MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

This change incorporates Executive Order No. 12767, dated 27 June 1991, published at 56 Federal Register 30284, which amends Executive Order No. 12473, dated 13 April 1984, as amended by Executive Order No. 12484, dated 13 July 1984, Executive Order No. 12550, dated 19 February 1986, Executive Order No. 12586, dated 3 March 1987, and Executive Order No. 12708, dated 23 March 1990. Significant amendments include: clarification of availability of witnesses at pretrial investigations and the use of their unsworn statements (R.C.M. 405); modification of defense disclosure and notice requirements (R.C.M. 701); modification of the scope of the Government's authority for pretrial agreement negotiations (R.C.M. 705); comprehensive changes to the speedy trial rules (R.C.M. 707); authority for pretrial conferences over objection (R.C.M. 802); modification of stays and release of the accused from confinement pending Government appeals (R.C.M. 908); modification of aggravating factors for murder (R.C.M. 1004); clarification of defense duties for advising the accused of post-trial rights (R.C.M. 1010); requirement that action be inserted in the record of trial (R.C.M. 1103 and 1107); clarification of when waiver of appeal must be filed (R.C.M. 1110); clarification of when advice by the staff judge advocate is required after final judgment (R.C.M. 1113); prohibition against admitting the results of polygraph examinations (Mil. R. Evid. 707); increase of maximum punishment for attempted murder (Paragraph 4, Part IV); addition of escape from confinement as an aggravating factor for a violation of Article 95, Uniform Code of Military Justice (Paragraph 19, Part IV); clarification of what constitutes operating a vehicle (Paragraph 35, Part IV); deletion of false swearing as a lesser included offense of perjury (Paragraph 57, Part IV); modification of the form specification for obstructing justice (Paragraph 96, Part IV).

Copies of Executive Order No. 12767 were transmitted to the Congress of the United States in accordance with Section 836 of title 10 of the United States Code on 14 August 1991. See 137 Cong. Rec. H 6450-04 (daily ed. 11 September 1991).

MCM, 1984, is changed as follows:

EXECUTIVE ORDER NO. 12767

AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States of America and by chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), 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, and Executive Order No. 12708, 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. 405(g)(1)(A) is amended to read as follows:

"(A) *Witnesses.* Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is 'reasonably available' when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a) (1)-(6) is not 'reasonably available.' "

b. R.C.M. 405(g)(4)(B) is amended–

(1) in clause (iii) to read as follows:

"(iii) Prior testimony under oath;";

(2) in clause (iv) to read as follows:

"(iv) Depositions of that witness; and"; and

(3) by adding the following clause at the end thereof:

"(v) In time of war, unsworn statements."

c. R.C.M. 701(a)(3)(B) is amended to read as follows:

"(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b) (1) or (2) of this rule."

d. R.C.M. 701(b) is amended–

(1) in subparagraph (1) to read as follows:

"(1) *Names of witnesses and statements.*

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.";

(2) in subparagraph (2) to read as follows:

"(2) *Notice of certain defenses.* The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses."; and

(3) in subparagraph (5) to read as follows:

"(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention."

e. R.C.M. 705(c)(2) is amended by deleting the first sentence and substituting therefor the following sentence:

"(2) *Permissible terms or conditions.* Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:".

f. R.C.M. 705(d) is amended—

(1) by deleting subparagraph (1);

(2) by redesignating subparagraph (2) as subparagraph (1) and amending it to read as follows:

"(1) *Negotiation.* Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel."

(3) by redesignating subparagraph (3) as subparagraph (2) and amending it to read as follows:

"(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement."

(4) by redesignating subparagraph (4) as subparagraph (3) and amending it to read as follows:

"(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement, or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign." and

(5) by redesignating subparagraph (5) as subparagraph (4).

g. R.C.M. 707 is amended to read as follows:

"Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Preferral of charges;

(2) The imposition of restraint under R.C.M. 304(a) (2)–(4); or,

(3) Entry on active duty under R.C.M. 204.

