Federal Register
Vol. 58, No. 248
Wednesday, December 29, 1993

Presidential Documents

Title 3—

The President

Executive Order 12888 of December 23, 1993

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, and Executive Order No. 12767, it is hereby ordered as follows:

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

a. R.C.M. 109 is amended to read as follows:

''(a) *In general*. Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Military Review. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension. Procedures to investigate complaints against military trial judges and appellate military judges are contained in subsection (c) of this rule.

(b) *Action after suspension or disbarment*. When a Judge Advocate General suspends a person from practice or the Court of Military Appeals disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard in writing.

(c) *Investigation of judges*.

(1) *In general*. These rules and procedures promulgated pursuant to Article 6a are established to investigate and dispose of charges, allegations, or information pertaining to the fitness of a military trial judge or appellate military judge to perform the duties of the judge's office.

(2) *Policy*. Allegations of judicial misconduct or unfitness shall be investigated pursuant to the procedures of this rule and appropriate action shall be taken. Judicial misconduct includes any act or omission that may serve to demonstrate unfitness for further duty as a judge, including but not limited to violations of applicable ethical standards.

(3) *Complaints*. Complaints concerning a military trial judge or appellate military judge will be forwarded to the Judge Advocate General of the service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints.

(4) *Initial action upon receipt of a complaint.* Upon receipt, a complaint will be screened by the Judge Advocate General concerned or by the individual designated in subsection (c)(3) of this rule to receive complaints. An initial inquiry is necessary if the complaint, taken as true, would constitute judicial misconduct or unfitness for further service as a judge. Prior to the commencement of an initial inquiry, the Judge Advocate General concerned shall be notified that a complaint has been filed and that an initial inquiry will be conducted. The Judge Advocate General concerned may temporarily suspend the subject of a complaint from performing judicial duties pending the outcome of any inquiry or investigation conducted pursuant to this rule. Such inquiries or investigations shall be conducted with reasonable promptness.

(5) *Initial inquiry.*

(A) *In general.* An initial inquiry is necessary to determine if the complaint is substantiated. A complaint is substantiated upon finding that it is more likely than not that the subject judge has engaged in judicial misconduct or is otherwise unfit for further service as a judge.

(B) *Responsibility to conduct initial inquiry.* The Judge Advocate General concerned, or the person designated to receive complaints under subsection (c)(3) of this rule, will conduct or order an initial inquiry. The individual designated to conduct the inquiry should, if practicable, be senior to the subject of the complaint. If the subject of the complaint is a military trial judge, the individual designated to conduct the initial inquiry should, if practicable, be a military trial judge or an individual with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the individual designated to conduct the inquiry should, if practicable, have experience as an appellate military judge.

(C) *Due process.* During the initial inquiry, the subject of the complaint will, at a minimum, be given notice and an opportunity to be heard.

(D) *Action following the initial inquiry.* If the complaint is not substantiated pursuant to subsection (c)(5)(A) of this rule, the complaint shall be dismissed as unfounded. If the complaint is substantiated, minor professional disciplinary action may be taken or the complaint may be forwarded, with findings and recommendations, to the Judge Advocate General concerned. Minor professional disciplinary action is defined as counselling or the issuance of an oral or written admonition or reprimand. The Judge Advocate General concerned will be notified prior to taking minor professional disciplinary action or dismissing a complaint as unfounded.

(6) *Action by the Judge Advocate General.*

(A) *In general.* The Judge Advocates General are responsible for the professional supervision and discipline of military trial and appellate military judges under their jurisdiction. Upon receipt of findings and recommendations required by subsection (c)(5)(D) of this rule the Judge Advocate General concerned will take appropriate action.

(B) *Appropriate Actions.* The Judge Advocate General concerned may dismiss the complaint, order an additional inquiry, appoint an ethics commission to consider the complaint, refer the matter to another appropriate investigative agency or take appropriate professional disciplinary action pursuant to the rules of professional conduct prescribed by the Judge Advocate General under subsection (a) of this rule. Any decision of a Judge Advocate General, under this rule, is final and is not subject to appeal.

(C) *Standard of Proof.* Prior to taking professional disciplinary action, other than minor disciplinary action as defined in subsection (c)(5)(D) of this rule, the Judge Advocate General concerned shall find, in writing, that the subject of the complaint engaged in judicial misconduct or is otherwise unfit for continued service as a military judge, and that such misconduct or unfitness is established by clear and convincing evidence.

(D) *Due process*. Prior to taking final action on the complaint, the Judge Advocate General concerned will ensure that the subject of the complaint is, at a minimum, given notice and an opportunity to be heard.

