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Title 3—

The President

Executive Order 12960 of May 12, 1995

Amendments to the Manual for Courts-Martial, United States, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, Executive Order No. 12767, Executive Order No. 12888, and Executive Order No. 12936, it is hereby ordered as follows:

Section 1. Part I of the Manual for Courts-Martial, United States, 1984, is amended as follows:

Preamble, paragraph 4, is amended to read as follows:

''4. Structure and application of the Manual for Courts-Martial.

The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and the Nonjudicial Punishment Procedures (Parts I–V). The Manual shall be applied consistent with the purpose of military law.

The Manual shall be identified as ''Manual for Courts-Martial, United States (19xx edition).'' Any amendments to the Manual made by Executive Order shall be identified as ''19xx Amendments to the Manual for Courts-Martial, United States.''''

Sec. 2. Part II of the Manual for Courts-Martial, United States, 1984, is amended to read as follows:

a. R.C.M. 810(d) is amended to read as follows:

''(d) *Sentence limitations.*

(1) *In general.* Sentences at rehearings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003. Except as otherwise provided in subsection (d)(2) of this rule, offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial or hearing, unless the sentence prescribed for the offense is mandatory. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited above, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an ''other trial'' no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving a mandatory punishment or one otherwise considered capital.

(2) *Pretrial agreement.* If, after the earlier court-martial, the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the approved sentence resulting at a rehearing of the affected charges and specifications may include any otherwise lawful

punishment not in excess of or more serious than lawfully adjudged at the earlier court-martial.''

b. R.C.M. 924(a) is amended to read as follows:

''(a) *Time for reconsideration.* Members may reconsider any finding reached by them before such finding is announced in open session.''

c. R.C.M. 924(c) is amended to read as follows:

''(c) *Military judge sitting alone.* In a trial by military judge alone, the military judge may reconsider any finding of guilty at any time before announcement of sentence and may reconsider the issue of the finding of guilty of the elements in a finding of not guilty only by reason of lack of mental responsibility at any time before announcement of sentence or authentication of the record of trial in the case of a complete acquittal.''

d. R.C.M. 1003(b)(9) and the accompanying discussion are deleted.

e. R.C.M. 1003(b)(10), (11), and (12) are redesignated as subsections (9), (10), and (11), respectively.

f. R.C.M. 1009 is amended to read as follows:

''(a) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) *Exceptions.*

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence after it has been announced, and may increase the sentence upon reconsideration in accordance with subsection (e) of this rule.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(c) *Clarification of sentence.* A sentence may be clarified at any time prior to action of the convening authority on the case.

(1) *Sentence adjudged by the military judge.* When a sentence adjudged by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practical after the ambiguity is discovered.

(2) *Sentence adjudged by members.* When a sentence adjudged by members is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members who adjudged the sentence as soon as practical after the ambiguity is discovered.

(d) *Action by the convening authority.* When a sentence adjudged by the court-martial is ambiguous, the convening authority may return the matter to the court-martial for clarification. When a sentence adjudged by the court-martial is apparently illegal, the convening authority may return the matter to the court-martial for reconsideration or may approve a sentence no more severe than the legal, unambiguous portions of the adjudged sentence.

(e) *Reconsideration procedure.* Any member of the court-martial may propose that a sentence reached by the members be reconsidered.

(1) *Instructions.* When a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration.

(2) *Voting.* The members shall vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

(3) *Number of votes required.*

(A) *With a view to increasing.* Subject to subsection (b) of this rule, members may reconsider a sentence with a view of increasing it only if at least a majority of the members vote for reconsideration.

(B) *With a view to decreasing.* Members may reconsider a sentence with a view to decreasing it only if:

(i) In the case of a sentence which includes death, at least one member votes to reconsider;

(ii) In the case of a sentence which includes confinement for life or more than 10 years, more than one-fourth of the members vote to reconsider; or

(iii) In the case of any other sentence, more than one-third of the members vote to reconsider.

(4) *Successful vote.* If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply.''

g. R.C.M. 1103(b)(3)(L) is deleted.

h. R.C.M. 1103(b)(3)(M) and (N) are redesignated as subsections (L) and (M), respectively.

i. R.C.M. 1103(c)(2) is amended to read as follows:

''(2) *Not involving a bad-conduct discharge.* If the special court-martial resulted in findings of guilty but a bad-conduct discharge was not adjudged, the requirements of subsections (b)(1), (b)(2)(D), and (b)(3)(A)—(F) and (I)—(M) of this rule shall apply.''

j. R.C.M. 1104(b)(2) is amended to read as follows:

''(2) *Summary courts-martial.* The summary court-martial record of trial shall be disposed of as provided in R.C.M. 1305(d). Subsection (b)(1)(D) of this rule shall apply if classified information is included in the record of trial of a summary court-martial.''

k. R.C.M. 1106(d)(3) is amended by adding a new subsection (B) as follows:

''(B) A recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence;''

l. R.C.M. 1106(d)(3)(B)—(E) are redesignated as subsections (C)—(F), respectively.

m. R.C.M. 1107(d) is amended by adding a new subparagraph (3) as follows:

''(3) *Postponing service of a sentence to confinement.*

(A) In a case in which a court-martial sentences an accused referred to in subsection (B), below, to confinement, the convening authority may postpone service of a sentence to confinement by a court-martial, without the consent of the accused, until after the accused has been permanently released to the armed forces by a state or foreign country.