(b) *Accountability.*

(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304(a) (2)–(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for the purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple charges.* When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which affect time periods.*

(A) *Dismissal or mistrial.* If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferral and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under this rule shall begin on the earlier of

(i) the date of repreferral;

(ii) the date of imposition of restraint under R.C.M. 304(a) (2)-(4).

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or

(iii) the date of entry on active duty under R.C.M. 204.

(C) *Government appeals.* If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Military Review under R.C.M. 908, if there is a further appeal to the Court of Military Appeals or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Military Appeals or, if appropriate, the Supreme Court.

(D) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.

(c) *Excludable delay.* All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

(2) *Motions.* Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made part of the appellate record.

(d) *Remedy.* A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(e) *Waiver.* Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense."

h. R.C.M. 802(c) is amended to read as follows:

"(c) *Rights of Parties.* No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial."

i. R.C.M. 908(b)(4) is amended to read as follows:

"(4) *Effect on the court-martial.* Upon written notice to the military judge under subsection (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Military Review of the appeal, except that solely as to charges and specifications not affected by the ruling or order:"

j. R.C.M. 908(b) is amended by inserting the following new subparagraph at the end thereof:

"(9) *Pretrial confinement of accused pending appeal.* If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under subsection (3) above, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B)."

k. R.C.M. 1004(c)(8) is amended to read as follows:

"(8) That, only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, robbery, or aggravated arson was major and who manifested a reckless indifference for human life;"

l. R.C.M. 1010 is amended to read as follows:

"In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

(a) The right to submit matters to the convening authority to consider before taking action;

(b) The right to appellate review, as applicable, and the effect of waiver or withdrawal of such right;

(c) The right to apply for relief from the Judge Advocate General if the case is neither reviewed by a Court of Military Review nor reviewed by the Judge Advocate General under R.C.M. 1201(b)(1); and

(d) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit."

m. R.C.M. 1103(b)(2)(D) is amended by–

(1) redesignating clause (iv) as clause (v); and

(2) inserting the following new clause (iv) after clause (iii):

"(iv) The original dated, signed action by the convening authority."

n. R.C.M. 1107(f)(1) is amended to read as follows:

"(1) *In general.* The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action shall be signed personally by the convening authority. The convening authority's authority to sign shall appear below the signature."

o. R.C.M. 1110(f)(1) is amended to read as follows:

"(1) *Waiver.* The accused may sign a waiver of appellate review at any time after the sentence is announced. The waiver must be filed within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days."

p. R.C.M. 1113(c)(1) is amended in the final paragraph thereof to read as follows:

"A dishonorable or a bad-conduct discharge may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. If on the date of final judgment a servicemember is not on appellate leave and more than 6 months have elapsed since approval of the sentence by the convening authority, before a dishonorable or a bad-conduct discharge may be executed, the officer exercising general court-martial jurisdiction over the servicemember shall consider the advice of that officer's staff judge advocate as to whether retention of the servicemember would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the convening authority, and a recommendation whether the discharge should be executed."

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended by adding the following new rule at the end of Section VII thereof:

"Rule 707. Polygraph examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible."

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

a. Paragraph 4e is amended to read as follows:

"e. *Maximum punishment.* Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged."

b. Paragraph 19 is amended—

(1) in subparagraph b(4) by adding the following thereto:

"[Note: If the escape was post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction."

(2) in subparagraph c(4)(a) by adding the following thereto:

"For purposes of the aggravating element of post-trial confinement (subparagraph b(4)(d), above) and increased punishment therefor (subparagraph e(4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial and not as a result of pretrial restraint or nonjudicial punishment."

(3) in subparagraph e by—

(a) amending clause (3) to read as follows:

"(3) *Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year."

(b) adding the following new clause at the end thereof:

"(4) *Escape from post-trial confinement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years."

