11. The plastic locking mechanism will melt and deform when subject to temperatures over 230°F. When the plastic deforms it allows the grill to collapse and fall to the ground.

12. Each Red Devil gas grill is packaged with an instruction booklet. Said booklet calls for the grill to be lit at the burner.

13. The instruction booklet, referred to in paragraph 12, does not contain an illustration that shows the consumer where to properly light the grill. Said booklet also does not warn consumers of the danger in lighting the grill at the venturi opening. It is also foreseeable that this booklet will not remain with the grill.

14. The features of the Red Devil gas grill, as set forth in paragraphs 9 through 11 above, constitute design defects under 15 U.S.C. 2064.

15. The failure to provide adequate instructions on how to light the Red Devil gas grill, or to warn consumers about the danger in lighting the grill at the venturi opening, as set forth in paragraph 12 and 13 above, constitutes a defect under 15 U.S.C. 2064.

*2. Substantial Risk of Injury*

16. All of the approximately 155,544 Red Devil gas grills have the same venturi tube and plastic locking mechanism design. It is foreseeable that consumers will light the grill at the venturi openings. Each grill has the potential to cause a severe burn injury.

17. If the Red Devil gas grill tips over, following the melting of the plastic locking mechanism, flames from the burner may ignite surrounding combustibles. This could cause severe burns or death to nearby consumers. It is also reasonably foreseeable that a consumer who is present would attempt to catch the falling grill, and receive severe burns to his or her hands or other body parts.

18. The defects in the Red Devil gas grill create a substantial risk of injury to consumers, within the meaning of section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2).

19. The Red Devil gas grill presents a substantial product hazard, as described in sections 15(a)(2), (c) and (d) of the CPSA, 15 U.S.C. 2064(a)(2), (c) and (d).

*Relief Sought*

Wherefore, in the public interest, Complaint Counsel requests that the Commission:

A. Determine that Respondents' Quantum and e4L Red Devil gas grill presents a ''substantial product hazard'' within the meaning of section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2).

B. Determine that public notification under section 15(c) of the CPSA, 15 U.S.C. 2064(c), is required to protect the public adequately from the substantial product hazard presented by the Red Devil gas grill which has been distributed and order that the Respondents:

(1) Give prompt public notice that the Red Devil gas grill presents an injury and fire hazard to consumers and of the remedies available to remove the risk of injury;

(2) Mail such notice to each person who is or has been a distributor or retailer of the Red Devil gas grill;

(3) Mail such notice to every person to whom Respondents know the Red Devil gas grill were delivered or sold; and

(4) Include in the notice required by (1), (2) and (3) above a complete description of the hazard presented, a warning to stop using the Red Devil gas grill immediately; and clear instructions to inform consumers how to avail themselves of any remedy ordered by the Commission.

C. Determine that action under section 15(d) of the CPSA, 15 U.S.C. 2064(d), is in the public interest and order Respondents:

(1) To elect to repair all the Red Devil gas grills so they will not create an injury and fire hazard; to replace all the Red Devil gas grills with a like or equivalent product which will not create an injury or fire hazard; or to refund to consumers the purchase price of the Red Devil gas grill;

(2) To make no charge to consumers and to reimburse them for any foreseeable expenses incurred in availing themselves of any remedy provided under any order issued in this matter;

(3) To reimburse distributors and dealers for expenses in connection with carrying out any Commission Order issued in this matter;

(4) To submit a plan satisfactory to the Commission, within ten (10) days of service of the final Order, directing that actions specified in paragraph C(1) through C(3) above be taken in a timely manner;

(5) To submit monthly reports documenting progress of the corrective action program;

(6) For a period of five (5) years after entry of a Final Order in this matter, to keep records of its actions taken to comply with paragraphs C(1) through C(3) above, and to supply these records upon request to the Commission for the purpose of monitoring compliance with the Final Order;

(7) To notify the Commission at least 60 days prior to any change in their business (such as incorporation, dissolution, assignment, sale or petition for bankruptcy) that results in, or is intended to result in, the emergence of successor ownership, the creation or dissolution of subsidiaries, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission; and

(8) To take such other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA.

Issued by order of the Commission.