(B) Subsection (A) applies to an accused who, while in custody of a state or foreign country, is temporarily returned by that state or foreign country to the armed forces for trial by court-martial; and after the court-martial, is returned to that state or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(C) As used in subsection (d)(3), the term ''state'' means a state of the United States, the District of Columbia, a territory, and a possession of the United States.''

n. R.C.M. 1107(d)(3) is redesignated as R.C.M. 1107(d)(4).

o. R.C.M. 1107(e)(1)(C)(iii) is amended to read as follows:

''(iii) *Rehearing on sentence only.* A rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings. If the convening authority determines a rehearing on sentence is impracticable, the convening authority may approve a sentence of no punishment without conducting a rehearing.''

p. R.C.M. 1107(f)(2) is amended to read as follows:

''(2) *Modification of initial action.* The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. The convening authority also may recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action. In addition, in any special court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Article 64, 66, 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action.''

q. R.C.M. 1108(b) is amended to read as follows:

''(b) *Who may suspend and remit.* The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial except for a sentence of death. The general court-martial convening authority over the accused at the time of the court-martial may, when taking the action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President. The commander of the accused who has the authority to convene a court-martial of the kind which adjudged the sentence may suspend or remit any part or amount of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial which does not include a bad-conduct discharge regardless of whether the person acting has previously approved the sentence. The ''unexecuted part of any sentence'' includes that part which has been approved and ordered executed but which has not actually been carried out.''

r. R.C.M. 1113(d)(2)(A) is amended by adding a new subparagraph (iii) as follows:

''(iii) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to Article 57(e), has postponed the service of a sentence to confinement;''

s. R.C.M. 1113(d)(2)(A)(iii)—(iv) are redesignated 1113(d)(A)(iv)—(v), respectively.

t. R.C.M. 1113(d)(5) is deleted.

u. R.C.M. 1113(d)(6) is redesignated as subsection (5).

v. R.C.M. 1201(b)(3)(A) is amended to read as follows:

''(A) *In general.* Notwithstanding R.C.M. 1209, the Judge Advocate General may, sua sponte or, except when the accused has waived or withdrawn the right to appellate review under R.C.M. 1110, upon application of the accused or a person with authority to act for the accused, vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial that has been finally reviewed, but has not been reviewed either by a Court of Military Review or by the Judge Advocate General under subsection (b)(1) of this rule, on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.''

w. R.C.M. 1305(d) is deleted.

x. R.C.M. 1305(e) is redesignated as subsection (d).

Sec. 3. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. M.R.E. 311(g)(2) is amended to read as follows:

''(2) *False statements.* If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules.''

b. M.R.E. 506(e) and (f) are amended to read as follows:

''(e) *Pretrial session.* At any time after referral of charges and prior to arraignment, any party may move for a session under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such motion, or sua sponte, the military judge promptly shall hold a pretrial session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (h), and the initiation of the procedure under subsection (i). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

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

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

(2) dismiss the charges;

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

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

c. M.R.E. 506(h) is amended to read as follows:

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

d. M.R.E. 506(i) is amended to read as follows:

''(i) *In camera proceedings.*

(1) *Definition.* For purposes of this subsection, an ''in camera proceeding'' is a session under Article 39(a) from which the public is excluded.

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

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

(4) *In camera proceeding.*

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

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

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

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

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

(F) *Sanctions.* Government information may not be disclosed over the Government's objection. If the Government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require. Such an order may include:

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

(ii) declaring a mistrial;

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

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

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

e. A new M.R.E. 506(j) is added as follows:

''(j) *Appeals of orders and rulings.* In a court-martial in which a punitive discharge may be adjudged, the Government may appeal an order or ruling

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

f. M.R.E. 506(j) and (k) are redesignated as (k) and (l), respectively.

Sec. 4. Part IV of the Manual for Courts-Martial, United States, 1984, is amended to read as follows:

a. Paragraph 4.c. is amended by adding a new subparagraph (4) as follows:

''(4) *Voluntary abandonment.* It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, such as, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.''

b. Paragraph 4.c.(4), (5), and (6) are redesignated as subparagraphs (5), (6) and (7), respectively.

c. Paragraph 30a.c(1), is amended to read as follows:

''(1) *Intent.* ''Intent or reason to believe'' that the information ''is to be used to the injury of the United States or to the advantage of a foreign nation'' means that the accused acted in bad faith and [delete ''or otherwise''] without lawful authority with respect to information that is not lawfully accessible to the public.''

d. Paragraph 35 is amended to read as follows:

''35. Article 111—Drunken or reckless operation of a vehicle, aircraft, or vessel

a. *Text.*

''Any person subject to this chapter who—

(1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (Article 112a(b)), 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 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis, shall be punished as a court-martial may direct.''

b. *Elements.*

(1) That the accused was operating or in physical control of a vehicle, aircraft, or vessel; and

(2) That while operating or in physical control of a vehicle, aircraft, or vessel, the accused:

(a) did so in a wanton or reckless manner, or

(b) was drunk or impaired, or

(c) the alcohol concentration in the accused's blood or breath was 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, or greater, as shown by chemical analysis.

[Note: If injury resulted add the following element]

(3) That the accused thereby caused the vehicle, aircraft, or vessel to injure a person.

c. *Explanation.*

(1) *Vehicle.* See 1 U.S.C. § 4.

(2) *Vessel. See 1* U.S.C. § 3.

(3) *Aircraft.* Any contrivance used or designed for transportation in the air.

(4) *Operates.* Operating a vehicle, aircraft, or vessel includes not only driving or guiding a vehicle, aircraft, or vessel while it is in motion, either in person or through the agency of another, but also setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle, aircraft, or vessel to move.