(7) *The Ethics Commission*.

(A) *Membership*. If appointed pursuant to subsection (c)(6)(B) of this rule, an ethics commission shall consist of at least three members. If the subject of the complaint is a military trial judge, the commission should include one or more military trial judges or individuals with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Members of the commission should, if practicable, be senior to the subject of the complaint.

(B) *Duties*. The commission will perform those duties assigned by the Judge Advocate General concerned. Normally, the commission will provide an opinion as to whether the subject's acts or omissions constitute judicial misconduct or unfitness. If the commission determines that the affected judge engaged in judicial misconduct or is unfit for continued judicial service, the commission may be required to recommend an appropriate disposition to the Judge Advocate General concerned.

(8) *Rules of procedure*. The Secretary of Defense or the Secretary of the service concerned may establish additional procedures consistent with this rule and Article 6a.''

b. R.C.M. 305(f) is amended to read as follows:

''*Military Counsel*. If requested by the prisoner and such request is made known to military authorities, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.''.

c. R.C.M. 305(h)(2)(A) is amended to read as follows:

''(A) *Decision*. Not later than 72 hours after the commander's ordering of a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue.''.

d. R.C.M. 305(i)(1) is amended to read as follows:

''(1) *In general*. A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement under military control. If the prisoner was apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement shall count as one day and the date of the review shall also count as one day.''.

e. R.C.M. 405(i) is amended to read as follows:

''(i) *Military Rules of Evidence*. The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412, and Section V—shall not apply in pretrial investigations under this rule.''.

f. R.C.M. 701(g)(3)(C) is amended to read as follows:

''(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and''.

g. R.C.M. 704(e) is amended to read as follows:

''(e) *Decision to grant immunity*. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion of the defense, grant appropriate relief directing that either an appropriate general court-martial convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.''.

h. R.C.M. 910(a)(1) is amended to read as follows:

''(1) *In general*. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.''.

i. R.C.M. 918(a)(1) is amended to read as follows:

''(1) *As to a specification*. General findings as to a specification may be: guilty; not guilty of an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; not guilty only by reason of lack of mental responsibility; or, not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.''.

j. R.C.M. 920(b) is amended to read as follows:

''(b) *When given*. Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.''.

k. R.C.M. 1103(g)(1)(A) is amended to read as follows:

''*In general*. In general and special courts-martial which require a verbatim transcript under subsections (b) or (c) of this rule and are subject to review by a Court of Military Review under Article 66, the trial counsel shall cause to be prepared an original and four copies of the record of trial. In all other general and special courts-martial the trial counsel shall cause to be prepared an original and one copy of the record of trial.''.

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

a. Mil. R. Evid. 311(e)(2) is amended to read as follows:

''(2) *Derivative Evidence*. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant. Notwithstanding other provisions of this Rule, an apprehension made in a dwelling in a manner that violates R.C.M. 302(d)(2)&(e) does not preclude the admission into evidence of a statement of an individual apprehended provided (1) that the apprehension was based on probable cause, (2) that the statement was made subsequent to the apprehension at a location outside the dwelling, and (3) that the statement was otherwise in compliance with these rules.''.

b. Mil. R. Evid. 505(a) is amended to read as follows:

''(a) *General rule of privilege.* Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege this rule applies to all stages of the proceedings.''.

c. Mil. R. Evid. 505(g)(1)(D) is amended by adding the following at the end:

''All persons requiring security clearances shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance.''.

d. Mil. R. Evid. 505(h)(3) is amended to read as follows:

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

e. Mil. R. Evid. 505(i)(3) is amended to read as follows:

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

f. Mil. R. Evid. 505(i)(4)(B) is amended to read as follows:

''*Standard.* Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available.''.

g. Mil. R. Evid. 505(j)(5) is amended to read as follows:

''(5) *Closed session*. The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.''.

h. Mil. R. Evid. 609(a) is amended to read as follows:

''(a) *General rule*. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.''.

i. Mil. R. Evid. 1101(d) is amended to read as follows:

''(d) *Rules inapplicable*. These rules (other than with respect to privileges and Mil. R. Evid. 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).''.