(4) in subparagraph f(4) to read as follows:

"(4) *Escape from confinement.*

In that __________ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order accused into confinement did, (at/on board __________ location) (subject-matter jurisdiction data, if required), on or about __________ 19____, escape from confinement."

c. Paragraph 35c(2) is amended to read as follows:

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

d. Paragraph 57d is amended to read as follows:

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

e. Paragraph 96f is amended to read as follows:

"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 (a trial by court-martial) (an investigation) (__________)] [influence the actions of __________, (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (__________)] [(influence) (alter) the testimony of __________ as a witness before a (court-martial) (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) he/she, the said __________, would [recommend dismissal of the charges against said __________] [(wrongfully refuse to testify) (testify falsely concerning __________) (__________)] [(at such trial) (before such investigating officer)] [__________]."

Section 4. These amendments shall take effect on 6 July 1991, subject to the following:

a. The amendments made to Rule for Courts-Martial 1004(c)(8) and paragraphs 4e, 19, and 35c(2) of Part IV shall apply to any offense committed on or after 6 July 1991.

b. Military Rule of Evidence 707 shall apply only in cases in which arraignment has been completed on or after 6 July 1991.

c. The amendments made to Rules for Courts-Martial 701 and 705 shall apply only in cases in which charges are preferred on or after 6 July 1991.

d. The amendments made to Rules for Courts-Martial 707 and 1010 shall apply only to cases in which arraignment occurs on or after 6 July 1991.

e. The amendment made to Rule for Courts-Martial 908(b)(9) shall apply only to cases in which pretrial confinement is imposed on or after 6 July 1991.

f. The amendment made to Rule for Courts-Martial 1113(c)(1) shall apply only in cases in which the sentence is adjudged on or after 6 July 1991.

g. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to 6 July 1991, which was not punishable when done or omitted.

h. The maximum punishment for an offense committed prior to 6 July 1991 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 6 July 1991, 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.

Section 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.

George Bush

THE WHITE HOUSE,
June 27, 1991

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

A. The Discussion accompanying R.C.M. 406(b) is amended by adding the following at the end thereof:

"The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause. *See* R.C.M. 601(d)(l). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. *See* R.C.M. 905(b)(1) and its Discussion."

B. The Discussion accompanying R.C.M. 701(b)(1) is amended to read as follows:

"Such notice shall be in writing except when impracticable. *See* R.C.M. 701(f) for statements that would not be subject to disclosure."

C. The Discussion accompanying R.C.M. 701(b)(2) is amended to read as follows:

"Such notice should be in writing except when impracticable. *See* R.C.M. 916(k) concerning the defense of lack of mental responsibility. *See* R.C.M. 706 concerning inquiries into the mental responsibility of the accused. *See* Mil. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. *See* R.C.M. 906(b)(6)."

D. The following Discussion is inserted after R.C.M. 707(a)(1):

"Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. *See also* Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief. Offenses ordinarily should be disposed of promptly to serve the interests of good order and discipline. Priority shall be given to persons in arrest or confinement."

E. The following Discussion is inserted after R.C.M. 707(c)(1):

"The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer."

F. The following Discussion is inserted after R.C.M. 707(e):

"Speedy trial issues may also be waived by a failure to raise the issue at trial. *See* R.C.M. 905(e) and 907(b)(2)."

G. The Discussion accompanying R.C.M. 905(d) is amended to read as follows:

"When trial cannot proceed further as the result of dismissal or other rulings on motions, the court-martial should adjourn and a record of the proceedings should be prepared for the convening authority. *See* R.C.M. 908(b)(4) regarding automatic stay of certain rulings and orders subject to appeal under that rule. Notwithstanding the dismissal of some specifications, trial may proceed in the normal manner as long as one or more charges and specifications remain. The promulgating orders should reflect the action taken by the court-martial on each charge and specification, including any which were dismissed by the military judge on a motion. *See* R.C.M. 1114."