(5) *Physical control and actual physical control.* These terms as used in the statute are synonymous. They describe the present capability and power to dominate, direct, or regulate the vehicle, vessel, or aircraft, either in person or through the agency of another, regardless of whether such vehicle, aircraft, or vessel is operated. For example, the intoxicated person seated behind the steering wheel of a vehicle with the keys of the vehicle in or near the ignition but with the engine not turned on could be deemed in actual physical control of that vehicle. However, the person asleep in the back seat with the keys in his or her pocket would not be deemed in actual physical control. Physical control necessarily encompasses operation.

(6) *Drunk or impaired.* ''Drunk'' and ''impaired'' mean any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties. The term ''drunk'' is used in relation to intoxication by alcohol. The term ''impaired'' is used in relation to intoxication by a substance described in Article 112(a), Uniform Code of Military Justice.

(7) *Reckless.* The operation or physical control of a vehicle, vessel, or aircraft is ''reckless'' when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: whether, under all the circumstances, the accused's manner of operation or physical control of the vehicle, vessel, or aircraft was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is operating or physically controlling a vehicle, vessel, or aircraft with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The nature of the conditions in which the vehicle, vessel, or aircraft is operated or controlled, the time of day or night, the proximity and number of other vehicles, vessels, or aircraft, and the condition of the vehicle, vessel, or aircraft, are often matters of importance in the proof of an offense charged under this article and, where they are of importance, may properly be alleged.

(8) *Wanton.* ''Wanton'' includes ''reckless'', but in describing the operation or physical control of a vehicle, vessel, or aircraft, ''wanton'' may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(9) *Causation.* The accused's drunken or reckless driving must be a proximate cause of injury for the accused to be guilty of drunken or reckless driving resulting in personal injury. To be proximate, the accused's actions need not be the sole cause of the injury, nor must they be the immediate cause of the injury; that is, the latest in time and space preceding the injury. A contributing cause is deemed proximate only if it plays a material role in the victim's injury.

(10) *Separate offenses.* While the same course of conduct may constitute violations of both subsections (1) and (2) of the Article, *(e.g.*, both drunken and reckless operation or physical control), this article proscribes the conduct described in both subsections as separate offenses, which may be charged separately. However, as recklessness is a relative matter, evidence of all the surrounding circumstances that made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, for example, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

d. *Lesser included offense.*

(1) Reckless or wanton or impaired operation or physical control of a vessel. Article 110—improper hazarding of a vessel.

(2) Drunken operation of a vehicle, vessel, or aircraft while drunk or with a blood or breath alcohol concentration in violation of the described per se standard.

(a) Article 110—improper hazarding of a vessel

(b) Article 112—drunk on duty

(c) Article 134—drunk on station

e. *Maximum punishment.*

(1) *Resulting in personal injury*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(2) *No personal injury involved*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification*.

In that ———————— (personal jurisdiction data), did (at/onboard—location) (subject-matter jurisdiction data, if required), on or about ———————— 19————, (in the motor pool area) (near the Officer's Club)(at the intersection of ———————— and ————————) (while in the Gulf of Mexico)(while in flight over North America) physically control [a vehicle, to wit: (a truck)(a passenger car) (————————————)] [an aircraft, to wit: (an AH–64 helicopter)(an F–14A fighter) (a KC–135 tanker) (————————————)] [a vessel, to wit: (the aircraft carrier USS ————————————) (the Coast Guard Cutter ————————————) (————————————)], [while drunk] [while impaired by ————————————] [while the alcohol concentration in his (blood was 0.10 grams of alcohol per 100 milliliters of blood or greater)(breath was 0.10 grams of alcohol per 210 liters of breath or greater) as shown by chemical analysis] [in a (reckless)(wanton) manner by (attempting to pass another vehicle on a sharp curve)(by ordering that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft)(vessel) to (strike and) (injure ————————————)].''

e. Paragraph 43.a.(3) is amended to read as follows:

''(3) is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life; or''

f. Paragraph 43.b.(3)(c) is amended to read as follows:

''(c) That this act was inherently dangerous to another and showed a wanton disregard for human life;''

g. Paragraph 43.c.(4)(a) is amended to read as follows:

''(a) *Wanton disregard for human life.* Intentionally engaging in an act inherently dangerous to another—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may also constitute murder if the

act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm. Examples include throwing a live grenade toward another or others in jest or flying an aircraft very low over one or more persons to cause alarm.''

h. Paragraph 45.a.(a) is amended to read as follows:

''(a) Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.''

i. Paragraph 45.b.(1) is amended to read as follows:

''(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force and without consent.''

j. Paragraph 45.c.(1)(a) and (b) are amended as follows:

''(a) *Nature of offense.* Rape is sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense.

(b) *Force and lack of consent.* Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that he or she is incapable of understanding the nature of the act is not consent.''

k. Paragraph 89.c. is amended to read as follows:

''(c) *Explanation.* ''Indecent'' language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. See paragraph 87 if the communication was made in the physical presence of a child.''

l. The following new paragraph is added after paragraph 103:

''103a. Article 134 (Self-injury without intent to avoid service)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused intentionally inflicted injury upon himself or herself;

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(3) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. *Explanation.*

(1) *Nature of offense.* This offense differs from malingering (*see* paragraph 40) in that for this offense, the accused need not have harbored a design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. This offense is characterized by intentional self-injury under such circumstances as prejudice good order and discipline or discredit the armed forces. It is not required that the accused be unable to perform duties, or that the accused actually be absent from his or her place of duty as a result of the injury. For example, the accused may inflict the injury while on leave or pass. The circumstances and extent of injury, however, are relevant to a determination that the accused's conduct was prejudicial to good order and discipline, or service-discrediting.

