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THE WHITE HOUSE

EXECUTIVE ORDER

PRESCRIBING AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION)

By virtue of the authority vested in me by the Uniform Code of Military Justice (10 U.S.C., ch. 47), and as President of the United States, I hereby prescribe the following amendments to the Manual for Courts-Martial, United States, 1969 (Revised edition), prescribed by Executive Order No. 11476 of June 19, 1969.

Section 1. The first paragraph within paragraph 34d is amended to read as follows:

"d. Witnesses. All available witnesses, including those requested by the accused, who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused, and if counsel has been requested, in the presence of the accused and his counsel. Ordinarily, application for the attendance of any witness subject to military law will be made to the immediate commanding officer of the witness, who will determine the availability of the witness. The Secretary of a Department may prescribe regulations which permit the payment of transportation expenses and a per diem allowance to civilians requested to testify in connection with the pretrial investigation."

Sec. 2. Paragraph 53d(2)(a) is amended to read as follows:

"(2) Military judge alone. (a) General. A general or special court-martial to which a military judge has been detailed shall consist of the military judge alone if the accused, before the court is assembled, so requests in writing and the military judge approves. Before deciding whether to make such a request, the accused must be informed of the identity of the military judge and permitted to consult with his defense counsel (Article 16). The military judge may hear arguments from both trial and defense counsel prior to acting on a request for trial before him alone. See appendix 8e for form of request.

"Because a general court-martial composed of a military judge alone does not have jurisdiction to try any case which has been referred for trial as capital (14a), the accused in such a case has no right to request trial before the military judge alone."

Sec. 3. Paragraph 53d(2)(b) is amended to read as follows:

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"(b) Request prior to trial. If the accused has requested in writing trial by the military judge alone and the military judge has approved the request prior to the start of trial, he should assure himself at the trial, before announcing that the court has assembled, that the request was understandingly made by the accused. After a request has been approved, it may be withdrawn by the accused at any time before assembly of the court in the discretion of the military judge. If the military judge finds that the approved request is defective or allows the accused to withdraw it, he may either adjourn the session or call the court into Article 39(a) session preparatory to assembly of the court with members. If the request was understandingly made and has not been withdrawn, the military judge should immediately announce that the court has assembled. See 61g and appendix 8b for procedure."

Sec. 4. Paragraph 53d(2)(c) is amended to read as follows:

"(c) Request made at Article 39(a) session. A request for trial by the military judge alone, if not made earlier, should be made at any Article 39(a) session held prior to assembly. The request must be made in writing. If the accused, after the Article 39(a) session is called to order, indicates his desire to be tried by judge alone, the court should, if necessary, be recessed while the request is executed in writing. If the military judge has a pending request at an Article 39(a) session, he will assure himself at the session that the request was understandingly made. If the military judge approves the request, he should announce that the court is assembled and proceed with the trial of the case. If the military judge disapproves the request, he should continue with the Article 39(a) proceedings. See appendix 8a for procedure."

Sec. 5. Paragraph 53d(2)(d) is amended to read as follows:

"(d) Inquiry prior to assembly with members. If a request for trial by the military judge alone has not been made prior to trial or at an Article 39(a) session, if any, the military judge, after calling the court to order, should give the accused an opportunity to make such a request. The request must be made in writing. If the accused, after the court is called to order, indicates his desire to be tried by the military judge alone, the court should, if necessary, be recessed while the request is executed in writing. If the accused submits a request and the military judge approves, the military judge should excuse the members from further participation in the case and announce that the court is assembled for the trial of the case. If the accused expressly declines to submit a request or if the military judge disapproves the request, the trial will proceed. See 61g and appendix 8b for procedure."

Sec. 6. Paragraph 53h is amended to read as follows:

"h. Explanation of rights of accused. Ordinarily, the military judge, or the president of a special court-martial without a military judge, need not volunteer advice to the accused during the course of the trial as it may be