H. The following Discussion is inserted after R.C.M. 1004(c)(8):

"Reckless indifference means a heedless disregard of consequences under circumstances involving grave danger to the life of others, although no harm is intended. The accused must have had actual knowledge of the grave danger to others or knowledge of circumstances that would cause an ordinary reasonable man to realize the highly dangerous character of such conduct. In determining whether participation in the offense was 'major,' the accused's presence at the scene and the extent to which the accused aided, abetted, assisted, encouraged, or advised the other participant(s) should be considered."

I. The Discussion accompanying R.C.M. 1010 is amended to read as follows:

"The post-trial duties of the defense counsel concerning the appellate rights of the accused are set forth in paragraph (E)(iv) of the Discussion accompanying R.C.M. 502(d)(6). The defense counsel shall explain the appellate rights to the accused and prepare the written document of such advisement prior to or during trial."

J. The Discussion accompanying R.C.M. 1101(c)(3) is amended by adding the following at the end thereof:

"If the request for deferment is denied, the basis for the denial should be in writing and attached to the record of trial."

K. The Discussion accompanying R.C.M. 1113(a) is amended to read as follows:

"An order executing the sentence directs that the sentence be carried out. Except as provided in subsections (d)(2), (3), and (5) of this rule, no part of a sentence may be carried out until it is ordered executed."

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. 405(g)(1)(A). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (g)(1)(A) was amended by adding a requirement that a witness be located within 100 miles of the situs of the investigation to be 'reasonably available.' Given the alternatives to testimony available under subsection (g)(4), a bright-line rule of 100 statute miles simplifies the 'reasonably available' determination and improves the efficiency of the investigation without diminishing the quality or fairness of the investigation. If a witness is located within 100 statute miles of the situs of the investigation, the investigating officer must consider the other factors in subsection (g)(1)(A) in determining availability. The remaining provisions of section (g) remain applicable. The production of witnesses located more than 100 statute miles from the situs of the investigation is within the discretion of the witness' commander (for military witnesses) or the commander ordering the investigation (for civilian witnesses)."

b. R.C.M. 405(g)(4)(B). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (4)(B) was amended by adding a new clause (v) which authorizes the investigating officer to consider, during time of war, unsworn statements of unavailable witnesses over objection of the accused. The burdens of wartime exigencies outweigh the benefits to be gained from requiring sworn statements when unsworn statements are available. Article 32, U.C.M.J., does not require the investigating officer to consider only sworn evidence or evidence admissible at courts-martial. The investigating officer should consider the lack of an oath in determining the credibility and weight to give an unsworn statement."

c. R.C.M. 406(b). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* The Discussion to R.C.M. 406(b) was amended to state explicitly the applicable standard of proof. *See United States v. Engle*, 1 M.J. 387, 389 n.4 (C.M.A. 1976). The sentence concerning pretrial advice defects is based upon *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988), in which the court reviewed the legislative history to the 1983 amendment to Article 34, U.C.M.J., and held that lack of a pretrial advice in violation of the article is neither jurisdictional nor *per se* prejudicial."

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

"*1991 Amendment:* Subsection (a)(3)(B) was amended to provide for prosecution disclosure of rebuttal witnesses to a defense of innocent ingestion. This conforms to the amendment to R.C.M. 701(b)."

e. R.C.M. 701(b)(1). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (b)(1) has been revised to expand the open discovery that is characteristic of military practice. It provides the trial counsel with reciprocal discovery and equal opportunity to interview witnesses and inspect evidence as that available to the defense under subsection (a). *See* Article 46, U.C.M.J., and R.C.M. 701(e). Enhanced disclosure requirements by the defense is consistent with a growing number of state jurisdictions that give the prosecution an independent right to receive some discovery from the defense. *See* Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Calif. L. Rev. 1567, 1579-1583 (1986). Mandatory disclosure requirements by the defense will better serve to foster the truth-finding process."