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

a. Paragraph 37c is amended by inserting the following new subparagraphs (10) and (11) at the end thereof:

''(10) *Use.* 'Use' means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

(11) *Deliberate ignorance.* An accused who consciously avoids knowledge of the presence of a controlled substance or the contraband nature of the substance is subject to the same criminal liability as one who has actual knowledge.''.

b. The last paragraph of paragraph 37e is amended to read as follows:

''When any offense under paragraph 37 is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. Section 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such an offense shall be increased by 5 years.''.

c. Paragraph 43d is amended to read as follows:

''d. *Lesser included offenses.*

(1) *Premeditated murder and murder during certain offenses.* Article 118(2) and (3)—murder

(2) *All murders under Article 118.*

(a) Article 119—involuntary manslaughter

(b) Article 128—assault; assault consummated by a battery; aggravated assault

(c) Article 134—negligent homicide

(3) *Murder as defined in Article 118(1), (2), and (4).*

(a) Article 80—attempts

(b) Article 119—voluntary manslaughter

(c) Article 134—assault with intent to commit murder

(d) Article 134—assault with intent to commit voluntary manslaughter''.

d. Para 45d(1) is amended by adding the following at the end thereof:

''(e) Article 120(b)—carnal knowledge''.

e. Para 45f(1) is amended to read as follows:

''(1) *Rape.*

In that————————————(personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ———— 19———— rape ———————————— (a person who had not attained the age of 16 years).''.

f. The following new paragraph is inserted after paragraph 96:

"96a. Article 134 (Wrongful interference with an adverse administrative proceeding)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be adverse administrative proceedings pending;

(3) That the act was done with the intent to influence, impede, or obstruct the conduct of such adverse administrative proceeding, or otherwise obstruct the due administration of justice;

(4) 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.

c. *Explanation.* For purposes of this paragraph ''adverse administrative proceeding'' includes any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. Examples of wrongful interference include wrongfully influencing, intimidating, impeding, or injuring a witness, an investigator, or other person acting on an adverse administrative action; by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to such administrative proceeding; and, the wrongful destruction or concealment of information relevant to such adverse administrative proceeding.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* 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) (subject-matter jurisdiction data, if required), on or about ———— 19————, wrongfully (endeavor to) [impede (an adverse administrative proceeding) (an investigation) (————)] [influence the actions of ————, (an officer responsible for making a recommendation concerning the adverse administrative proceeding) (an individual responsible for making a decision concerning an adverse administrative proceeding) (an individual responsible for processing an adverse administrative proceeding) (————)] [(influence) (alter) the testimony of ————, a witness before (a board established to consider an adverse administrative proceeding or elimination) (an investigating officer) (————)] in the case of ————, by [(promising) (offering) (giving) to the said ————, (the sum of $————) (———— , of a value of about $————)] [communicating to the said ———— a threat to ————] [————], (if) (unless) the said ————, would [recommend dismissal of the action against said ————] [(wrongfully refuse to testify) (testify falsely concerning ————) (————)] [(at such administrative proceeding) (before such investigating officer) (before such administrative board)] [————].''.

Sec. 4. These amendments shall take effect on January 21, 1994, subject to the following:

a. The amendments made to paragraphs 37c, 37e, 43d(2), 45d(1), and 96a of Part IV shall apply to any offense committed on or after January 21, 1994.

b. The amendments made to Section III shall apply only in cases in which arraignment has been completed on or after January 21, 1994.

c. The amendment made to Rules for Courts-Martial 405(i), 701(g)(3)(C), and 704(e) shall apply only in cases in which charges are preferred on or after January 21, 1994.

d. The amendments made to Rules for Courts-Martial 910, 918, and 920 shall apply only to cases in which arraignment occurs on or after January 21, 1994.

e. The amendments made to Rule for Courts-Martial 305 shall apply only to cases in which pretrial confinement is imposed on or after January 21, 1994.

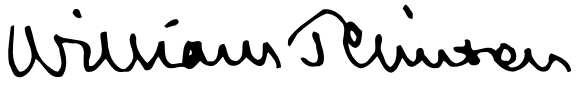
f. The amendment to Rule for Courts-Martial 1103(g)(1)(A) shall apply only in cases in which the sentence is adjudged on or after January 21, 1994.

g. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to January 21, 1994, which was not punishable when done or omitted.

h. The maximum punishment for an offense committed prior to January 21, 1994, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

i. 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 January 21, 1994, and any such 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.

Sec. 5. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of title 10 of the United States Code.



THE WHITE HOUSE,
December 23, 1993.

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

A. The following Discussion is inserted after R.C.M. 109(c)(2):

''The term 'unfitness' should be construed broadly, including, for example, matters relating to the incompetence, impartiality, and misconduct of the judge. Erroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process.''.