assumed that his counsel has performed his duties properly, has advised the accused of his rights and the law affecting the case, and that, for reasons best known to them, they desire to pursue a certain course. But see 61f(2) and 70b. However, after a determination of guilt has been reached, the military judge or president of a special court-martial without a military judge will personally remind the accused of his rights to make a sworn or unsworn statement to the court in mitigation or extenuation of the offenses of which he stands convicted, or to remain silent. See 75c(2). Further, when deemed necessary, the military judge, or the president of a special court-martial without a military judge, will satisfy himself that the accused is aware of any right to which he is entitled by inquiry of counsel or by explaining that right. The rights of the accused with respect to the statute of limitations (68c; Art. 43) will, when applicable, be explained to the accused unless it otherwise affirmatively appears that the accused is aware of these rights. See 70b for the procedure to be followed as to guilty pleas. An accused, who is not represented by legally qualified counsel should be advised of his rights to remain silent, testify as a witness, or make an unsworn statement as appropriate at the proper stages of a trial (75c(2), 140a, 148e, and 149b). When an accused is represented by legally qualified counsel, it may be assumed, except in the situations noted above, that he has been correctly advised of these rights, and it is unnecessary to inquire if the accused has been so advised or to explain the rights to the accused. Any inquiry or explanation as to the rights of the accused to testify or to make an unsworn statement in a court-martial with a military judge shall be made out of the hearing of the court members. See appendix 8 for forms of instructions."

Sec. 7. Paragraph 61f(2) is amended to read as follows:

"(2) Ascertaining legal qualifications of counsel for the defense. After the court has ascertained the qualifications of the members of the prosecution, the military judge, or the president of a special court-martial without a military judge, will question the accused to ensure his understanding of each of the elements of Article 38(b) and will determine whom he desires to represent him (see appendix 8a, page A8-4, and appendix 10a, page A10-2). Counsel representing the accused will then be asked to state whether the legal qualifications of the detailed members of the defense are other than as stated in the order convening the court.

"If the accused introduces counsel of his own selection and the qualifications of that counsel are not shown in the order convening the court, his selected counsel will be asked to state whether he has been certified by an appropriate Judge Advocate General as competent to act as counsel before a general court-martial and, if not, whether he has any of the legal qualifications enumerated in Article 27(b)(1). See 48a regarding qualifications of counsel before general and special courts-martial."

Sec. 8. Paragraph 70b(2) is amended to read as follows:

"(2) The military judge, the president of a special court-martial without a military judge, or summary court-martial must explain to the accused the meaning and effect of any plea of guilty made by him. This explanation must include the following:

"The elements of the offense to which the plea of guilty relates;

"That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;

"The maximum authorized punishment, including permissible additional punishment (127c, Section B), as appropriate, which may be adjudged upon conviction of the offense; and

"That the maximum authorized punishment may be adjudged upon conviction of the offense. Further, the military judge, president of a special court-martial without a military judge, or summary court-martial must question the accused about what he did or did not do and what he intended (where this is pertinent) to determine whether the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty. The military judge, president of a special court-martial without a military judge, or summary court-martial must also personally advise the accused that his plea, if accepted, waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him. In order to accept the plea, the military judge, president of a special court-martial without a military judge, or summary court-martial must determine on the basis of his inquiries and such additional interrogation as he deems necessary, that there is a knowing and conscious waiver of the foregoing rights."

Sec. 9. Paragraph 76b(1) is amended to read as follows:

"b. Procedure for courts-martial with members. (1) Instructions on punishment. Before a court-martial closes to deliberate and vote on the sentence, the military judge, or the president of a special court-martial without a military judge, must give appropriate instructions on the punishment, to include a statement of the maximum authorized punishment which may be imposed and instructions on the procedures to be followed in voting on the sentence as set forth in 76b(2) and 76b(3), including the requirement that the voting on proposed sentences begin with the lightest proposal. Such instructions will be given orally. The instructions should be tailored to the facts and circumstances of the individual case and should fully inform the members of the court-martial on their sole responsibility for selecting an appropriate sentence and that the court-martial may consider all matters in extenuation and mitigation, as well as those in aggravation, whether introduced before or after the findings; evidence admitted as to the background and character of the accused; and the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character. The maximum punishment will be the lowest of the following: the total permitted by 127c for

the offenses of which the accused stands convicted, or the jurisdictional limit of the court-martial (see Art. 19), or, in a rehearing or new or other trial of the case, the maximum authorized pursuant to 81d or 110a(2). A court-martial must not be advised of the basis for the sentence limitation or of any sentence which might be imposed for the offense if not limited as set forth above. If an additional punishment is authorized because of the provisions of 127c, Section B, however, the military judge or the president of a special court-martial without a military judge, should advise the court of the basis for the increased permissible punishment. If the president of a special court-martial without a military judge has any question as to the maximum punishment that may be adjudged in a case, he may request counsel for either or both sides to procure and present pertinent information concerning the matter for his consideration. This information will be given in open session in the presence of the accused and his counsel and should be made a matter of record."