Dated this 29th day of May, 2001.

Alan H. Schoem,
*Assistant Executive Director, Office of Compliance, U.S. Consumer Product Safety Commission, (301) 504–0621.*

Eric L. Stone,
*Director, Legal Division, Office of Compliance.*

Jimmie L. Williams, Jr.,
*Complaint Counsel, Office of Compliance, 4330 East West Highway, Bethesda, Maryland 20814–4408, (301) 504–0626, ext. 1376.*

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Manual for Courts-Martial

**AGENCY:** Joint Service Committee on Military Justice (JSC), DOT.

**ACTION:** Notice of Proposed Amendments to the Manual for Courts-Martial, United States, (2000 ed.) and Notice of Public Meeting.

**SUMMARY:** The Department of Defense is considering recommending changes to the Manual for Courts-Martial, United States, (2000 ed.) (MCM). The proposed changes are the 2001 draft annual review required by the MCM and DoD Directive 5500.17, ''Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' May 8, 1996. The proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial. The proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, ''Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon,'' May 21, 1964, and do not constitute the official position of the Department of Defense, the Military

Departments, or any other government agency.

This notice also sets forth the date, time and location for the public meeting of the JSC to discuss the proposed changes.

This notice is provided in accordance with DoD Directive 5500.17, ''Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' May 8, 1996. This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

In accordance with paragraph III B 4 of the Internal Organization and Operating Procedures of the JSC, the committee also invites members of the public to suggest changes to the Manual for Courts-Martial in accordance with the herein-described format.

**DATES:** Comments on the proposed changes must be received no later than August 20, 2001 for consideration by the JSC. A public meeting will be held on Thursday, July 19, 2001 at 2:00 p.m. It will be held at Room 808, 1501 Wilson Blvd., Arlington, VA 22209–2403.

**ADDRESSES:** Comments on the proposed changes should be sent to Captain Richard M. Burke, U.S. Marine Corps, Military Law Branch, Judge Advocate Division, HQMC, Room 5E618, Washington, DC 20380–1775.

**FOR FURTHER INFORMATION CONTACT:** Captain Richard M. Burke, U.S. Marine Corps, Military Law Branch, Judge Advocate Division, HQMC, Room 5E618, Washington, DC 20380–1775, (703) 614–3699/4250; FAX (703) 695–8350.

**SUPPLEMENTARY INFORMATION:** The proposed amendments to the Manual for Courts-Martial are as follows:

*Amend paragraph 4 of the Preamble by adding a new third subparagraph to read as follows:*

The Department of Defense Joint Service Committee (JSC) on Military Justice reviews the Manual for Courts-Martial and proposes amendments to the Department of Defense for consideration by the President on an annual basis. In conducting its annual review, the JSC is guided by DoD Directive 5500.17, ''The Roles and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' a copy of which is included in this Manual as Appendix 26. DoD Directive 5500.17 includes provisions allowing public participation in the annual review process.

*Amend R.C.M. 307(c)(3) to read as follows:*

*Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Except for aggravating factors under R.C.M. 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

*Amend subparagraph (ix) of the Discussion accompanying R.C.M. 307(c) to read as follows:*

(ix) *Matters in aggravation.* Matters in aggravation that do not increase the maximum authorized punishment ordinarily should not be alleged in the specification. Prior convictions need not be alleged in the specification to permit increased punishment. Aggravating factors in capital cases should not be alleged in the specification. Notice of such factors is normally provided in accordance with R.C.M. 1004(b)(1).

*Amended the analysis accompanying R.C.M. 307(c)(3) by inserting the following at the end thereof:*

*200 Amendment:* The Rule was amended by modifying language in the Discussion at (H)(ix), and pulling it into the text of the Rule, to emphasize that facts that increase maximum authorized punishments must be alleged and proven beyond a reasonable doubt. *Jones* v. *United States,* 526 U.S. 227 (1999) *See also Apprendi* v. *New Jersey,* 530 U.S. 466 (2000). R.C.M. 1003(d) prior convictions and R.C.M. 1004 capital aggravating factors were excluded because the rule in *Apprendi* exempts prior convictions and distinguishes capital sentencing schemes. R.C.M. 1004 capital aggravation factors were also excluded to avoid complicating Part IV of the Manual and because R.C.M. 1004 already establishes a separate scheme for satisfying an accused's Constitutional rights in this area. *See Walton* v. *Arizona*, 497 U.S. 639 (1990) (capital aggravation factors as ''standards'' to guide the making a choice between death and lessor punishment).

