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Presidential Documents

Title 3—

The President

Executive Order 13468 of July 24, 2008

2008 Amendments to the Manual for Courts-Martial, United States

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), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Parts II and IV of the Manual for Courts- Martial, United States, are amended as described in the Annex attached and made a part of this order.

Sec. 2. These amendments shall take effect 30 days from the date of this order.

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, 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,
July 24, 2008.

Billing code 3195–01–P

ANNEX

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

(a) R.C.M. 103 is amended by adding the following new subparagraph (20) and re-designating the current subparagraph (20) as subparagraph (21):

"(20) "Writing" includes printing and typewriting and reproductions of visual symbols by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."

(b) R.C.M. 405(h)(3) is amended to read as follows:

"(3) *Access by spectators*. Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer. Article 32 investigations are public hearings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Commanders or investigating officers must conclude that no lesser methods short of closing the Article 32 investigation can be used to protect the overriding interest in the case. Commanders or investigating officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a commander or investigating officer believes closing the Article 32 investigation is necessary, the commander or investigating officer must make specific findings of fact in writing that

support the closure. The written findings of fact must be included in the Article 32 investigating officer's report. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting."

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

"(B) *Verbatim transcript required.* Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim transcript of all sessions except sessions closed for deliberations and voting when:"

(d) R.C.M. 1103(e) is amended to read as follows:

"(e) *Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of mental responsibility; termination prior to findings; termination after findings.* Notwithstanding subsections (b), (c), and (d) of this rule, if proceedings resulted in an acquittal of all charges and specifications or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if the proceedings were terminated by withdrawal, mistrial, or dismissal before findings, or if the proceedings were terminated after findings by approval of an administrative discharge in lieu of court-martial, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet). The convening authority or higher authority may prescribe additional requirements."

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

"(A) *In general.* In general and special courts-martial that require a verbatim transcript under subsections (b) or (c) of this rule and are subject to a review by a Court of Criminal Appeals under Article 66, the trial counsel shall cause to be prepared an original record of trial."

(f) R.C.M. 1103(j)(2) is amended to read as follows:

"(2) *Preparation of written record.* When the court-martial, or any part of it, is recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, a transcript or summary in writing (as defined in R.C.M. 103), as required in subsection (b)(2)(A), (b)(2)(B), (b)(2)(C), or (c) of this rule, as appropriate, shall be prepared in accordance with this rule and R.C.M. 1104 before the record is forwarded under R.C.M. 1104(e), unless military exigencies prevent transcription."

(g) R.C.M. 1104(a)(1) is amended to read as follows:

"(1) *In general.* A record is authenticated by the signature of a person specified in this rule who thereby declares that the record accurately reports the proceedings. An electronic record of trial may be authenticated with the electronic signature of the military judge or other authorized person. Service of an authenticated electronic copy of the record of trial with a means to review the record of trial satisfies the requirement of service under R.C.M. 1105(c) and 1305(d). No person may be required to authenticate a record of trial if that person is not satisfied that it accurately reports the proceedings."

(h) R.C.M. 1106(d) is amended to read as follows:

"(d) *Form and content of recommendation.*

(1) The purpose of the recommendation of the staff judge advocate or legal officer is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The staff judge advocate or legal officer shall use the record of trial in the preparation of the recommendation, and may also use the personnel records of the accused or other matters in advising the convening authority whether clemency is warranted.

(2) *Form*. The recommendation of the staff judge advocate or legal officer shall be a concise, written communication.

(3) *Required contents*. The staff judge advocate or legal advisor shall provide the convening authority with a copy of the report of results of trial, setting forth the findings, sentence, and confinement credit to be applied, a copy or summary of the pretrial agreement, if any, any recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence, and the staff judge advocate's concise recommendation."

(i) R.C.M. 1111(a)(1) is amended by inserting the following sentence at the end of the rule:

"Forwarding of an authenticated electronic copy of the record of trial satisfies the requirements under this rule."