B. The following Discussion is inserted after R.C.M. 109(c)(3):

''Complaints need not be made in any specific form, but if possible complaints should be made under oath. Complaints may be made by judges, lawyers, a party, court personnel, members of the general public or members of the military community. Reports in the news media relating to the conduct of a judge may also form the basis of a complaint.

An individual designated to receive complaints under this subsection should have judicial experience. The chief trial judge of a service may be designated to receive complaints against military trial judges.''.

C. The following Discussion is inserted after R.C.M. 109(c)(4):

''Complaints under this subsection will be treated with confidentiality. Confidentiality protects the subject judge and the judiciary when a complaint is not substantiated. Confidentiality also encourages the reporting of allegations of judicial misconduct or unfitness and permits complaints to be screened with the full cooperation of others.

Complaints containing allegations of criminality should be referred to the appropriate criminal investigative agency in accordance with Appendix 3 of this Manual.''.

D. The following Discussion is inserted after R.C.M. 109(c)(5)(B):

''To avoid the type of conflict prohibited in Article 66(g), the Judge Advocate General's designee should ordinarily not be a member of the same Court of Military Review as the subject of the complaint. If practicable, a former appellate military judge should be designated.''.

E. The following Discussion is inserted after R.C.M. 109(c)(6)(B):

''The discretionary reassignment of military trial judges or appellate military judges to meet the needs of the service is not professional disciplinary action.''.

F. The following Discussion is inserted after R.C.M. 109(c)(7):

''The Judge Advocate General concerned may appoint an ad hoc or a standing commission.''.

G. The Discussion to R.C.M. 701(g)(3) is amended by adding the following after the first paragraph:

''The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Government. Before imposing this sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2)

the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process.''.

H. The Discussion following R.C.M. 910(a)(1) is amended to read as follows:

''*See* paragraph 2, Part IV, concerning lesser included offenses. When the plea is to a named lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit. A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. *See also* subsection (g) of this rule.

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. *See* R.C.M. 1001(b)(4).''.

I. The last two paragraphs of the Discussion accompanying R.C.M. 918(a)(1) are amended to read as follows:

''*Lesser included offenses*. If the evidence fails to prove the offense charged but does prove an offense necessarily included in the offense charged, the factfinder may find the accused not guilty of the offense charged but guilty of a named lesser offense, which is included in the offense charged, without the use of exceptions and substitutions. Ordinarily, an attempt is a lesser included offense even if the evidence establishes that the offense charged was consummated. *See* Part IV concerning lesser included offenses.

Offenses arising from the same act or transaction. The accused may be found guilty of two or more offenses arising from the same act or transaction, whether or not the offenses are separately punishable. *But see* R.C.M. 906(b)(12); 907(b)(3)(B); 1003(c)(1)(C).''

J. The Discussion accompanying R.C.M. 920(b) is amended to read as follows:

''After members have reached a finding on a specification, instructions may not be given on an offense included therein which was not described in an earlier instruction unless the finding is illegal. This is true even if the finding has not been announced. When instructions are to be given is a matter within the sole discretion of the military trial judge.''.

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. 109. The Analysis is amended by inserting the following at the end thereof:

''*1993 Amendment*: Subsection (a) was amended to conform with subsection (c). The amendment to subsection (a) clarifies that the Judge Advocates General are responsible for the supervision and discipline of judges and attorneys. The amendment to subsection (a) is not intended to limit the authority of a Judge Advocate General in any way.

New subsection (c) is based on Article 6a, Uniform Code of Military Justice. Article 6a was enacted by the Defense Authorization Act for Fiscal Year 1990. ''Military Appellate Procedures,'' title XIII, 1A1303, National Defense Authorization Act for Fiscal Year 1990, Pub. L. No. 101–189, 103 Stat. 1352, 1576 (1989). The legislative history reveals Congressional intent that, to the extent consistent with the Uniform Code of Military Justice, the procedures to investigate and dispose of allegations concerning judges in the military should emulate those procedures found in the civilian sector. *See H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 656 (1989) [hereinafter*

Conf. Rep. No. 331]. The procedures established by subsection (c) are largely patterned after the pertinent sections of the *ABA Model Standards Relating to Judicial Discipline and Disability Retirement (1978) [hereinafter ABA Model Standard]* and the procedures dealing with the investigation of complaints against federal judges in *28 U.S.C. 1A372 (1988).* The rule recognizes, however, the overall responsibility of the Judge Advocates General for the certification, assignment, professional supervision and discipline of military trial and appellate military judges. *See* Articles 6, 26 & 66, Uniform Code of Military Justice.