Sec. 10. Paragraph 89c(8)(a) is amended to read as follows:

"(8) Action on rehearing or new or other trial. (a) Rehearing or other trial. In acting on a rehearing or other trial, the convening authority is subject to the sentence limitations prescribed for the court in adjudging a sentence. See 81d. Additionally, except when a rehearing or other trial is combined with a trial on additional offenses, if any portion of the original sentence was suspended and the suspension was not properly vacated (97b) before the order directing the rehearing, the convening authority shall take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended.

"The convening authority may approve a sentence adjudged upon a rehearing or other trial without regard to whether any portion or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment actually to be served or executed under the new sentence, the accused will be credited with any portion or amount of the former sentence included within the new sentence that was served or executed prior to the time it was disapproved or set aside. Additionally, he will be credited with any period actually spent in confinement in connection with the charges which are the subject of the rehearing or other trial between the date the rehearing or other trial is ordered and the date of the rehearing or other trial. For example, if the original sentence consisted of confinement at hard labor for six months and forfeiture of $50 per month for six months, of which one month's confinement has been served prior to the date the rehearing is ordered (Art. 57(b)) but no pay has been forfeited, and the sentence adjudged upon the rehearing is identical to the original sentence, the person charged with administrative execution of the new sentence would credit the accused with one month's confinement; the accused would have a balance of confinement for five months and forfeitures for six months yet to be executed. If the accused also actually spent one month in confinement in connection with the charges before the rehearing between the date the rehearing was ordered and the date of the rehearing, he would receive one month

additional credit and would have a balance of confinement for four months and forfeitures for six months yet to be executed. To insure that credit shall be given in proper cases, the convening authority shall, if he approves any part of a sentence adjudged upon a rehearing or other trial, direct in his action that any portion or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside and any period actually spent in confinement in connection with the charges before the rehearing or other trial between the date the rehearing or other trial was ordered and the date of the rehearing or other trial shall be credited to the accused. See appendix 14 (forms 19 and 45).

"If, in his action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on these findings, he will, unless a further rehearing is ordered, provide in his action that all rights, privileges, and property affected by an executed portion of the sentence adjudged at the former hearing shall be restored. The same restorative action will be taken if the court, at a rehearing, acquits the accused of all charges and specifications which were tried at the former hearing. See Article 75 and appendix 14 (forms 10 and 24)."

Sec. 11. Paragraph 110f is amended to read as follows:

"f. Action by persons charged with the execution of the sentence. Persons charged with the administrative duty of executing a sentence adjudged upon a new trial after it has been ordered into execution shall credit the accused with any executed portion or amount of the original sentence included within the new sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence. Additionally, they shall credit the accused with any period actually spent in confinement in connection with the charges which are the subject of the new trial between the date the new trial is granted and the date of the new trial itself. For example, if the original sentence consisted of confinement at hard labor for five years, of which one year had already been served prior to the granting of a new trial, and two months were spent in pretrial confinement, after the new trial was granted, only two years and ten months would remain to be executed if confinement for four years were awarded and approved upon a new trial."

Sec. 12. The second paragraph within paragraph 122b(2) is amended to read as follows:

"A request or other action to cause the court to make inquiry concerning the accused's sanity may be initiated by the military judge or any member of the court, prosecution, or defense. Where the defense proffers expert testimony concerning the accused's mental responsibility or capacity, the accused may be required to submit to psychiatric evaluation by Government psychiatrists as a condition to the admission of defense psychiatric evidence. The military judge rules finally as to whether an inquiry should be made into the mental capacity of the

accused at the time of trial or into the mental responsibility of the accused at the time of the offense (Art. 51(b); see 122b(3) and (4)). The president of a special court-martial without a military judge rules finally on all questions of law but rules subject to objection by any member on all factual issues. Thus, if the issue of whether an inquiry should be made into the mental capacity of the accused at the time of trial or into the mental responsibility of the accused at the time of the offense involves only a legal determination, the president of a special court-martial without a military judge rules finally. When such an issue is solely one of fact, the president of a special court-martial without a military judge rules subject to objection by any member (Art. 51(b); see 122b(3) and (4)). As to mixed questions of law and fact, see 57b. Before asking whether any member objects to a ruling which is subject to objection, the members should be given such instructions as will enable them to understand the question that is before them and the legal standards and procedure by which they will determine it if objection is made. If thereafter, a member objects to the ruling, the court will close and vote on whether an inquiry should be made (57f). A tie vote of the members upon a motion relating to the sanity of the accused is a determination against the accused (Art. 52(c)). If it is determined to make an inquiry, priority will be given to it, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused. If it appears that the inquiry will be protracted or if the court desires to hear expert testimony, the court may adjourn and report the matter to the convening authority with its recommendations. These recommendations may include a recommendation that the accused be examined as provided in 121 and that the officer or officers conducting the examination be made available as witnesses. As a result of a subsequent report of mental examination conducted under 121, the convening authority may withdraw the charges from the court, hold the proceedings in abeyance, refer the matter to the court for its consideration subject to the provisions of 122c, or take other appropriate action."

