any commissioned
17 officer who is convicted of conduct unbecoming an officer shall
18 be punished as a court-martial may direct.

19 § -223 **General article.** Though not specifically
20 mentioned in this chapter, all disorders and neglects to the
21 prejudice of good order and discipline in the state military
22 forces, all conduct of a nature to bring discredit upon the

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1 state military forces, offenses specified by the governor or the
2 adjutant general by rule, and crimes and offenses not capital,
3 of which persons subject to this chapter may be guilty, shall be
4 taken cognizance of by a general, special, or summary court-
5 martial, according to the nature and degree of the offense, and
6 shall be punished at the discretion of that court. Where a
7 crime constitutes an offense that violates both this chapter and
8 the criminal laws of the state where the offense occurs or
9 criminal laws of the United States, jurisdiction of the military
10 court shall be determined in accordance with section -2(b).

11 **PART XI. MISCELLANEOUS PROVISIONS**

12 **§ -231 Courts of inquiry.** (a) Courts of inquiry to
13 investigate any matter may be convened by any person authorized
14 to convene a general court-martial or by any other person
15 designated by the governor or the adjutant general for that
16 purpose, whether or not the persons involved have requested such
17 an inquiry.

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

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

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

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

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

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

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

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

19 (j) Each court of inquiry shall keep a record of its
20 proceedings, which shall be authenticated by the signatures of
21 the president and counsel for the court and forwarded to the
22 convening authority. If the record cannot be authenticated by

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1 the president, it shall be signed by a member in lieu of the
2 president. If the record cannot be authenticated by the counsel
3 for the court, it shall be signed by a member in lieu of the
4 counsel.

5 **§ -232 Authority to administer oaths or affirmations.**

6 (a) The following members of the state military forces may
7 administer oaths or affirmations for the purposes of military
8 administration, including military justice, and affidavits may
9 be taken for those purposes before persons having the general
10 powers of a notary public:

- 11 (1) All judge advocates;
- 12 (2) All summary courts-martial;
- 13 (3) All adjutants, assistant adjutants, acting adjutants,
14 and personnel adjutants;
- 15 (4) All commanding officers;
- 16 (5) All staff judge advocates and legal officers, and
17 acting or assistant staff judge advocates and legal
18 officers;
- 19 (6) The president, military judge, trial counsel, and
20 assistant trial counsel for all general and special
21 courts-martial;

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(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 promulgated by the governor or the adjutant general, or by law.

(b) Officers of the state military forces may 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 such 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

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1 time of the member's order to duty in or with any of the state
2 military forces or within ninety days thereafter.

3 (c) Under rules prescribed by the governor or the adjutant
4 general, officers with the authority to convene courts-martial
5 or to impose non-judicial punishment shall receive periodic
6 training regarding the purposes and administration of this
7 chapter.

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

14 **§ -234 Complaints of wrongs.** Any member of the state
15 military forces who has a complaint against the member's
16 commanding officer, and who, upon due application to that
17 commanding officer, is refused redress, may complain to any
18 superior commissioned officer, who shall forward the complaint
19 to the officer exercising general court-martial jurisdiction
20 over the officer against whom it is made. The officer
21 exercising general court-martial jurisdiction shall examine into
22 the complaint and take proper measures for redressing the wrong

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1 complained of, and shall, as soon as possible, send to the
2 governor or the adjutant general a true statement of that
3 complaint, with the proceedings had thereon.

4 **§ -235 Redress of injuries to property.** (a) Whenever a
5 complaint is made to any commanding officer that willful damage
6 has been done to the property of any person or that the person's
7 property has been wrongfully taken by members of the state
8 military forces, the commanding officer may, subject to such
9 rules as the governor or the adjutant general may adopt, convene
10 a board to investigate the complaint. The board shall consist
11 of from one to three commissioned officers, and, for the purpose
12 of that investigation, it has power to summon witnesses and
13 examine them upon oath or affirmation, to receive depositions or
14 other documentary evidence, and to assess the damages sustained
15 against the responsible parties. The assessment of damages made
16 by the board is subject to the approval of the commanding
17 officer, and the amount approved by the commanding officer shall
18 be charged against the pay of the offenders. The order of the
19 commanding officer directing charges herein authorized is
20 conclusive, except as provided in subsection (c), on any
21 disbursing officer for the payment by the disbursing officer to
22 the injured parties of the damages so assessed and approved.

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1 (b) If the offenders cannot be ascertained, but the
2 organization or detachment to which they belong is known,
3 charges totaling the amount of damages assessed and approved may
4 be made in such proportion as may be considered just upon the
5 individual members thereof who are shown to have been present at
6 the scene at the time the damages complained of were inflicted,
7 as determined by the approved findings of the board.

8 Alternatively, if the offenders cannot be ascertained, but the
9 organization or detachment to which they belong is known,
10 charges totaling the amount of damages assessed and approved may
11 be paid to the injured parties from the military funds of the
12 units of the state military forces to which the offenders
13 belonged.

14 (c) Any person subject to this chapter who is accused of
15 causing willful damage to property has the right to be
16 represented by counsel, to summon witnesses in the person's
17 behalf, and to cross-examine those appearing against the person.
18 The person has the right of appeal to the next higher commander.

19 **§ -236 Delegation of authority by the governor;**
20 **rulemaking authority of the governor.** (a) The governor may
21 delegate any authority vested in the governor under this chapter

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1 to the adjutant general and may provide for the sub delegation
2 of any such authority as appropriate.