Subsection (c)(2) is based on the committee report accompanying the FY 90 Defense Authorization Act. *See Conf. Rep. No. 331 at 658.* This subsection is designed to increase public confidence in the military justice system while contributing to the integrity of the system. See Landmark Communications v. Virginia, 435 U.S. 829 (1978).

The first sentence of the Discussion to subsection (c)(2) is based on the committee report accompanying the Defense Authorization Act. *Conf. Rep. No. 331 at 358.* The second and third sentences of the discussion are based on the commentary to *ABA Model Standard 3.4. See also Chandler v. Judicial Council,* 398 U.S. 74 (1970).

Subsections (c)(3), (c)(5), and (c)(7) reflect, and adapt to the conditions of military practice, the general principle that judges should investigate judges.

The first paragraph of the Discussion to subsection (c)(3) is based on the commentary to *ABA Model Standard 4.1.*

The discussion to subsection (c)(4) is based on the commentary to *ABA Model Standard 4.6.*

The clear and convincing standard found in subsection (c)(6)(c) is based on *ABA Model Standard 7.10.*

Under subsection (c)(7), the principal purpose of the commission is to advise the Judge Advocate General concerned as to whether the allegations contained in a complaint constitute a violation of applicable ethical standards. This subsection is not intended to preclude use of the commission for other functions such as rendering advisory opinions on ethical questions. *See ABA Model Standard 9* on the establishment and role of an advisory committee.

Subsection (c)(7)(A) is based on *ABA Model Standard 2.3,* which provides that one-third of the members of a commission should be active or retired judges.''.

b. R.C.M. 305(f). The Analysis accompanying R.C.M. 305(f) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to subsection (f) provides a specific time period by which to measure compliance. Because it is possible to obtain credit for violations of this section under subsection (k), a standard of compliance was thought necessary. *See, e.g., United States v. Chapman,* 26 M.J. 515 (A.C.M.R. 1988), *pet. denied* 27 M.J. 404 (C.M.A. 1989). This amendment, while protecting the rights of the prisoner, also gives reasonable protection to the Government in those cases where the prisoner is confined in a civilian facility and the request is never, or is belatedly, communicated to military authorities. While it is expected that military authorities will have procedures whereby civilian confinement authorities communicate such requests in a timely fashion, the failure to communicate such a request, or the failure to notify military authorities in a timely manner should be tested for prejudice under Article 59, and should not be considered as invoking the credit provisions of subsection (k) of this rule.''.

c. R.C.M. 305(h)(2)(A). The Analysis accompanying R.C.M. 305(h)(2)(A) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to subsection (h)(2)(A) clarifies that the 72 hour period operates in two distinct situations: (a) if the commander

orders the prisoner into pretrial confinement, the commander has 72 hours to decide whether pretrial confinement will continue, and (b) if someone other than the prisoner's commander orders the prisoner into pretrial confinement, the prisoner's commander has 72 hours from receipt of a report that the prisoner has been confined to decide whether pretrial confinement will continue.''.

d. R.C.M. 305(i)(1). The Analysis accompanying R.C.M. 305(i)(1) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to subsection (i)(1) provides that the required review only becomes applicable whenever the accused is confined under military control. For example, if the prisoner was apprehended and is being held by civilian authorities as a military deserter in another state from where the prisoner's unit is located and it takes three days to transfer the prisoner to an appropriate confinement facility, the seven day period under this rule would not begin to run until the date of the prisoner's transfer to military authorities. Any unreasonable period of time that it may take to bring a prisoner under military control should be tested for prejudice under Article 59, and should not be considered as invoking the credit provisions of subsection (k) of this rule absent evidence of bad faith by military authorities in utilizing civilian custody. *But see United States v. Ballesteros,* 29 M.J. 14 (C.M.A. 1989). However, any time spent in civilian custody at the request of military authorities would be subject to pretrial confinement credit mandated by *United States v. Allen,* 17 M.J. 126 (C.M.A. 1984).

The amendment further clarifies the method of calculation to determine if the rule has been violated. *See United States v. DeLoatch,* 25 M.J. 718 (A.C.M.R. 1987); *contra, United States v. New,* 23 M.J. 889 (A.C.M.R. 1987).''.

e. R.C.M. 405(i). The Analysis accompanying R.C.M. 405(i) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to R.C.M. 405(i) makes the provisions of Mil. R. Evid. 412 applicable at pretrial investigations.''.