f. R.C.M. 701(b)(2). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (b)(2) was revised to add the requirement that the defense give notice of its intent to present the defense of innocent ingestion. The innocent ingestion defense, often raised during trials for wrongful use of a controlled substance, poses similar practical problems (*e.g.*, substantial delay in proceedings) as those generated by an alibi defense, and thus merits similar special treatment."

g. R.C.M. 701(b)(5). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (b)(5) was amended to clarify that when the defense withdraws notice of an intent to rely upon the alibi, innocent ingestion, or insanity defenses, or to introduce expert testimony of the accused's mental condition, neither evidence of such intention, nor statements made in connection therewith, are admissible against the servicemember who gave notice. This rule applies regardless of whether the person against whom the evidence is offered is an accused or a witness. *Fed. R. Crim.* P. 12.1 and 12.2, upon which the subsection is based, were similarly amended [*See* H.R. Doc. No. 64, 99th Cong., 1st Sess. 17-18 (1985)]."

h. R.C.M. 705(c). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (2) was amended to clarify that either side can propose the inclusion of the listed terms in a pretrial agreement. This conforms to the amendment to R.C.M. 705(d)."

i. R.C.M. 705(d). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* R.C.M. 705(d) was amended to authorize either party to initiate pretrial agreement negotiations and propose terms and conditions. The amendment does not change the general rule that all terms and conditions of a pretrial agreement proposed pursuant to this rule must not violate law, public policy or regulation. Subparagraph (1) was eliminated and subparagraphs (2)-(5), as amended, were renumbered (1)-(4), respectively. This amendment is patterned after federal civilian practice [*see Fed. R. Crim. P.* 11(e)] where there is no requirement that negotiations for plea agreements originate with the defense. In courts-martial, the military judge is required to conduct an exhaustive inquiry into the providence of an accused's guilty plea and the voluntariness of the pretrial agreement. R.C.M. 705(c) ensures that certain fundamental rights of the accused cannot be bargained away. Furthermore, it can be difficult to determine which side originated negotiations, or a particular clause. *Cf. United States v. Jones*, 23 M.J. 305, 308-309 (C.M.A. 1987) (Cox, J., concurring)."

j. R.C.M. 707. The Analysis to R.C.M. 707 is amended to read as follows:

"Rule 707. Speedy trial.

Introduction. This rule applies the accused's speedy trial rights under the 6th Amendment and Article 10, U.C.M.J., and protects the command and societal interest in the prompt administration of justice. *See generally Barker v. Wingo,* 407 U.S. 514 (1972); *United States v. Walls,* 9 M.J. 88 (C.M.A. 1980). The purpose of this rule is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable. This rule amends the former rule, which excluded from accountable time periods covered by certain exceptions.

(a) *In general.* This subsection is based on *ABA Standards For Criminal Justice, Speedy trial,* 12-2.1, 12-2.2 (1986). The ABA Standards set no time limit but leave the matter open depending on local conditions. The basic period from arrest or summons to trial under *The Federal Speedy Trial Act,* 18 U.S.C. § 3161, is 100 days. The period of 120 days was selected for courts-martial as a reasonable outside limit given the wide variety of locations and conditions in which courts-martial occur. The dates of the events which begin government accountability are easily ascertainable and will avoid the uncertainty involved in *Thomas v. Edington,* 26 M.J. 95 (C.M.A. 1988).

The 90-day rule previously established in R.C.M. 707(d) has been eliminated. As such, the 120-day rule established in subsection (a) of this rule applies to all cases, not just cases where the accused is in pretrial confinement. Judicial decisions have held, however, that when an accused has been held in pretrial confinement for more than 90 days, a presumption arises that the accused's right to a speedy trial under Article 10, U.C.M.J. has been violated. In such cases, the government must demonstrate due diligence in bringing the case to trial. *United States v. Burton,* 44 C.M.R. 166 (C.M.A. 1971). Unless *Burton* and its progeny are reexamined, it would be possible to have a *Burton* violation despite compliance with this rule.

