

CHANGES TO THE MANUAL FOR COURTS-MARTIAL OF INTEREST TO LAW ENFORCEMENT OFFICERS

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On April 11, 2002, President Bush signed Executive Order 13262 amending the Manual for Courts-Martial (MCM). Those provisions of interest to law enforcement officers (LEOs) are summarized here. These changes are reflected in MCM 2002.

CHANGES TO THE NATURE OF OFFENSES AND AVAILABLE DEFENSES

Elimination of “suspect exception” to False Official Statement Offenses (Article 107). Prior to the change, it was a possible MCM defense to a charge of making a false official statement that the statement was made by a suspect during an interrogation unless the suspect had an independent duty or obligation to speak. This defense has been eliminated. EFFECT ON LAW ENFORCEMENT: The MCM 2000 suggested that the correct offense when a suspect lied to interrogators was false swearing if the statement was under oath. Now, when suspects lie to interrogators, charge false official statement. When the lie is made under oath, charge false swearing.

Larceny Using ATM Cards or Electronic Transactions (Article 121). When an accused was charged with wrongfully using an ATM, credit, debit, or similar card or code to obtain goods or money, there was a split of opinion whether this larceny was a “taking” or “obtaining.” The change makes clear that this offense is an “obtaining” by false pretenses. EFFECT

ON LAW ENFORCEMENT: This clarification affects primarily trial counsel and military judges who prefer or instruct upon charges. LEOs, however, should always consult the MCM for the elements of an offense, and their definitions, during an investigation and before interrogations.

Adultery as Prejudicial to Good Order and Discipline or Service Discrediting (Article 134). Adultery, like most Article 134 offenses, requires the government to prove the act was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. Not every act of adultery can meet this test. MCM 2002 now provides general guidance and a list of factors to assist in deciding whether the adultery meets this element, including factors that focus on the facts and circumstances surrounding the relationship of the actors, the circumstances of the offense, and the effect the adultery had on the military. EFFECT ON LAW ENFORCEMENT: When LEOs are involved in investigating adultery cases, they should review the new MCM factors and collect evidence so commanders can make good decisions, and the trial counsel will be armed with sufficient evidence should the case be tried.

The significance of separations and mistake of fact in adultery offenses. The change provides that a marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction. It is no defense that the married participant is legally separated at the time of the offense, although it may be a factor in whether the conduct was prejudicial or service discrediting. In addition, MCM 2002 recognizes a defense of *mistake of fact* if the accused had an honest and reasonable belief either that the accused and the co-actor were

both unmarried, or that they were lawfully married to each other. EFFECT ON LAW ENFORCEMENT: In adultery investigations, and especially in interrogations of a suspect, LEOs should determine whether the accused may assert a mistake of fact claim, and then develop evidence that confirms or refutes the claim.

CHANGES IN COURTS-MARTIAL PROCEDURE

Gag orders. A military judge may now issue a protective order to prevent the counsel, the accused, and witnesses from making “extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.” (R.C.M. 806(d)). EFFECT ON LAW ENFORCEMENT: LEOs must scrupulously obey a gag order. When there is a gag order and the investigation continues during the trial or while the trial is pending, LEOs should seek guidance from trial counsel on the effect of a gag order if the officer needs to discuss the offense with others.

Sequestration of witnesses from the courtroom. Before the change, M.R.E. 615 provided that, with some exceptions, a military judge “shall exclude” witnesses from a courts-martial if counsel for either side requests it. The old rule seemed to require sequestering crime victims who were to testify in the sentencing proceedings unless there was a statutory provision that permitted their presence. The change permits *some* victim-witnesses to be in the courtroom. EFFECT ON LAW ENFORCEMENT: LEOs with victim-witness responsibilities may have to reexamine their policies. Though the change might permit some victim-witnesses to remain in the courtroom, there may be instances where the trial counsel would still

prefer to sequester the witness. Consult the trial counsel before telling a victim they may attend the proceedings.

Defense not required to disclose certain information that is privileged under the psychotherapist-patient privilege. Under the reciprocal discovery provisions, the defense can be required to disclose certain information. A change to R.C.M. 701 makes clear that disclosure would not include privileged matters protected under the psychotherapist-patient privilege in M.R.E. 513. (R.C.M. 701.) EFFECT ON LAW ENFORCEMENT: Law enforcement must remember that communications between a patient and their psychotherapists are privileged and cannot be obtained until a claim of privilege is resolved. Use great caution when investigating cases that lead to reviewing or seizing medical records.