(2) *How injury inflicted.* The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission that produces, prolongs, or aggravates a sickness or disability. Thus, voluntary starvation that results in a debility is a self-inflicted injury. Similarly, the injury may be inflicted by another at the accused's request.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Intentional self-inflicted injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Intentional self-inflicted injury in time of war or in a hostile fire pay zone.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that ———————— (personal jurisdiction data), did, (at/on board—location) (in a hostile fire pay zone) on or about ———————— 19——, (a time of war,) intentionally injure himself/herself by ———————— (nature and circumstances of injury).''

Sec. 5. These amendments shall take effect on June 10, 1995, subject to the following:

a. Nothing in these amendments shall be construed to make punishable any act done or omitted prior to June 10, 1995.

b. The maximum punishment for an offense committed prior to June 10, 1995, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

c. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to June 10, 1995, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

THE WHITE HOUSE,
May 12, 1995.

Billing code 3195–01–P

Changes to the Analysis accompanying the Manual for Courts-Martial, United States, 1984.

1. Changes to Appendix 21, the Analysis accompanying the Rules for Courts-Martial (Part II, MCM, 1984).

a. R.C.M. 203. The Analysis accompanying R.C.M. 203 is amended by inserting the following at the end thereof:

''*1995 Amendment:* The discussion was amended in light of *Solorio v. United States,* 483 U.S. 435 (1987). *O'Callahan v. Parker,* 395 U.S. 258 (1969), held that an offense under the code could not be tried by court-martial unless the offense was ''service connected.'' *Solorio* overruled *O'Callahan.*''

b. R.C.M. 307. The Analysis accompanying R.C.M. 307 is amended by inserting the following at the end thereof:

''*1995 Amendment:* The discussion was amended in conformance with a concurrent change to R.C.M. 203, in light of *Solorio v. United States,* 483 U.S. 435 (1987). *O'Callahan v. Parker,* 395 U.S. 258 (1969), held that an offense under the code could not be tried by court-martial unless the offense was ''service connected.'' *Solorio* overruled *O'Callahan.*''

c. R.C.M. 810. The Analysis accompanying R.C.M. 810 is amended by inserting the following at the end thereof:

''*1995 Amendment:* Subsection (d) was amended in light of the change to Article 63 effected by the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992). The amendment reflects that subsection (d) sentencing limitations only affect the sentence that may be approved by the convening or higher authority following the rehearing, new trial or other trial. Subsection (d) does not limit the maximum sentence that may be adjudged at the rehearing, new trial, or other trial.''

d. R.C.M. 924. The Analysis accompanying R.C.M. 924 is amended by inserting the following at the end thereof:

''*1995 Amendment:* The amendment limits reconsideration of findings by the members to findings reached in closed session but not yet announced in open court and provides for the military judge, in judge alone cases, to reconsider the ''guilty finding'' of a not guilty only by reason of lack of mental responsibility finding.''

e. R.C.M. 1003(b). The Analysis accompanying R.C.M. 1003(b) is amended by inserting the following:

''*1995 Amendment:* Punishment of confinement on bread and water or diminished rations [R.C.M. 1003(d)(9)], as a punishment imposable by a court-martial, was deleted. Confinement on bread and water or diminished rations was originally intended as an immediate, remedial punishment. While this is still the case with nonjudicial punishment (Article 15), it is not effective as a court-martial punishment. Subsections (d)(10) through (d)(12) were redesignated (d)(9) through (d)(11), respectively.''

f. R.C.M. 1009. The Analysis accompanying R.C.M. 1009 is amended by inserting the following at the end thereof:

''*1995 Amendment:* This rule was changed to prevent a sentencing authority from reconsidering a sentence announced in open session. Subsection (b) was amended to allow reconsideration if the sentence was less than the mandatory maximum prescribed for the offense or the sentence exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial. Subsection (c) is new and provides for the military judge to clarify an announced sentence that is ambiguous. Subsection (d) provides for the convening authority to exercise discretionary authority to return an ambiguous sentence for clarification, or take action consistent with R.C.M. 1107.''

g. R.C.M. 1103. The Analysis accompanying R.C.M. 1103 is amended by inserting the following at the end thereof:

''*1995 Amendment:* Punishment of confinement on bread and water or diminished rations [R.C.M. 1003(d)(9)], as a punishment imposable by a

court-martial, was deleted. Consequently, the requirement to attach a Medical Certificate to the record of trial [R.C.M. 1103(b)(3)(L)] was deleted. Subsections (3)(M) and (3)(N) were redesignated (3)(L) and (3)(M), respectively.''

h. R.C.M. 1105(b)(4). The Analysis accompanying R.C.M. 1105(b) is amended to read as follows:

''*1995 Amendment:* The Discussion accompanying subsection (b)(4) was amended to reflect the new requirement, under R.C.M. 1106(d)(3)(B), that the staff judge advocate or legal advisor inform the convening authority of a recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence.''

i. R.C.M. 1106(d)(3). The Analysis accompanying R.C.M. 1106(d) is amended to read as follows:

''*1995 Amendment:* Subsection (d)(3)(B) is new. It requires that the staff judge advocate's or legal advisor's recommendation inform the convening authority of any clemency recommendation made by the sentencing authority in conjunction with the announced sentence, absent a written request by the defense to the contrary. Prior to this amendment, an accused was responsible for informing the convening authority of any such recommendation. The amendment recognizes that any clemency recommendation is so closely related to the sentence that staff judge advocates and legal advisors should be responsible for informing convening authorities of it. The accused remains responsible for informing the convening authority of other recommendations for clemency, including those made by the military judge in a trial with member sentencing and those made by individual members. *See United States v. Clear,* 34 M.J. 129 (C.M.A. 1992); R.C.M. 1105(b)(4). Subsections (d)(3)(B)—(d)(3)(E) are redesignated as (d)(3)(C)—(d)(3)(F), respectively.''