*Insert the following Discussion to accompany R.C.M. 405(g)(1)(A):*

A witness located beyond the 100 mile limit is not *per se* unavailable. To determine if a witness beyond 100 miles is reasonably available, the significance of the witness's live testimony must be balanced against the relative difficulty and expense of obtaining the witness's presence at the hearing.

*Amend the analysis accompanying R.C.M. 405(g)(1) by inserting the following before the discussion of subsection (2):*

*200 Amendment:* The Discussion to subsection (g)(1)(A) is new. It was added in light of the decision in *United States* v. *Marie,* 43 M.J. 35 (1995) that a witness beyond 100 miles from the site of the investigation is not *per se* unavailable.

*Amend the second paragraph of the Discussion accompanying R.C.M. 406(b) to read as follows:*

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, and endorsements, and report of investigation are forwarded with the pretrial advice. In addition the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and the recommendation of the Article 32 investigating officer. However, there is no legal requirement to include such information, and failure to do so is not error.

*Amend the analysis accompanying R.C.M. 406(b) by inserting the following at the end thereof:*

*200 Amendment:* The Discussion to R.C.M. 406(b) was amended to add as additional, non-binding guidance that the SJA should include the recommendation of the Article 32 investigating officer.

*Amend R.C.M. 707(b)(3)(D) to read as follows:*

*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. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

*Amend the analysis accompanying R.C.M. 707(b) by inserting the following before the discussion of subsection (c):*

*200 Amendment:* Subsection (3)(D) was amended in light of *United States* v. *Becker,* 53 M.J. 229 (2000), to clarify that the 120-day time period applies to sentence-only rehearings. The amendment also designates the first session under R.C.M. 803 as the point where an accused is brought to trial in a sentence-only rehearing.

*Amend R.C.M. 707(c) to read as follows:*

(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

*Delete the Discussion accompanying R.C.M. 707(c).*

*Amend the analysis accompanying R.C.M. 707(c) by inserting the following before the discussion of subsection (d):*

*200 Amendment:* Subsection (c) was amended to treat periods of the accused's unauthorized absence as excludable delay for purposes of speedy trial. *See United States* v. *Dies,* 45 M.J. 376 (1996). The discussion was deleted as superfluous.

*Amend R.C.M. 707(d) to read as follows:*

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* 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.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

*Insert the following Discussion accompanying R.C.M. 707(d):*

*See* subsection (c)(1) and the accompanying Discussion concerning reasons for delay and procedures for parties to request delay.

*Amend the analysis accompanying R.C.M. 707(d) by inserting the following before the discussion of subsection (e):*

*200 Amendment:* Subsection (d) was amended in light of *United States* v. *Becker*, 53 M.J. 229 (2000), to provide for sentence relief as a sanction for violation of the 120-day rule in sentence-only rehearings. The amendment sets forth factors for the court to consider to determine whether or to what extent sentence relief is appropriate and provides for the sentence credit to be applied to the sentence approved by the convening authority.

*Amend R.C.M. 806(b) to read as follows:*

*(b) Control of spectators and closure.*

(1) *Control of spectators.* In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom. When excluding specific persons, the military judge must make findings on the record establishing the reason for the exclusion, the basis for the military judge's belief that exclusion is necessary, and that the exclusion is as narrowly tailored as possible.

(2) *Closure.* Courts-martial shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure.

*The following discussion is added to R.C.M. 806(b)(1):*

The military judge must ensure that the dignity and decorum of the proceedings are maintained and that the rights and interests of the parties and society are protected. Public access to a session may be limited, specific persons excluded from the courtroom, and, under unusual circumstances, a session may be closed.