f. R.C.M. 701(g)(3)(C). The Analysis accompanying R.C.M. 701(g)(3)(C) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to R.C.M. 701(g)(3)(C), based on the decision of *Taylor v. Illinois,* 484 U.S. 400 (1988), recognizes that the Sixth Amendment compulsory process right does not preclude a discovery sanction that excludes the testimony of a material defense witness. This sanction, however, should be reserved to cases where the accused has willfully and blatantly violated applicable discovery rules, and alternative sanctions could not have minimized the prejudice to the Government. *See Chappee v. Commonwealth of Massachusetts,* 659 F.Supp. 1220 (D. Mass. 1988). The Discussion to R.C.M. 701(g)(3)(C) adopts the test, along with factors the judge must consider, established by the *Taylor* decision.''.

g. R.C.M. 704(e). The Analysis accompanying R.C.M. 704(e) is amended by inserting the following at the end thereof:

''*1993 Amendment.* Subsection (e) to R.C.M. 704 was amended to make the military practice for granting immunity for defense witnesses consistent with the majority rule within the Federal Courts. *United States v. Burns,* 684 F.2d 1066 (2d Cir. 1982), *cert. denied,* 459 U.S. 1174 (1983); *United States v. Shandell,* 800 F.2d 322 (2d Cir. 1986); *United States v. Turkish,* 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); *United States v. Thevis,* 665 F.2d 616 (5th Cir. 1982), *cert. denied,* 459 U.S. 825 (1982); *United States v. Pennell,* 737 F.2d 521 (6th Cir. 1984); *United States v. Taylor,* 728 F.2d 930 (7th Cir. 1984); *United States v. Brutzman,* 731 F.2d 1449 (9th Cir. 1984); *McGee v. Crist,* 739 F.2d 505 (10th Cir. 1984); *United States v. Sawyer,* 799 F.2d 1494 (11th Cir. 1986). The amended rule conforms R.C.M. 704(e) with case law requiring the military judge to consider the Government's interest in not granting immunity to the defense witness. *See United States v. Smith,* 17 M.J. 994, 996 (A.C.M.R. 1984), *pet. denied,* 19 M.J. 71 (C.M.A. 1984); *United States v. O'Bryan,* 16 M.J. 775 (A.F.C.M.R. 1983), *pet. denied,* 18 M.J. 16 (C.M.A. 1984).''.

The majority rule recognizes that an accused has no Sixth Amendment right to immunized testimony of defense witnesses and, absent prosecutorial misconduct which is intended to disrupt the judicial fact-finding process, an accused is not denied Fifth Amendment due process by the Government's failure to immunize a witness. If the military judge finds that the witness is a target for prosecution, there can be no claim of Government overreaching or discrimination if a grant of immunity is denied. *United States v. Shandell, supra.*

The prior military rule was based on *United States v. Villines, supra,* which had adopted the minority view espoused in *Government of Virgin Islands v. Smith,* 615 F.2d 964 (3d Cir. 1980). This view permitted the court to also immunize a defense witness when the witness' testimony was clearly exculpatory, essential to the defense case and there was no strong Government interest in withholding testimonial immunity. This rule has been sharply criticized. *See, e.g., United States v. Turkish, supra; United States v. Taylor, supra; United States v. Pennel, supra; United States v. Zayas,* 24 M.J. 132, 137 (C.M.A. 1987)(dissenting opinion by Judge Cox).

The current rule continues to recognize that a military judge is not empowered to immunize a witness. Upon a finding that all three prerequisites exist, a military judge may only abate the proceedings for the affected charges and specifications unless the convening authority grants immunity to the witness.''.

h. R.C.M. 910(a)(1). The Analysis accompanying R.C.M. 910(a)(1) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to R.C.M. 910(a)(1) removed the necessity of pleading guilty to a lesser included offense by exceptions and substitutions. This parallels the amendment to R.C.M. 918(a)(1), allowing a finding of guilty to a named lesser included offense without mandating the use of exceptions and substitutions, made to more closely correspond to verdict practice in federal district courts. *See* Analysis comments for R.C.M. 918(a)(1).''.

i. R.C.M. 918(a)(1). The Analysis accompanying R.C.M. 918(a)(1) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to R.C.M. 918(a)(1) allows for a finding of guilty of a named lesser included offense of the charged offense, and eliminates the necessity of making findings by exceptions and substitutions. This serves to conform military practice to that used in criminal trials before federal district courts. *See* Fed. R. Crim. P. 31(c); E. Devitt and C. Blackman, **Federal Jury Practice and Instructions**, 18.07 (1977). The practice of using exceptions and substitutions is retained for those cases in which the military judge or court members must conform the findings to the evidence actually presented, *e.g.*, a larceny case in which the finding is that the accused stole several of the items alleged in the specification but not others.''.

j. R.C.M. 920(b). The Analysis accompanying R.C.M. 920(b) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The amendment to R.C.M. 920(b) is based on the 1987 amendments to Federal Rule of Criminal Procedure 30. Federal Rule of Criminal Procedure 30 was amended to permit instructions either before or after arguments by counsel. The previous version of R.C.M. 920 was based on the now superseded version of the federal rule.