The discussion is based on *United States v. McDonald,* 456 U.S. 1 (1982); *United States v. Marion,* 404 U.S. 307 (1971). *See also United States v. Lovasco,* 431 U.S. 783 (1977). Delay before restraint or referral of charges could raise due process issues. *See id.; United States v. McGraner,* 13 M.J. 408 (C.M.A. 1982). *See generally* Pearson and Bowen, *Unreasonable Pre-Preferral Delay,* 10 A.F. JAG Rptr. 73 (June 1981).

(b) *Accountability.* Subsection (1) is based on *United States v. Manalo,* 1 M.J. 452 (C.M.A. 1976). The reference to R.C.M. 304(a)(2)-(4) conforms to the language of R.C.M. 707(a)(2).

Subsection (2) is based on *ABA Standards, supra* at 12-2.2(a) (1986). *See also United States v. Talavera,* 8 M.J. 14 (C.M.A. 1979).

Subsection (3)(A) establishes that a mistrial or dismissal by any proper authority begins a new trial period. This subsection clarifies the date from which to begin measuring new time periods in cases involving rereferral, restraint or no restraint.

Subsection (3)(B) clarifies the intent of this portion of the rule. The harm to be avoided is continuous pretrial restraint. *See United States v. Gray,* 21 M.J. 1020 (N.M.C.M.R. 1986). Where an accused is released from pretrial restraint for a significant period, he will be treated the same as an accused who was not restrained. Therefore, unless the restraint is reimposed, the 120-day time period will run from the date of preferral or entry on active duty regardless of whether that event occurs before or after the accused was released from restraint.

Subsection (3)(C) clarifies the effect of government appeals on this rule. This subsection treats all government appeals the same. Once the parties are given notice of either the government's decision not to appeal under R.C.M. 908(b)(8) or the decision of the Court of Military Review under R.C.M. 908(c)(3), a new 120-day period begins.

This subsection clarifies how time should be counted for those charges not affected by the ruling that is subject to appeal. Under R.C.M. 908(b)(4), trial on such charges may in some circumstances proceed notwithstanding the appeal, or trial may await resolution of the appeal. Since traditional policy of resolving all known charges at a single trial has not changed (*See* R.C.M. 906(b)(10), Discussion), charges not the subject of the appeal may be properly delayed without violating this rule. Accordingly, where the trial is interrupted by a government appeal, all charges may be treated the same and proceeded upon at the same time once the appeal is resolved.

(c) *Excludable delays.* This subsection, based on *ABA Standards for Criminal Justice, Speedy Trial,* 12-1.3 (1986), follows the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay. *See United States v. Longhofer,* 29 M.J. 22 (C.M.A. 1989). The rule of procedure established in subsection (1) is based on *United States v. Maresca,* 28 M.J. 328 (C.M.A. 1989). *See also United States v. Carlisle,* 25 M.J. 426, 428 (C.M.A. 1988).

The discussion to subsection (1) provides guidance for judges and convening authorities to ensure speedy trial issues are fully developed at trial. *See United States v. Maresca, supra.* This amendment follows ABA guidance and places responsibility on a military judge or the convening authority to grant reasonable pretrial delays. Military judges and convening authorities are required, under this subsection, to make an independent determination as to whether there is in fact good cause for a pretrial delay, and to grant such delays for only so long as is necessary under the circumstances. *ABA Standards, supra* at 12-1.3; *United States v. Longhofer, supra.* Decisions granting or denying pretrial delays will be subject to review for both abuse of discretion and the reasonableness of the period of delay granted. *Id.; United States v. Maresca, supra.*

(d) *Remedy.* This subsection is based on *The Federal Speedy Trial Act,* 18 U.S.C. § 3162. The Federal Rule provides dismissal as the sanction for speedy trial violations but permits the judge to dismiss with or without prejudice. Accordingly, this subsection permits the judge to dismiss charges without prejudice for non-constitutional violations of this rule. If, however, the accused has been denied his or her constitutional right to a speedy trial, the only available remedy is dismissal with prejudice. *Strunk v. United States,* 412 U.S. 434 (1973).