Exclusion of specific persons, if unreasonable under the circumstances, may violate the accused's right to a public trial, even though other spectators remain. Whenever specific persons or some members of the public are excluded, exclusion must be limited in time and scope to the minimum extent necessary to achieve the purpose for which it is ordered. Prevention of overcrowding or noise may justify limiting access to the courtroom. Disruptive or distracting appearance or conduct may justify excluding specific persons. Specific persons may be excluded when necessary to protect witnesses from harm or intimidation. Access may be reduced when no other means is available to relieve a witness' inability to testify due to embarrassment or extreme nervousness. Witnesses will ordinarily be excluded from the courtroom so that they cannot hear the testimony of other witnesses. *See* Mil. R. Evid. 615.

*The following discussion is added to R.C.M. 806(b)(2):*

The military judge is responsible for protecting both the accused's right to, and the public's interest in, a public trial. A court-martial session is ''closed'' when no member of the public is permitted to attend. A court-martial is not ''closed'' merely because the exclusion of certain individuals results in there being no spectators present, so long as the exclusion is not so broad as to effectively bar everyone who might attend the sessions and is for a proper purpose.

A session may be closed over the objection of the accused or the public upon meeting the constitutional standard set forth in this Rule. *See also* Mil. R. Evid. 412(c), 505(i) and (j), 506(i), and 513(e)(2).

The accused may waive his right to a public trial. The fact that the prosecution and defense jointly seek to have a session closed does not, however, automatically justify closure, for the public has a right to attend courts-martial. Opening trials to public scrutiny reduces the chance of arbitrary and capricious decisions and enhances public confidence in the court-martial process.

The most likely reason for a defense request to close court-martial proceedings is to minimize the potentially adverse effect of publicity on the trial. For example, a pretrial Article 39(a) hearing at which the admissibility of a confession will be litigated may, under some circumstances, be closed, in accordance with this Rule, in order to prevent disclosure to the public (and hence to potential members) of the very evidence that may be excluded. When such publicity may be a problem, a session should be closed only as a last resort.

There are alternative means of protecting the proceedings from harmful effects of publicity, including a thorough *voir dire* (*see* R.C.M. 912), and if necessary, a continuance to allow the harmful effects of publicity to dissipate (*see* R.C.M. 906(b)(1)). Alternatives that may occasionally be appropriate and are usually preferable to closing a session include: directing members not to read, listen to, or watch any accounts concerning the case; issuing a protective order (*see* R.C.M. 806(d)); selecting members from recent arrivals in the command, or from outside the immediate area (*see* R.C.M. 503(a)(3)); changing the place of trial (*see* R.C.M. 906(b)(11)); or sequestering the members.

*Amend the analysis accompanying R.C.M. 806(b) by inserting the following before the discussion of subsection(c):*

*200 Amendment:* Subsection (b) was divided to separate the provisions addressing control of spectators and closure and to clarify that exclusion of specific individuals is not a closure. The rules for control of spectators now in subsection (b)(1) were amended to require the military judge to articulate certain findings on the record prior to excluding specific spectators. *See United States* v. *Short*, 41 M.J. 42 (1994). The rules on closure now in subsection (b)(2) and the Discussion were amended in light of military case law that has applied the Supreme Court's Constitutional test for closure to courts-martial. *See ABC Inc.* v. *Powell*, 47 M.J. 363 (1997); *United States* v. *Hershey*, 20 M.J. 433 (C.M.A. 1985); *United States* v. *Grunden*, 2 M.J. 116 (C.M.A. 1977).

*Amend the Discussion accompanying R.C.M.* 916(k)(1) to read as follows:

*See* R.C.M. 706 concerning sanity inquiries; R.C.M. 909 concerning the capacity of the accused to stand trial; and R.C.M. 1102A concerning any post-trial hearing for an accused found not guilty only by reason of lack of mental responsibility.

*Amend the analysis accompanying R.C.M.* 916(k)(1) by inserting the following before the discussion of subsection (2):

*200 Amendment:* The Discussion to R.C.M. 916(k)(1) was amended to add a cross-reference to R.C.M. 1102A.

*Amend R.C.M. 916(k)(1) to read as follows:*

(2) *Partial mental responsibility.* A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not an affirmative defense.