3 (b) The governor or the adjutant general, in accordance
4 with chapter 91, shall adopt such rules necessary to administer
5 and implement this chapter. Any rules required to be adopted by
6 any provision in this chapter shall be adopted in accordance
7 with chapter 91. Chapter 91 shall apply notwithstanding section
8 121-5 or any other contrary provision of law.

9 § -237 **Case management; data collection and**
10 **accessibility.** The adjutant general shall prescribe uniform
11 standards and criteria for conduct of each of the following
12 functions at all stages of the military justice system,
13 including pretrial, trial, post-trial, and appellate processes,
14 using, insofar as practicable, the best practices of federal and
15 state courts:

- 16 (1) Collection and analysis of data concerning substantive
17 offenses and procedural matters in a manner that
18 facilitates case management and decision making within
19 the military justice system, and that enhances the
20 quality of periodic reviews;
21 (2) Case processing and management;

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(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. Such a court 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 so located.

(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

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1 in such form as may be prescribed by rules issued under this
2 chapter.

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

10 **§ -240 Payment of fines and disposition thereof.** Fines
11 imposed by a military court may be paid to it or to an officer
12 executing its process. The amount of such fine may be noted
13 upon any state roll or account for pay of the delinquent and
14 deducted from any pay or allowance due or thereafter to become
15 due the delinquent, until the fine is liquidated. Any sum so
16 deducted shall be returned to the military court that imposed
17 the fine. The officer collecting a fine or penalty imposed by a
18 military court upon an officer or enlisted person shall pay it
19 within thirty days to the director of finance to the credit of
20 the state general fund.

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1 **§ -241 Immunity for action of military courts or**
2 **nonjudicial punishment.** No accused may bring an action or
3 proceeding against:

4 (1) The convening authority or a member of a military
5 court or officer or person acting under its authority
6 or reviewing its proceedings because of the approval,
7 imposition, or execution of any sentence or the
8 imposition or collection of a fine or penalty, or the
9 execution of any process or mandate of a military
10 court; or

11 (2) A commanding officer for imposing any authorized
12 nonjudicial punishment.

13 **§ -242 Presumption of jurisdiction.** The jurisdiction of
14 the military courts and boards established by this chapter shall
15 be presumed and the burden of proof rests on any person seeking
16 to oust those courts or boards of jurisdiction in any action or
17 proceeding.

18 **§ -243 Uniformity of interpretation.** This chapter shall
19 be so construed as to effectuate its general purpose to make
20 uniform the law of those states that enact it and, so far as
21 practical, to make that law uniform with the law of the United
22 States.

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1 **§ -244 Severability.** The provisions of this chapter are
2 hereby declared to be severable and if any provision of this
3 chapter or the application of such provision to any person or
4 circumstance is declared invalid for any reason, such
5 declaration shall not affect the validity of the remaining
6 portions of this chapter."

7 SECTION 3. Chapter 124A, Hawaii Revised Statutes, is
8 repealed.

9 SECTION 4. This Act does not affect rights and duties that
10 matured, penalties that were incurred, and proceedings that were
11 begun before its effective date.

12 SECTION 5. This Act, upon its approval, shall take effect
13 on January 1, 2023.

14

15

16

INTRODUCED BY: 

17

BY REQUEST

JAN 24 2022

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Report Title:

Department of Defense; Hawaii National Guard; The Hawaii Code of Military Justice

Description:

Updates the Hawaii Code of Military Justice, by repealing chapter 124A, Hawaii Revised Statutes, and adding a new chapter to promote order and discipline in the State Military Forces by fostering an independent military justice system and updating nonjudicial punishment and courts-martial procedures.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Defense

TITLE: A BILL FOR AN ACT RELATING TO THE HAWAII CODE OF MILITARY JUSTICE.

PURPOSE: To update the Hawaii Code of Military Justice, by repealing chapter 124A, Hawaii Revised Statutes, and adding a new chapter to promote order and discipline in the State Military Forces by fostering an independent military justice system and updating nonjudicial punishment and courts-martial procedures.

MEANS: Repeal chapter 124A, Hawaii Revised Statutes (HRS), and add a new chapter.

JUSTIFICATION: The current Hawaii Code of Military Justice (HCMJ), which outlines procedures and punishments for violations of military justice, was first enacted in 1982. Updates are needed to give commanders the tools they need to maintain good order and discipline within the State Military Forces while simultaneously protecting the due process rights of the accused. The updates also bring non-judicial punishment and court-martial procedures further in line with the Uniform Code of Military Justice.

Authorized punishments under the current HCMJ do not serve as a significant deterrent for servicemember misconduct and lack the necessary teeth to maintain good order and discipline. The updates to court-martial procedures will help State Military Force judge advocates seamlessly transition between state service and federal service when called upon. Finally, this revision will further develop confidence in an independent military justice system.

Impact on the public: A revised HCMJ will give the public confidence that the State Military Forces are well disciplined and

well-regulated to meet the needs of the State in times of emergency or war.

Impact on the department and other agencies:
Positive impact to the Department of Defense for discipline and readiness. No new impacts on other agencies.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: DEF 116.

OTHER AFFECTED
AGENCIES: Judiciary, Public Safety (including Corrections, Sheriffs, and county police departments), Attorney General (and county prosecuting attorney offices).

EFFECTIVE DATE: January 1, 2023.