Sec. 13. The fifth paragraph within paragraph 140a(2) is amended to read as follows:

"A statement of an accused or suspect obtained from him in violation of any of the above warning requirements as to the right to remain silent or the right to counsel is considered to be involuntary, and therefore inadmissible against him, because of the violation alone, even if the accused or suspect knew that he had these rights despite the lack of warning. These warning requirements do not apply to the questioning of witnesses at a trial. Where the defense presents expert testimony concerning the accused's mental condition, a Government expert, testifying in rebuttal, may testify as to his conclusions concerning the accused's mental responsibility or capacity based on interviews with the accused conducted without advising him of the foregoing rights."

Sec. 14. The fifth paragraph within paragraph 150b is amended to read as follows:

"The privilege against compulsory self-incrimination protects a person only from being compelled to testify

against himself or to provide the Government otherwise with evidence of a testimonial or communicative nature and does not protect him from being compelled by an order or force to exhibit his body or other physical characteristics as evidence. The privilege is therefore not violated, for example, by the use of compulsion in taking the fingerprints of an accused or other person, in exhibiting or requiring him to exhibit a scar on his body, in placing his feet in tracks, or trying clothing or shoes on him or requiring him to do so. An accused may be required to submit to psychiatric evaluation or testing by the Government as a condition precedent to his presenting psychiatric testimony that would raise an issue as to his mental responsibility or capacity. Also, the privilege is not violated by the use of compulsion in requiring a person to produce for use as evidence or otherwise a record of writing under his control containing or disclosing matter incriminating him when the record or writing is under his control in a representative rather than a personal capacity, as when it is in his control as the custodian of a non-appropriated fund."

Sec. 15. The second paragraph of the fourth paragraph within paragraph 152 is amended to read as follows:

"A search conducted as an incident of lawfully apprehending a person, which may include a search of his person, of the clothing he is wearing, and of property which, at the time of apprehension, is in his immediate possession or control, or of an area from within which he might gain possession of weapons or destructible evidence; but a search which involves an intrusion into his body, as by taking a sample of his blood for chemical analysis, may be conducted under this rule only when there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable. See the example of an unreasonable method in the last paragraph of 150b."

Sec. 16. The following subparagraph (b) is added to Article 42, appendix 2:

"(b) Each witness before a court-martial shall be examined on oath."

Sec. 17. Appendix 14, Form 19, is amended to read as follows:

"19. In the foregoing case of _____, the sentence is approved and will be duly executed. (_____ is designated as the place of confinement.) The accused will be credited with (confinement from _____, 19__, to _____, 19__, and) any (other) portion of the punishment served or executed from _____, 19__, to _____, 19__, under the sentence adjudged at the former trial of this case. Additionally, the accused will be credited with actual confinement from _____, 19__, to _____, 19__, being the period spent in confinement between the date the sentence of the former trial in this case was (set aside) (disapproved) and the

present sentence in this case was announced."

Sec. 18. Appendix 14, Form 45, is amended to read as follows:

"In the foregoing case of _____, the sentence is approved. The accused will be credited with (confinement from _____, 19__, to _____, 19__, and) any (other) portion of the punishment served or executed from _____, 19__, to _____, 19__, under the sentence adjudged at the former trial of this case. Additionally, the accused will be credited with actual confinement from _____, 19__, to _____, 19__, being the period spent in confinement between the date the sentence of the former trial in this case was (set aside) (disapproved) and the present sentence in this case was announced. The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be _____ (see Form 41, above)."

Sec. 19. These amendments shall be in effect after January 27, 1975 , with respect to all court-martial processes taken on and after that date: Provided, That nothing contained in these amendments shall be construed to invalidate any investigation, trial in which arraignment has been completed, or other action begun prior to January 27, 1975 ; and any such investigation, trial, or other action may be completed in accordance with the applicable laws, Executive orders, and regulations in the same manner and with the same effect as if these amendments had not been prescribed.

GERALD R. FORD

THE WHITE HOUSE,
January 27, 1975

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