j. R.C.M. 1107(d). The Analysis accompanying R.C.M. 1107(d) is amended to read as follows:

''*1995 Amendment:* Subsection (d)(3) is new. It is based on the recently enacted Article 57(e). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2505 (1992). *See generally* Interstate Agreement on Detainers Act, 18 U.S.C. App. III. It permits a military sentence to be served consecutively, rather than concurrently, with a civilian or foreign sentence. The prior subsection (d)(3) is redesignated (d)(4).''

k. R.C.M. 1107(d)(2). The Analysis accompanying R.C.M. 1107(d)(2) is amended to read as follows:

''*1995 Amendment:* The last sentence in the Discussion accompanying subsection (d)(2) is new. It clarifies that forfeitures adjudged at courts-martial take precedence over all debts owed by the accused. Department of Defense Military Pay and Allowances Entitlement Manual, Volume 7, Part A, paragraph 70507a (12 December 1994).''

l. R.C.M. 1107(e)(1)(C)(iii). The Analysis accompanying R.C.M. 1107(e)(1) is amended to read as follows:

''*1995 Amendment:* The second sentence in R.C.M. 1107(e)(1)(C)(iii) is new. It expressly recognizes that the convening authority may approve a sentence of no punishment if the convening authority determines that a rehearing on sentence is impracticable. This authority has been recognized by the appellate courts. *See e.g., United States v. Monetesinos,* 28 M.J. 38 (C.M.A. 1989); *United States v. Sala,* 30 M.J. 813 (A.C.M.R. 1990).''

m. R.C.M. 1107(f)(2). The Analysis accompanying R.C.M. 1107(f)(2) is amended by inserting the following at its end:

''*1995 Amendment:* The amendment allows a convening authority to recall and modify any action after it has been published or after an accused has been officially notified, but before a record has been forwarded for review, as long as the new action is not less favorable to the accused than the prior action. A convening authority is not limited to taking only corrective action, but may also modify the approved findings or sentence provided the modification is not less favorable to the accused than the earlier action.''

n. R.C.M. 1113(d)(2)(A). The Analysis accompanying R.C.M. 1113(d)(2)(A) is amended by inserting the following at the end thereof:

''*1995 Amendment:* Subsection (d)(2)(A)(iii) is new. It is based on the recently enacted Article 57(e). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2505 (1992). *See generally* Interstate Agreement on Detainers Act, 18 U.S.C. App. III. It permits a military sentence to be served consecutively, rather than concurrently, with a civilian or foreign sentence. The prior subsections (d)(2)(A)(iii)—(iv) are redesignated (d)(2)(A)(iv)—(v), respectively.''

o. R.C.M. 1113(d)(5). The Analysis accompanying R.C.M. 1113(d)(5) is amended by inserting the following at the end thereof:

''*1995 Amendment:* Subsection (5) was deleted when the punishment of confinement on bread and water or diminished rations [R.C.M. 1113(d)(9)], as a punishment imposable by a court-martial, was deleted. Subsection (6) was redesignated (5).''

p. R.C.M. 1201(b)(1). The Analysis accompanying R.C.M. 1201(b)(1) is amended to read as follows:

''*1995 Amendment:* The Discussion accompanying subsection (1) was amended to conform with the language of Article 69(a), as enacted by the Military Justice Amendments of 1989, tit. XIII, sec. 1302(a)(2), National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101–189, 103 Stat. 1352, 1576 (1989).''

2. Changes to Appendix 21, the Analysis accompanying the Punitive Articles (Part IV, MCM, 1984).

a. Paragraph 4c. The Analysis accompanying paragraph 4c is amended to read as follows:

''*1995 Amendment:* Subparagraph (4) is new. It recognizes voluntary abandonment as an affirmative defense as established by the case law. *See United States v. Byrd,* 24 M.J. 286 (C.M.A. 1987). *See also United States v. Schoof,* 37 M.J. 96, 103–04 (C.M.A. 1993); *United States v. Rios,* 33 M.J. 436, 440–41 (C.M.A. 1991); *United States v. Miller,* 30 M.J. 999 (N.M.C.M.R. 1990); *United States v. Walther,* 30 M.J. 829, 829–33 (N.M.C.M.R. 1990). The prior subparagraphs (4)—(6) have been redesignated (5)—(7), respectively.''

b. Paragraph 30a.c. The Analysis accompanying paragraph 30a.c., is amended as follows:

''*1995 Amendment:* This subparagraph was amended to clarify that the intent element of espionage is not satisfied merely by proving that the accused acted without lawful authority. Article 106a, Uniform Code of Military Justice. The accused must have acted in bad faith. *United States v. Richardson,* 33 M.J. 127 (C.M.A. 1991); *see Gorin v. United States,* 312 U.S. 19, 21 n.1 (1941).''

c. Paragraph 35. The Analysis accompanying paragraph 35 is amended to read as follows:

''*1995 Amendment:* This paragraph was amended pursuant to the changes to Article 111 included in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992). New subparagraphs c(2) and (3) were added to include vessels and aircraft, respectively. Paragraph 35 was also amended to make punishable actual physical control of a vehicle, aircraft, or vessel while drunk or impaired, or in a reckless fashion, or while one's blood or breath alcohol concentration is in violation of the described per se standard. A new subparagraph c(5) was added to define the concept of actual physical control. This change allows drunk or impaired individuals who demonstrate the capability and power to operate a vehicle, aircraft, or vessel to be apprehended if in the vehicle, aircraft, or vessel, but not actually operating it at the time.