(j) R.C.M. 1113 is amended by adding the following new subparagraph (d) and re-designating the current subparagraph (d) as subparagraph (e):

"(d) *Self-executing punishments*. Under regulations prescribed by the Secretary concerned, a dishonorable or bad conduct discharge that has been approved by an appropriate convening authority may be self-executing after final judgment at such time as:

(1) The accused has received a sentence of no confinement or has completed all confinement;

(2) The accused has been placed on excess or appellate leave; and,

(3) The appropriate official has certified that the accused's case is final. Upon completion of the certification, the official shall forward the certification to the accused's personnel office for preparation of a final discharge order and certificate."

(k) R.C.M. 1114(a) is amended by inserting the following as subsection (a)(4):

"(4) *Self-executing final orders*. An order promulgating a self-executing dishonorable or bad conduct discharge need not be issued. The original action by a convening authority approving a discharge and certification by the appropriate official that the case is final may be forwarded to the accused's personnel office for preparation of a discharge order and certificate."

(l) R.C.M. 1305(b) is amended by changing the first sentence to read as follows:

"(b) *Contents*. The summary court-martial shall prepare a written record of trial, which shall include:"

(m) R.C.M. 1305(c) is amended to read as follows:

"(c) *Authentication*. The summary court-martial shall authenticate the record by signing the record of trial. An electronic record of trial may be authenticated with the electronic signature of the summary court-martial."

(n) R.C.M. 1305(d)(1)(A) is amended to read as follows:

"(A) *Service*. The summary court-martial shall cause a copy of the record of trial to be served on the accused as soon as it is authenticated. Service of an authenticated electronic

copy of the record of trial with a means to review the record of trial satisfies the requirement of service under this rule."

(o) R.C.M. 1306(b)(3) is amended to read as follows:

"(3) *Signature*. The action on the record of trial shall be signed by the convening authority. The action on an electronic record of trial may be signed with the electronic signature of the convening authority."

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

(a) Paragraph 14, Article 90, Assaulting or willfully disobeying superior commissioned officer, paragraph c.(2)(g) is amended to read as follows:

"c.(2)(g) *Time for compliance*. When an order requires immediate compliance, an accused's declared intent not to obey and the failure to make any move to comply constitutes disobedience. Immediate compliance is required for any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. If an order requires performance in the future, an accused's present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may."

(b) Paragraph 44, Article 119, Manslaughter, paragraph b. is amended to read as follows:

"b. *Elements*.

(1) Voluntary manslaughter.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.

(Note: Add the following if applicable)

(e) That the person killed was a child under the age of 16 years.

(2) Involuntary manslaughter.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson.

(Note: Add the following if applicable)

(e) That the person killed was a child under the age of 16 years."

(c) Paragraph 44, Article 119, Manslaughter, paragraph c.(1)(c) is added following paragraph c.(1)(b):

"(c) *When committed upon a child under 16 years of age.* The maximum punishment is increased when voluntary manslaughter is committed upon a child under 16 years of age. The accused's knowledge that the child was under 16 years of age at the time of the offense is not required for the increased maximum punishment."

(d) Paragraph 44, Article 119, Manslaughter, paragraph c.(2)(c) is added following paragraph c.(2)(b):

"(c) *When committed upon a child under 16 years of age.*

The maximum punishment is increased when involuntary manslaughter is committed upon a child under 16 years of age. The accused's knowledge that the child was under 16 years of age at the time of the offense is not required for the increased maximum punishment."

(e) Paragraph 44, Article 119, Manslaughter, paragraph e.(3) is added following paragraph e.(2):

"(3) *Voluntary manslaughter of a child under 16 years of age*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years."

(f) Paragraph 44, Article 119, Manslaughter, paragraph e.(4) is added following paragraph e.(3):

"(4) *Involuntary manslaughter of a child under 16 years of age*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years."

(g) Paragraph 44, Article 119, Manslaughter, paragraph f. is amended to read as follows:

"f. *Sample specifications*.

(1) *Voluntary manslaughter*.

In that _____ (personal jurisdiction data), did, (at/on board - location) (subject matter jurisdiction data, if required), on or about _____, willfully and unlawfully kill _____, (a child under 16 years of age) by _____ him/her (in) (on) the _____ with a _____.

(2) *Involuntary manslaughter*.