(e) *Waiver.* A lack of a demand for immediate trial will not constitute waiver and will not preclude an accused from raising speedy trial issues at trial. *See Barker v. Wingo, supra."*

k. R.C.M. 802(c). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* The prohibition against conferences proceeding over the objection of any party was eliminated as it conflicted with the military judge's specific authority to order such a conference under section (a) of this rule and general authority to control the conduct of court-martial proceedings. While the military judge may compel the attendance of the parties, neither party may be compelled to resolve any issue or be pressured to make any concessions."

l. R.C.M. 905(d). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* The Discussion was amended to reflect the change to R.C.M. 908(b)(4)."

m. R.C.M. 908(b). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (4) was amended to state explicitly that, upon timely notice of appeal, the legal effect of an appealable ruling or order is stayed pending appellate resolution. Although most military practitioners understood this necessary effect of an appeal under the rule, some civilian practitioners were confused by the absence of an explicit statement in the rule.

New subsection (9) is based on 18 U.S.C. § 3143(c) governing the release of an accused pending appeal by the United States of an order of dismissal of an indictment or information, or an order suppressing evidence. Since appeals by the United States under Article 62, U.C.M.J., contemplate a situation in which the accused has not been convicted, a commander's decision whether to subject the individual to continued confinement after an appeal has been taken should be based on the same considerations which would authorize the imposition of pretrial confinement."

n. R.C.M. 1004(c)(8). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (c)(8) was based on the Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 797 (1982), that the cruel and unusual punishment clause of the Eighth Amendment prohibits imposition of the death penalty on a defendant convicted of felony-murder 'who d[id] not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed.' The amendment to subsection (c)(8) is based on the Supreme Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987) distinguishing *Enmund*. In *Tison*, the Court held that the *Enmund* culpability requirement is satisfied when a defendant convicted of felony-murder was a major participant in the felony committed and manifested a reckless indifference to human life."

o. R.C.M. 1010. The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* This rule was changed to place the responsibility for informing the accused of post-trial and appellate rights on the defense counsel rather than the military judge. Counsel is better suited to give this advisement in an atmosphere in which the accused is more likely to comprehend the complexities of the rights."

p. R.C.M. 1101(c)(3). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* The Discussion accompanying this subsection was amended to provide for the inclusion of the written basis for any denial of deferment in the record of trial. Although written reasons for denials are not mandatory, and their absence from the record of trial will not per se invalidate a denial decision, their use is strongly encouraged. *See Longhofer v. Hilbert*, 23 M.J. 755 (A.C.M.R. 1986)."

q. R.C.M. 1103(b)(2)(D). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Subsection (b)(2)(D)(iv) was redesign as subsection (b)(2)(D)(v), and new subsection (b)(2)(D)(iv) was added. The 1984 rules omitted any requirement that the convening authority's action be included in the record of trial. This amendment corrects that omission."

r. R.C.M. 1107(f)(1). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* The 1984 rules omitted any requirement that the convening authority's action be included in the record of trial. This amendment corrects that omission."

s. R.C.M. 1110(f)(1). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Language was added to clarify that, although the waiver must be filed within 10 days of receipt by the accused or defense counsel of the convening authority's action, it may be signed at any time after trial up to the filing deadline."

t. R.C.M. 1113(a). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* The discussion was amended by adding a reference to subsection (5) of R.C.M. 1113(d). This brings the discussion into accord with the general rule of R.C.M. 1113(d)(2)(A) that any court-martial sentence to confinement begins to run from the date it is adjudged."