The amendment also clarifies that culpability extends to the person operating or exercising actual physical control through the agency of another *(e.g.,* the captain of a ship giving orders to a helmsman). The amendment also provides a blood/alcohol blood/breath concentration of 0.10 or greater

as a per se standard for illegal intoxication. The change will not, however, preclude prosecution where no chemical test is taken or even where the results of the chemical tests are below the statutory limits, where other evidence of intoxication is available. *See United States v. Gholson,* 319 F. Supp. 499 (E.D. Va. 1970).

A new paragraph c(9) was added to clarify that in order to show that the accused caused personal injury, the government must prove proximate causation and not merely cause-in-fact. *Accord United States v. Lingenfelter,* 30 M.J. 302 (C.M.A. 1990). The definition of ''proximate cause'' is based on *United States v. Romero,* 1 M.J. 227, 230 (C.M.A. 1975). Previous subparagraph c(2) is renumbered c(4). Previous subparagraphs c(3)–c(5) are renumbered c(6)–c(8), respectively, and previous subparagraph c(6) is renumbered c(10).

Subparagraphs d(1) and (2) are redesignated d(2)(b) and d(2)(c). The new d(2)(a) adds Article 110 (improper hazarding of a vessel) as a lesser included offense of drunken operation or actual physical control of a vessel. The new d(1) adds Article 110 (improper hazarding of a vessel) as a lesser included offense of reckless or wanton or impaired operation or physical control of a vessel.''

d. Paragraph 43. The Analysis accompanying paragraph 43 is amended to read as follows:

''*1995 Amendment:* The word ''others'' was replaced by the word ''another'' in Article 118(3) pursuant to the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992). This change addresses the limited language previously used in Article 118(3) as identified in *United States v. Berg,* 30 M.J. 195 (C.M.A. 1990).''

e. Paragraph 45. The Analysis accompanying paragraph 45 is amended to read as follows:

''*1995 Amendment:* The offense of rape was made gender neutral and the spousal exception was removed under Article 120(a). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992).

Rape may ''be punished by death'' only if constitutionally permissible. In *Coker v. Georgia,* 322 U.S. 585 (1977), the Court held that the death penalty is ''grossly disproportionate and excessive punishment for the rape of an adult woman,'' and is ''therefore forbidden by the Eighth Amendment as cruel and unusual punishment.'' Id. at 592 (plurality opinion). *Coker,* however, leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult. *See Coker,* 433 U.S. at 595. *See Leatherwood v. State,* 548 So.2d 389 (Miss. 1989) (death sentence for rape of minor by an adult is not cruel and unusual punishment prohibited by the Eighth Amendment). *But see Buford v. State,* 403 So.2d 943 (Fla. 1981) (sentence of death is grossly disproportionate for sexual assault of a minor by an adult and consequently is forbidden by Eighth Amendment as cruel and unusual punishment).''

f. Paragraph 89. The Analysis accompanying paragraph 89c is amended to read as follows:

''*1995 Amendment:* The second sentence is new. It incorporates a test for ''indecent language'' adopted by the Court of Military Appeals in *United States v. French,* 31 M.J. 57, 60 (C.M.A. 1990). The term ''tends reasonably'' is substituted for the term ''calculated to'' to avoid the misinterpretation that indecent language is a specific intent offense.''

g. Paragraph 103a. Insert the following after the Analysis of paragraph 103:

''103a. Article 134 (Self-injury without intent to avoid service)

c. *Explanation. 1995 Amendment.* This offense is based on paragraph 183a of MCM, U.S. Army, 1949; *United States v. Ramsey,* 35 M.J. 733 (A.C.M.R. 1992), *aff'd,* 40 M.J. 71 (C.M.A. 1994); *United States v. Taylor,* 38 C.M.R. 393 (C.M.A. 1968); *see generally* TJAGSA Practice Note, *Confusion About Malingering and Attempted Suicide,* The Army Lawyer, June 1992, at 38.

e. *Maximum punishment. 1995 Amendment.* The maximum punishment for subsection (1) reflects the serious effect that this offense may have on readiness and morale. The maximum punishment reflects the range of the effects of the injury, both in degree and duration, on the ability of the accused to perform work, duty, or service. The maximum punishment for subsection (1) is equivalent to that for offenses of desertion, missing movement through design, and certain violations of orders. The maximum punishment for subsection (2) is less than the maximum punishment for the offense of malingering under the same circumstances because of the absence of the specific intent to avoid work, duty, or service. The maximum punishment for subsection (2) is equivalent to that for nonaggravated offenses of desertion, willfully disobeying a superior commissioned officer, and nonaggravated malingering by intentional self-inflicted injury.

f. *Sample specification. 1995 Amendment. See* appendix 4, paragraph 177 of MCM, U.S. Army, 1949. Since incapacitation to perform duties is not an element of the offense, language relating to ''unfitting himself for the full performance of military service'' from the 1949 MCM has been omitted. The phrase ''willfully injure'' has been changed to read ''intentionally injure'' to parallel the language contained in the malingering specification under Article 115.''

3. Changes to Appendix 22, the Analysis accompanying the Military Rules of Evidence (Part III, MCM, 1984).

a. M.R.E. 311(g)(2). The Analysis accompanying M.R.E. 311(g)(2) is amended by inserting the following at the end thereof:

''*1995 Amendment:* Subsection (g)(2) was amended to clarify that in order for the defense to prevail on an objection or motion under this rule, it must establish, *inter alia,* that the falsity of the evidence was ''knowing and intentional'' or in reckless disregard for the truth. *Accord Franks v. Delaware,* 438 U.S. 154 (1978).''

b. M.R.E. 506(e). The Analysis accompanying M.R.E. 506(e) is amended by inserting the following at the end thereof:

''*1995 Amendment:* It is the intent of the Committee that if classified information arises during a proceeding under Rule 506, the procedures of Rule 505 will be used.