Types of civilian convictions admissible during sentencing. Both military and civilian *convictions* are admissible during the sentencing phase of a trial. Civilian convictions include “any disposition following an initial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of *no lo contendre*, regardless of the subsequent disposition, sentencing procedure, or final judgment.” Deferred adjudications and the following are **not** convictions for sentencing purposes: “a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused.” R.C.M. 1001(b)(3)(A). EFFECT ON LAW ENFORCEMENT: LEOs, not trial

counsel, have the best sources to determine an accused's criminal past. When NCIC or other sources of criminal information are not clear that there has been a finding of guilt (a conviction), LEOs should obtain the court records so the trial counsel may determine whether the matter is a *conviction*. In addition, LEOs should note that what is a conviction for purposes of impeachment (M.R.E. 609) is narrower than a conviction for sentencing purposes.

CHANGES TO MAXIMUM PUNISHMENTS

Maximum confinement and forfeitures in a Special Court-Martial increased to 1 year. Prior to the change, the maximum confinement and period of forfeitures at a special court-martial was only 6 months. (R.C.M. 201(f)(2)(B)).
EFFECT ON LAW ENFORCEMENT: LEOs can expect that some cases that would have been tried at a general court-martial will now be tried at a special. A special court-martial does not require an Article 32 investigation.

Both fines and forfeitures may be adjudged at any court-martial. Prior to the change, summary and special courts-martial could adjudge fines or forfeitures, but not both. That limitation was removed. R.C.M. 1003(b)(3)

Confinement for life without eligibility for parole. The MCM change incorporates an earlier U.C.M.J. change providing that a sentence of life without eligibility for parole is permitted in cases where confinement for life is authorized. Confinement for life without eligibility for parole is also available in cases where the death penalty is authorized, except for convicted spies under Article 106 where the

death penalty is mandatory. R.C.M. 1003(b)(7), R.C.M. 1004(e)

CHANGES TO SENTENCING THRESHOLDS

EFFECT ON LAW ENFORCEMENT: In light of these changes, agencies may wish to reconsider policies on investigative jurisdiction.

The following is not a modified table of maximum punishments, but only an illustration of changes made to certain offenses. The maximum punishments have not changed, just the thresholds.

Offense	Old Threshold	New Threshold	To impose a punishment of
Article 103, Offenses involving captured or abandoned property	\$100 or less	\$500 or less	BCD, 6 months
Article 103, Offenses involving captured or abandoned property	More than \$100	More than \$500 or any firearm or explosive	DD, 5 years
Article 108, Military property offenses - Selling or disposing; willful damage, destruction, losing and willful suffering	\$100 or less	\$500 or less	BCD, 1 year
Article 108, Military property offenses - Selling or disposing; willful damage, destruction, losing and willful suffering	More than \$100	More than \$500	DD, 10 years
Article 108, Military property offenses - Neglect	\$100 or less	\$500 or less	6 months
Article 108, Military property offenses - Neglect	More than \$100	More than \$500	BCD, 1 year
Article 109, Military property - Wasting etc.	\$100 or less	\$500 or less	BCD, 1 year
Article 109, Military property - Wasting etc.	More than \$100	More than \$500	DD, 5 years
Article 121, Larceny, Military property	\$100 or less	\$500 or less	BCD, 1 year
Article 121, Larceny, Military property	More than \$100	More than \$500	DD, 10 years
Article 121, Larceny, other than military property	\$100 or less	\$500 or less	BCD 6 months
Article 121, Larceny, other than military property	More than \$100	More than \$500	DD, 5 years
Article 121 Wrongful appropriation	\$100 or less	\$500 or less	3 months
Article 121 Wrongful appropriation	More than \$100	More than \$500	BCD, 6 months
Article 123a, Check offenses, intent to defraud	\$100 or less	\$500 or less	BCD 6 months
Article 123a, Check offenses, intent to defraud	More than \$100	More than \$500	DD, 5 years
Article 126, Simple arson	\$100 or less	\$500 or less	DD, 1 year
Article 126, Simple arson	More than \$100	More than \$500	DD, 5 years
Article 132, False claims, false writings, papers, and oath	\$100 or less	\$500 or less	BCD, 6 months
Article 132, False claims, false writings, papers, and oath	More than \$100	More than \$500	DD, 5 years

Offense	Old Threshold	New Threshold	To impose a punishment of
Article 134, Obtaining services under false pretenses	\$100 or less	\$500 or less	BCD, 6 months
Article 134, Obtaining services under false pretenses	More than \$100	More than \$500	DD, 5 years
Article 134, Stolen property offenses	\$100 or less	\$500 or less	BCD, 6 months
Article 134, Stolen property offenses	More than \$100	More than \$500	DD, 3 years