

CODE 20

SIDEBAR

COVID-19 AND MILITARY JUSTICE OPERATIONS

This Code 20 Sidebar addresses continuity of operations for courts-martial in light of the guidance provided by the Department of Defense and Department of the Navy. Additional information can be found at the recently released Secretary of Defense Guidance on Travel Restrictions for Department of Defense Components in response to COVID-19, Deputy Secretary of Defense Memo re: Stop Movement for all Domestic Travel for DoD Components in Response to Corona virus Disease 2019 dated 13 March 2020, ALNAV 026/20, ALNAV 025/20, NAVADMIN 064/20, MARADMIN 167/20, MARADMIN 162/20, and MARADMIN 150/20. Below are several questions we have seen that hopefully we can answer to reduce the uncertainty.

1. Are our courts “closed” during this time?

Answer: No. However, whether a proceeding will take place (e.g., motions hearing, guilty plea, trial) will be determined on a case-by-case basis by the military judge. After arraignment, it is within the discretion of the military judge whether and when a proceeding will take place.

Circuit Judges have provided information to the Senior Trial Counsel and Defense Counsel within their circuits as to how they can be reached if they are teleworking and how motions and notices can be filed.

2. What if the court-martial involves a witness or other service member located outside the local area?

Answer: In order to mitigate the transmission of COVID-19, the Deputy Secretary of Defense issued a stop movement order for all domestic travel that went into effect on 16 March 2020. In accordance with the Deputy Secretary of Defense, all DoD military and civilian personnel and their families are ordered to stop movement. This means all official travel (TDY, TAD, and PCS moves) and personal leave outside of the local area is prohibited unless one of the exceptions is met. According to the Deputy Secretary of Defense, “a travel exception may be granted in writing to the guidance contained herein for compelling cases where the travel is: (1) determined to be mission-essential; (2) necessary for humanitarian reasons; or (3) warranted due to extreme hardship. Mission-essential travel refers to work that must be performed to ensure the continued operations of mission-essential functions, as determined by the DoD Component.” Whether a specific court-martial warrants “mission essential” travel will be determined by the first flag officer, first General Officer, or Senior Executive Service (SES) in the chain of command of the traveler. Before denying travel, these travel approval authorities should discuss with their Staff Judge Advocate how their decision to deny travel may impact the case.

If a witness or any participant in a court-martial is unable to travel to the court-martial based on the recent travel restrictions, trial or defense counsel may, either individually or jointly, request a continuance under R.C.M. 906(b)(1). The Discussion in that rule states, “The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. See Article 40.” Although within the discretion of the military judge, it is likely that the Stop Travel order will warrant a continuance except in extraordinary circumstances.

In the absence of a continuance, other options for counsel to consider include requesting use of remote testimony under R.C.M. 914B or seeking to declare a witness unavailable under M.R.E. 804 and R.C.M. 703(b)(3). However, it is important to emphasize that trial witnesses cannot testify on the ultimate issue of guilt remotely via VTC if the defense objects.

3. What can the convening authority do if charges are preferred and not referred?

Answer: The convening authority should evaluate each case independently. The first step in that evaluation is consideration of the applicable statute of limitations for each specification. Based on that evaluation, and if the statute of limitation does not require going forward on the case in the near term, the convening authority can dismiss the charge(s) and re-prefer the charge(s) at a later date. If an Article 32 hearing is pending and the CA declines to dismiss the charge(s) due to a statute of limitation issue or for some other reason, the convening authority can grant a trial counsel request for excludable delay. If the convening authority elects to do this, the convening authority should grant such a request in increments. For example, grant a request for excludable delay for 30 days and then reevaluate the situation to determine if another excludable delay request is warranted. Most appointing orders provide that Article 32 Hearing Officers can grant short delays. However, the short delay that an Article 32 Hearing Officer is typically authorized to grant may not be long enough in the current environment, and the better practice is to have the CA grant larger periods of excludable delay. Remember to inform victim(s) and victims’ counsel when charges are dismissed or an Article 32 hearing is delayed.

4. What do I do if the accused is in pre-trial confinement and the witnesses are not able to travel?

Answer: Each case should be analyzed independently. This means if an accused is in pre-trial confinement, the Government must exercise reasonable diligence to ensure the accused is brought to trial. *U.S. v. Kossman*, 38 M.J. 258 (C.M.A. 1993). As previously indicated, if witnesses are not able to travel to the court-martial as a result of the recent travel restrictions, the Government may present that information as evidence supporting a continuance in the court-martial proceedings. The military judge will make an independent decision based on the facts of the case, but it is likely that the Stop Travel Order will warrant relief in most cases. The Government must continue to proceed diligently in a case even if a continuance is granted. “Stop Travel” does not mean the parties should stop working on a case and they must be ready to proceed on the rescheduled date.

5. Will I be able to submit requests for pre-referral tools such as warrants and investigative subpoenas?

Answer: Yes. Military judges will continue to consider all filings submitted to the court. Check with your Circuit Military Judge to determine how electronic filings will be submitted and the requirements for such submissions.

6. What if the accused demands speedy trial or opposes the Government's request for a continuance?

Answer: All cases must be evaluated independently. The Military Judge will consider all filings submitted to the court and make a decision based on the evidence presented.

7. If the court-martial proceeds, will special measures be implemented to prevent the spread of COVID-19?

Answer: Yes. All guidance provided in NAVADMIN 064/20, MARADMIN 167/20, MARADMIN 162/20, and MARADMIN 150/20 will be followed in all military courtrooms. This includes, but is not limited to, employing distance guidance between individuals in the courtroom to the extent practicable and properly disinfecting the courtroom before and after each session of court.

8. Will the courts be open for spectators?

Answer: In accordance with the constitutional obligation to maintain open courts, the trial courts will not, absent exceptional circumstances or as provided for certain closed hearings, prevent anyone from entering a court-martial proceeding. With that said, individuals who do not have a professional need to be present are requested to seriously consider whether the public interest would be better served by remaining away from the proceedings.

9. What do I do if someone involved in the court-martial tests positive with COVID-19, shows symptoms of COVID-19, or comes in close contact with a person that has COVID-19?

Answer: Notify your chain of command and the military judge immediately.

This Sidebar and support references have been posted to Code 20's page on the JAG Portal at: <https://portal.secnav.navy.mil/orgs/JAG/20/SitePages/Home.aspx>

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