u. R.C.M. 1113(c)(1). The Analysis is amended by inserting the following at the end thereof:

"*1991 Amendment:* Language was added to the second sentence of the paragraph following subsection (c)(1)(B) to specify that a staff judge advocate's advice is required only when the servicemember is not on appellate leave on the date of final judgment and more than six months have elapsed since the convening authority's approval of the sentence. The third sentence was modified to reflect this change. The subsection was not intended to grant an additional clemency entitlement to a servicemember. Significant duty performance since the initial approval is relevant to the convening authority's determination of the best interest of the service. Since a member on appellate leave is performing no military duty, an additional staff judge advocate's advice would serve no useful purpose."

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

a. Section VII. The Analysis is amended by inserting the following at the end thereof:

"Rule 707. Polygraph examinations.

Rule 707 is new and is similar to *Cal. Evid. Code* 351.1 (West 1988 Supp.). The Rule prohibits the use of polygraph evidence in courts-martial and is based on several policy grounds. There is a real danger that court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility'. *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' 'traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted'. *Id.* There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of polygraphs. This could result in the court-martial degenerating into a trial of the polygraph machine. *State v. Grier*, 300 S.E.2d 351 (N.C. 1983). Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system. *See People v. Kegler*, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987). Thus, this amendment adopts a bright-line rule that polygraph evidence is not admissible by any party to a court-martial even if stipulated to by the parties. This amendment is not intended to accept or reject *United States v. Gipson*, 24 M.J. 343 (C.M.A. 1987), concerning the standard for admissibility of other scientific evidence under Mil. R. Evid. 702 or the continued vitality of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Finally, subsection (b) of the rule ensures that any statements which are otherwise admissible are not rendered inadmissible solely because the statements were made during a polygraph examination."

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

a. Insert the following after the Analysis of paragraph 4e:

"*1991 Amendment:* This paragraph was revised to allow for the imposition of confinement in excess of 20 years for the offense of attempted murder. There are cases in which the aggravating factors surrounding commission of an attempted murder are so egregious that a 20 year limitation may be inappropriate. Although life imprisonment may be imposed by the sentencing authority, mandatory minimum punishment provisions do not apply in the case of convictions under Article 80."

b. Insert the following after the Analysis of paragraph 19b:

"*1991 Amendment:* Subparagraph b(4) was amended by adding an aggravating element of post-trial confinement to invoke increased punishment for escapes from post-trial confinement."

c. Insert the following after the Analysis of paragraph 19c(4)(a):

"*1991 Amendment:* Subparagraph c(4)(a) was amended to specify that escape from post-trial confinement is subject to increased punishment."

d. Insert the following after the Analysis of paragraph 19:

"*1991 Amendment:* Subparagraphs e and f were amended to provide increased punishment for escape from post-trial confinement. The increased punishment reflects the seriousness of the offense and is consistent with other federal law. *See* 18 U.S.C. § 751(a)."

e. Insert the following after the Analysis of paragraph 35c(2):

"*1991 Amendment:* The order of the last and penultimate phrases was reversed to clarify that 'so as to cause the particular vehicle to move' modifies only 'the manipulation of its controls' and not 'the setting of its motive power in action.' This change makes clear that merely starting the engine, without movement of the vehicle, is included within the definition of 'operating'."

f. Insert the following after the Analysis of paragraph 57d:

"*1991 Amendment:* Subparagraph d was amended by deleting false swearing as a lesser included offense of perjury. *See United States v. Smith*, 26 C.M.R. 16 (C.M.A. 1958); MCM, 1984, Part IV, para. 79c(1). Although closely related to perjury, the offense of false swearing may be charged separately."

g. Insert the following after the Analysis of paragraph 96f:

"*1991 Amendment:* The form specification was amended by deleting the parentheses encompassing 'wrongfully' as this language is not optional, but is a required component of a legally sufficient specification."