The purpose of this amendment is to give the court discretion to instruct the members before or after closing arguments or at both times. The amendment will permit courts to continue instructing the members after arguments as Rule 30 and R.C.M. 920(b) had previously required. It will also permit courts to instruct before arguments in order to give the parties an opportunity to argue to the jury in light of the exact language used by the court. *See United States v. Slubowski,* 7 M.J. 461 (C.M.A 1979); *United States v. Pendry,* 29 M.J. 694 (A.C.M.R. 1989).''.

k. The Analysis accompanying R.C.M. 1103(g)(1)(A) is amended by inserting the following at the end thereof:

''*1993 Amendment*: Subsection (g)(1)(A) was amended by adding the phrase ''and are subject to review by a Court of Military Review under Article 66'' to eliminate the need to make four copies of verbatim records of trial for courts-martial which are not subject to review by a Court of Military Review. These cases are reviewed in the Office of the Judge Advocate General under Article 69 and four copies are not ordinarily necessary.''.

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

a. The Analysis accompanying M.R.E. 303 is amended by inserting the following at the end thereof:

''*1993 Amendment*: R.C.M. 405(i) and Mil. R. Evid 1101(d) were amended to make the provisions of Mil. R. Evid. 412 applicable at pretrial investigations. These changes ensure that the same protections afforded victims of nonconsensual sex offenses at trial are available at pretrial hearings. *See* Criminal Justice Subcommittee of House Judiciary Committee Report, 94th Cong., 2d Session, July 29, 1976. Pursuant to these amendments, Mil. R. Evid. 412 should be applied in conjunction with Mil. R. Evid. 303. As such, no witness may be compelled to answer a question calling for a personally degrading response prohibited by Rule 303. Mil. R. Evid. 412, however, protects the victim even if the victim does not testify. Accordingly, Rule 412 will prevent questioning of the victim or other witness if the questions call for responses prohibited by Rule 412.''.

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

''*1993 Amendment*: The amendment to Mil. R. Evid. 311(e)(2) was made to conform Rule 311 to the rule of *New York* v. *Harris,* 495 U.S. 14 (1990). The purpose behind the exclusion of derivative evidence found during the course of an unlawful apprehension in a dwelling is to protect the physical integrity of the dwelling, not to protect suspects from subsequent lawful police interrogation. *See id.* A suspect's subsequent statement made at another location that is the product of lawful police interrogation is not the fruit of the unlawful apprehension. The amendment also contains language added to reflect the ''good faith'' exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897 (1984), and the ''inevitable discovery'' exception set forth in *Nix v. Williams*, 467 U.S. 431 (1984).''.

c. The Analysis accompanying Mil. R. Evid. 412 is amended by inserting the following at the end thereof:

''*1993 Amendment*. R.C.M. 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations. Congress intended to protect the victims of nonconsensual sex crimes at preliminary hearings as well as at trial when it passed Fed. R. Evid. 412. *See* Criminal Justice Subcommittee of the House Judiciary Committee Report, 94th Cong., 2d Session, July 1976.''.

d. The Analysis accompanying M.R.E. 505(a) is amended by inserting the following at the end thereof:

''*1993 Amendment*: The second sentence was added to clarify that this rule, like other rules of privilege, applies at all stages of all actions and is not relaxed during the sentencing hearing under M.R.E. 1101(c).''.

e. The Analysis accompanying M.R.E. 505(g) is amended by inserting the following at the end thereof:

''*1993 Amendment*: Subsection (g)(1)(D) was amended to make clear that the military judge's authority to require security clearances extends to persons involved in the conduct of the trial as well as pretrial preparation for it. The amendment requires persons needing security clearances to submit to investigations necessary to obtain the clearance.''.

f. The Analysis accompanying M.R.E. 505(h) is amended by inserting the following at the end thereof:

''*1993 Amendment*: Subsection (h)(3) was amended to require specificity in detailing the items of classified information expected to be introduced. The amendment is based on *United States v. Collins*, 720 F.2d. 1195 (11th Cir. 1983).''.

g. The Analysis accompanying M.R.E. 505(i) is amended by inserting the following at the end thereof:

''*1993 Amendment*: Subsection (i)(3) was amended to clarify that the classified material and the government's affidavit are submitted only to the military judge. The word ''only'' was placed at the end of the sentence to make it clear that it refers to ''military judge'' rather than to ''examination.'' The military judge is to examine the affidavit and the classified information without disclosing it before determining to hold an in camera proceeding as defined in subsection (i)(1). The second sentence of subsection (i)(4)(B) was added to provide a standard for admission of classified information in sentencing proceedings.''.

h. The Analysis accompanying M.R.E. 505(j) is amended by inserting the following at the end thereof:

''*1993 Amendment*: Subsection (j)(5) was amended to provide that the military judge's authority to exclude the public extends to the presentation of any evidence that discloses classified information, and not merely to the testimony of witnesses. *See generally United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985), *cert. denied*, 474 U.S. 1062 (1986).''.

i. The Analysis accompanying Mil. R. Evid. 609(a) is amended by adding the following at the end thereof:

''*1993 Amendment*. The amendment to Mil. R. Evid. 609(a) is based on the 1990 amendment to Fed. R. Evid. 609(a). The previous version of Mil. R. Evid. 609(a) was based on the now superseded version of the Federal Rule. This amendment removes from the rule the limitation that the conviction may only be elicited during cross-examination. Additionally, the amendment clarifies the relationship between Rules 403 and 609. The amendment clarifies that the special balancing test found in Mil. R. Evid. 609(a)(1) applies to the accused's convictions. The convictions of all other witnesses are only subject to the Mil. R. Evid. 403 balancing test. *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).''.

j. The Analysis accompanying Mil. R. Evid. 1101(d) is amended by inserting the following at the end thereof:

''*1993 Amendment*. Mil. R. Evid. 1101(d) was amended to make the provisions of Mil. R. Evid. 412 applicable at pretrial investigations.''.

3. Changes to Appendix 21, the Analysis accompanying the punitive articles (Part IV, MCM, 1984).

a. The Analysis accompanying paragraph 37c, Part IV, is amended by inserting the following at the end thereof:

''*1993 Amendment*. Paragraph c was amended by adding new paragraphs (10) and (11). Subparagraph (10) defines the term ''use'' and delineates knowledge of the presence of the controlled substance as a required component of the offense. *See United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). The validity of a permissive inference of knowledge is recognized. *See United States v. Ford*, 23 M.J. 331 (C.M.A. 1987); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). Subparagraph (11) precludes an accused from relying upon lack of actual knowledge when such accused has purposefully avoided knowledge of the presence or identity of controlled substances. *See United States v. Mance, supra* (Cox, J., concurring). When an accused deliberately avoids knowing the truth concerning a crucial fact (i.e., presence or identity) and there is a high probability that the crucial fact does exist, the accused is held accountable to the same extent as one who has actual knowledge. *See United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). Subsection (11) follows federal authority which equates actual knowledge with deliberate ignorance. *See United States v. Ramsey*, 785 F.2d 184 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986).''.

b. The Analysis accompanying paragraph 43d(2), Part IV, is amended by inserting the following at the end thereof:

''*1993 Amendment*. The listed lesser included offenses of murder under Article 118(3) were changed to conform to the rationale of *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982). Inasmuch as Article 118(3) does not require specific intent, attempted murder, voluntary manslaughter, assault with intent to murder and assault with intent to commit voluntary manslaughter are not lesser included offenses of murder under Article 118(3).''.

c. The Analysis accompanying paragraph 45(d), Part IV, is amended by inserting the following at the end thereof:

''*1993 Amendment*. The amendment to para 45d(1) represents an administrative change to conform the Manual with case authority. Carnal knowledge is a lesser included offense of rape where the pleading alleges that the victim has not attained the age of 16 years. *See United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989); *United States v. Stratton*, 12 M.J. 998 (A.F.C.M.R. 1982), *pet. denied*, 15 M.J. 107 (C.M.A. 1983); *United States v. Smith*, 7 M.J. 842 (A.C.M.R. 1979).''.

d. The Analysis accompanying paragraph 96a, Part IV, is amended by inserting the following after the analysis to paragraph 96:

''*1993 Amendment*. Paragraph 96a is new and proscribes conduct that obstructs administrative proceedings. *See generally* 18 U.S.C.1A1505, *Obstruction of proceedings before departments, agencies, and committees*. This paragraph, patterned after paragraph 96, covers obstruction of certain administrative proceedings not currently covered by the definition of criminal proceeding found in paragraph 96c. This paragraph is necessary given the increased number of administrative actions initiated in each service.''.

[FR Citation 58 FR 69153]