In that _____ (personal jurisdiction data), did, (at/on board location) (subject matter jurisdiction data, if required), on or about _____, (by culpable negligence) (while (perpetrating) (attempting to perpetrate) an offense

directly affecting the person of _____, to wit:

(maiming) (a battery) (_____)) unlawfully kill

_____ (a child under 16 years of age) by _____

him/her (in)(on) the _____ with a _____."

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

(a) The following Discussion is added immediately after R.C.M. 103(20):

"The definition of "writing" includes letters, words, or numbers set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or any other form of data compilation. This section makes it clear that computers and other modern reproduction systems are included in this definition, and consistent with the definition of "writing" in Military Rule of Evidence 1001. The definition is comprehensive, covering all forms of writing or recording of words or word-substitutes."

(b) The Discussion immediately following R.C.M. 1103(g)(1)(A) is amended to read as follows:

"An original record of trial includes any record of the proceedings recorded in a form that satisfies the definition of a "writing" in R.C.M. 103. Any requirement to prepare a printed record of trial pursuant to this rule, either in lieu of or in addition to a record of trial recorded or compiled in some other format, including electronic or digital formats, is subject to service regulation."

Changes to Appendix 11, Forms of Sentences

(a) a. is amended to read as follows:

"a. *Announcement of sentence*

See R.C.M. 1007

In announcing the sentence, the president or, in cases tried by military judge alone, the military judge should announce:

"(Name of accused), this court-martial sentences you ."

The sentence should now be announced following one of the forms contained in *b* below, or any necessary modification or combination thereof. Each of the forms of punishment prescribed in b are separate, that is, the adjudging of one form of punishment is not contingent upon any other punishment also being adjudged. The forms in b, however, may be combined and modified so long as the punishments adjudged is not forbidden by the code and does not exceed the maximum authorized by this Manual (*see* R.C.M. 1003 and Part IV) in the particular case being tried. In announcing a sentence consisting of combined punishments, the president or military judge may, for example, state:

"To forfeit all pay and allowances, to be reduced to Private, E-1, to be confined for one year, and to be dishonorably discharged from the service."

"To forfeit $350.00 pay per month for six months, to be confined for six months, and to be discharged from the service with a bad conduct discharge."

"To forfeit all pay and allowances, to be confined for one year and to be dismissed from the service."

"To forfeit $250.00 pay per month for one month, and to perform hard labor without confinement for one month.""

Changes to Appendix 12, Maximum Punishment Chart

Appendix 12, the Maximum Punishment Chart, is amended as follows:

(a) in the item relating to Article 119, by inserting after the maximum punishment for involuntary manslaughter:

"Voluntary manslaughter of a child under the age of 16 years

DD, BCD 20 yrs. Total

Involuntary manslaughter of a child under the age of 16 years

DD, BCD 15 yrs. Total"

Changes to Appendix 22, Analysis of the Military Rules of Evidence

(a) Amend the Analysis accompanying Mil. R. Evid. 801(d)(1)(B) to read as follows:

"Rule 801(d)(1)(B) makes admissible as substantive evidence on the merits a statement consistent with the in-court testimony of the witness and "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Unlike Rule 801(d)(1)(A), the earlier consistent statement need not have been made under oath or at any type of proceeding. On its face, the Rule does not require that the consistent statement offered have been made prior to the time the improper influence or motive arose or prior to the alleged recent fabrication. Notwithstanding this, the Supreme Court has read such a requirement into the rule. *Tome v. United States*, 513 U.S. 150 (1995); *see also United States v. Allison*, 49 M.J. 54 (C.A.A.F. 1998). The limitation does not, however, prevent admission of a consistent statement made after an inconsistent statement but before the improper influence or motive arose. *United States v. Scholle*, 553 F.2d 1109 (8th Cir. 1977). Rule 801(d)(1)(B) provides a possible means to admit evidence of fresh complaint in prosecution of sexual offenses. Although limited to circumstances in which there is a charge, for example, of recent fabrication, the Rule, when applicable, would permit not only fact of fresh complaint, as is presently possible, but also the entire portion of the consistent statement."

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