The new subsection (e) was formerly subsection (f). The matters in the former subsection (f) were adopted without change. The former subsection (e) was amended and redesignated as subsection (f) (see below).''

c. M.R.E. 506(f). The Analysis accompanying M.R.E. 506(f) is amended by inserting the following at the end thereof:

''*1995 Amendment. See generally* Rule 505(f) and its accompanying Analysis. Note that unlike Rule 505(f), however, Rule 506(f) does not require a finding that failure to disclose the information in question ''would materially prejudice a substantial right of the accused.'' Dismissal is not required when the relevant information is not disclosed in a ''reasonable period of time.''

Subsection (f) was formerly subsection (e). The subsection was amended to cover action after a defense motion for discovery, rather than action after referral of charges. The qualification that the government claim of privilege pertains to information ''that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in a court-martial proceeding'' was deleted as unnecessary. Action by the convening authority is required if, after referral, the defense moves for disclosure and the Government claims the information is privileged from disclosure.''

d. M.R.E. 506(h). The Analysis accompanying M.R.E. 506(h) is amended by inserting the following at the end thereof:

''*1995 Amendment:* Subsection (h) was amended to provide that government information may not be disclosed by the accused unless authorized by the military judge.''

e. M.R.E. 506(i). The Analysis accompanying M.R.E. 506(i) is amended by inserting the following at the end thereof:

''*1995 Amendment:* Subsection (i) was amended to clarify the procedure for in camera proceedings. The definition in subsection (i)(1) was amended to conform to the definition of in camera proceedings in M.R.E. 505(i)(1). Subsections (i)(2) and (i)(3) were unchanged. Subsection (i)(4)(B), redesignated as (i)(4)(C), was amended to include admissible evidence relevant to punishment of the accused, consistent with *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Subsection (i)(4)(C) was redesignated as (i)(4)(D), but was otherwise unchanged. The amended procedures provide for full disclosure of the government information in question to the accused for purposes of litigating the admissibility of the information in the protected environment of the in camera proceeding; *i.e.,* the Article 39(a) session is closed to the public and neither side may disclose the information outside the in camera proceeding until the military judge admits the information as evidence in the trial. Under subsection (i)(4)(E), the military judge may authorize alternatives to disclosure, consistent with a military judge's authority concerning classified information under M.R.E. 505. Subsection (i)(4)(F) allows the Government to determine whether the information ultimately will be disclosed to the accused. However, the Government's continued objection to disclosure may be at the price of letting the accused go free, in that subsection (i)(4)(F) adopts the sanctions available to the military judge under M.R.E. 505(i)(4)(E). *See U.S. v. Reynolds,* 345 U.S. 1, 12 (1953).''

f. M.R.E. 506(j). The Analysis accompanying M.R.E. 506(j) is amended by inserting the following at the end thereof:

''*1995 Amendment:* Subsection (j) was added to recognize the Government's right to appeal certain rulings and orders. See R.C.M. 908. The former subsection (j) was redesignated as subsection (k). The subsection speaks only to government appeals; the defense still may seek extraordinary relief through interlocutory appeal of the military judge's orders and rulings. *See generally,* 28 U.S.C. § 1651(a); *Waller v. Swift,* 30 M.J. 139 (C.M.A. 1990); *Dettinger v. United States,* 7 M.J. 216 (C.M.A. 1979).''

g. M.R.E. 506(j) and (k). The Analyses accompanying M.R.E. 506(j) and M.R.E. 506(k) are redesignated as subdivisions (k) and (l), respectively.

Changes to the Discussion Accompanying the Manual for Courts-Martial, United States, 1984.

A. The Discussion accompanying Part I., Preamble, paragraph. 4., is amended by inserting the following at the end thereof:

''The 1995 amendment to paragraph 4 of the Preamble is intended to eliminate the practice of identifying the Manual for Courts-Martial, United States, by a particular year. As long as the Manual was published in its entirety sporadically *(e.g.,* 1917, 1921, 1928, 1949, 1951, 1969 and 1984), with amendments to it published piecemeal, it was logical to identify the Manual by the calendar year of publication, with periodic amendments identified as ''Changes'' to the Manual. The more frequent publication of a new edition of the Manual, however, means that it is more appropriately identified by the calendar year of edition. Amendments made in a particular calendar year will be identified by publishing the relevant Executive order containing those amendments in its entirety in a Manual appendix.''

B. Subsection 2(B)(ii) of the Discussion following R.C.M. 202(a) is amended to read as follows:

''(ii) *Effect of discharge and reenlistment.* For offenses occurring on or after 23 October 1992, under the 1992 Amendment to Article 3(a), a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service. For offenses occurring prior to 23 October 1992, a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service only if the offense was punishable by confinement for five (5) years or more and could not be tried

in the courts of the United States or of a State, a Possession, a Territory, or the District of Columbia. However, *see* (iii)(a) below.''

C. Subsections 2(B)(iii) and 2(B)(iii)(a) of the Discussion following R.C.M. 202(a) are amended to read as follows:

''(iii) *Exceptions.* There are several exceptions to the general principle that court-martial jurisdiction terminates on discharge or its equivalent.

(*a*) A person who was subject to the code at the time an offense was committed may be tried by court-martial for that offense despite a later discharge or other termination of that status if:

(*1*) For offenses occurring on or after 23 October 1992, the person is, at the time of the court-martial, subject to the code, by reentry into the armed forces or otherwise. See Article 3(a) as amended by the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2505 (1992);

(*2*) For offenses occurring before 23 October 1992,

(*A*) The offense is one for which a court-martial may adjudge confinement for five (5) or more years;

(*B*) The person cannot be tried in the courts of the United States or of a State, a Possession, a Territory, or the District of Columbia; and

(*C*) The person is, at the time of the court-martial, subject to the code, by reentry into the armed forces or otherwise. *See* Article 3(a) prior to the 1992 amendment.''

D. The Discussion following R.C.M. 203 is amended to read as follows:

''(a) *In general.* Courts-martial have power to try any offense under the code except when prohibited from so doing by the Constitution. The rule enunciated in *Solorio v. United States*, 483 U.S. 435 (1987) is that jurisdiction of courts-martial depends solely on the accused's status as a person subject to the Uniform Code of Military Justice, and not on the ''service connection'' of the offense charged.

(b) *Pleading and proof.* Normally, the inclusion of the accused's rank or grade will be sufficient to plead the service status of the accused. Ordinarily, no allegation of the accused's armed force or unit is necessary for military members on active duty. *See* R.C.M. 307 regarding required specificity of pleadings.''

E. Subparagraph (F) of the Discussion following R.C.M. 307(c)(3) is amended to read as follows:

''(F) *Subject-matter jurisdiction allegations.* Pleading the accused's rank or grade along with the proper elements of the offense normally will be sufficient to establish subject-matter jurisdiction.''

F. The first two sentences of the Discussion following R.C.M. 810(d)(1) are amended to read as follows:

''In approving a sentence not in excess of one more severe than one approved previously, a convening authority is not limited to approving the same or lesser amount of the same type of punishment formerly approved. An appropriate sentence on a retried or reheard offense should be adjudged without regard to any credit to which the accused may be entitled.''

G. The following Discussion is inserted after R.C.M. 902(d)(2):

''Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that only matters material to the central issue of the military judge's possible disqualification are considered, thereby, preventing the proceedings from becoming a forum for unfounded opinion, speculation or innuendo.''

H. The Discussion following R.C.M. 1003(b)(6) is amended to read as follows:

''Restriction does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum

limits for each. *See* subsection (c)(1)(A)(ii) of this rule. The sentence adjudged should specify the limits of the restriction.''

I. The Discussion following R.C.M. 1105(b)(4) is amended by adding the following sentence at the end thereof:

''If the sentencing authority makes a clemency recommendation in conjunction with the announced sentence, see R.C.M. 1106(d)(3)(B).''

J. The following Discussion is inserted after R.C.M. 1106(d)(3)(B):

''The recommendation required by this rule need not include information regarding other recommendations for clemency. *See* R.C.M. 1105(b)(5), which pertains to clemency recommendations that may be submitted by the accused to the convening authority.''

K. The Discussion following R.C.M. 1107(d)(1) is amended to read as follows:

''A sentence adjudged by a court-martial may be approved if it was within the jurisdiction of the court-martial to adjudge *(see* R.C.M. 201(f)) and did not exceed the maximum limits prescribed in Part IV and Chapter X of this Part for the offense(s) of which the accused legally has been found guilty.

When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeiture exceeds the jurisdiction of the court-martial. When mitigating confinement or hard labor without confinement, the convening authority should use the equivalencies at R.C.M. 1003(b)(6) and (7), as appropriate. One form of punishment may be changed to a less severe punishment of a different nature, as long as the changed punishment is one that the court-martial could have adjudged. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for 6 months (but not vice versa). A pretrial agreement may also affect what punishments may be changed by the convening authority.

See also R.C.M. 810(d) concerning sentence limitations upon a rehearing or new or other trial.''

L. The Discussion following R.C.M. 1107(d)(2) is amended by adding the following sentence at the end thereof:

''Since court-martial forfeitures constitute a loss of entitlement of the pay concerned, they take precedence over all debts.''

M. The Discussion following R.C.M. 1107(d)(3) is amended to read as follows:

''The convening authority's decision to postpone service of a court-martial sentence to confinement normally should be reflected in the action.''

N. The following Discussion is inserted after R.C.M. 1107(f)(2):

''For purposes of this rule, a record is considered to have been forwarded for review when the convening authority has either delivered it in person or has entrusted it for delivery to a third party over whom the convening authority exercises no lawful control (*e.g.,* the United States Postal Service).''

O. The following Discussion is inserted after R.C.M. 1113(d)(2)(A)(iii):

''The convening authority's decision to postpone service of a court-martial sentence to confinement normally should be reflected in the action.''

P. The Discussion following R.C.M. 1201(b)(1) is amended to read as follows:

''A case forwarded to a Court of Military Review under this subsection is subject to review by the Court of Military Appeals upon petition by the accused under Article 67(a)(3) or when certified by the Judge Advocate General under Article 67(a)(2).''

Q. The Discussion following R.C.M. 1301(d)(1) is amended to read as follows:

''The maximum penalty which can be adjudged in a summary court-martial is confinement for 30 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade. *See* subsection (2) below for additional limits on enlisted persons serving in pay grades above the fourth enlisted pay grade.

A summary court-martial may not suspend all or part of a sentence, although the summary court-martial may recommend to the convening au-

thority that all or part of a sentence be suspended. If a sentence includes both reduction in grade and forfeitures, the maximum forfeiture is calculated at the reduced pay grade. *See also* R.C.M. 1003 concerning other punishments which may be adjudged, the effects of certain types of punishment, and combination of certain types of punishment. The summary court-martial should ascertain the effect of Article 58a in that armed force.''

Changes to the Maximum Punishment Chart of the Manual for Courts-Martial, United States, 1984.

Appendix 12, the Maximum Punishment Chart, is amended by adding after Art. 134 (Seizure, destruction, removal, or disposal of property to prevent) the following:

''Self-injury without intent to avoid service In time of war, or while receiving special pay under

37 U.S.C. 310....	DD	5 yrs.	Total
Other.....	DD	2 yrs.	Total''

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