*Insert the following Discussion to accompany R.C.M. 916(k)(2):*

Discussion. Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense. The defense must notify the trial counsel before the beginning of trial on the merits if the defense intends to introduce expert testimony as to the accused's mental condition. *See* R.C.M. 701(b)(2).

*Amend the analysis accompanying R.C.M. 916(k)(2) by inserting the following before the discussion of subsection (3):*

*200 Amendment:* Subsection (k)(2) was modified to clarify that evidence of an accused's impaired mental state may be admissible. *See United States* v. *Schap,* 49 M.J. 317,322 (1998); *United States* v. *Berri*, 33 M.J. 337 (C.M.A. 1991); *Ellis* v. *Jacob*, 26 M.J. 90 (C.M.A. 1988).

*Amend R.C.M.* 1103(f)(2) to read as follows:

(2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the convening authority may not approve any sentence imposed at such a rehearing more severe than or in excess of that adjudged by the earlier court-martial.

*Amend the analysis accompanying R.C.M. 1103(f) by inserting the following before the discussion of subsection (g):*

*200 Amendment:* Subsection (f)(2) was amended to reflect amendments to Article 63, UCMJ, in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315,2506 (1992). The revisions provide that subsection (f)(2) sentencing limitations are properly applicable only to the sentence that may be approved by the convening authority following a rehearing. Subsection (f)(2) as revised does not limit the maximum sentence that may be adjudged at the rehearing. *See United States* v. *Gibson,* 43 M.J. 343, 346 n.3 (1995); *United States* v. *Lawson,* 34 M.J. 38 (C.M.A. 1992) (Cox, J., concurring); *United States* v. *Greaves*, 48 M.J. 885 (A.F.Ct.Crim.App. 1998), *rev. denied,* 51 M.J. 365 (1999).

*Insert the following new subsection (iv) after R.C.M. 1107(e)(1)(B)(iii) to read as follows:*

(iv) *Sentence reassessment.* If a superior authority has approved some of the findings of guilty and has authorized a rehearing as to other offenses and the sentence, the convening authority may, unless otherwise directed, reassess the sentence based on the approved findings of guilty and dismiss the remaining charges. Reassessment is appropriate only where the convening authority determines that the accused's sentence would have been at least of a certain magnitude had the prejudicial error not been committed and the reassessed sentence is appropriate in relation to the affirmed findings of guilty.

*Amend the Discussion to R.C.M.* 1107(e)(1)(B)(iii) to read as follows:

A sentence rehearing, rather than a reassessment, may be more appropriate in cases where a significant part of the government's case has been dismissed. The convening authority may not take any action inconsistent with directives of superior competent authority. Where that directive is unclear, appropriate clarification should be sought from the authority issuing the original directive.

*Amend the analysis accompanying R.C.M. 1107(e)(1) by inserting the following before the discussion of subsection (2):*

*200 Amendment:* The Discussion to R.C.M. 1107(e)(1)(B)(iii) was moved to new subsection (1)(B)(iv) to expressly recognize that, in cases where a superior authority has approved some findings of guilty and has authorized a rehearing as to other offenses, the convening authority may, unless otherwise directed, reassess a sentence based on approved findings of guilty under the criteria established by *United States* v. *Sales,* 22 M.J. 305 (C.M.A. 1986), and dismiss the remaining charges. *See United States* v. *Harris*, 53 M.J. 86 (2000). The power of convening authorities to reassess had been expressly authorized in paragraph 92*a* of MCM, 1969. The authorizing language was moved to the Discussion following R.C.M. 1107(e)(1)(B)(iii) in MCM, 1984. The Discussion was amended to advise practitioners to apply the criteria for sentence reassessment established by *United States* v. *Sales,* 22 M.J. 305 (C.M.A. 1986). *See also United States* v. *Harris,* 53 M.J. 86 (2000); *United States* v. *Eversole,* 53 M.J. 132 (2000). The Discussion was further amended to encourage practitioners to seek clarification from superior authority where the directive to the convening authority is unclear.

*Amend R.C.M. 1108(b) to read as follows:*

(b) *Who may suspend and remit.* The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of court-martial, except for a sentence of death. The general court-martial convening authority over the accused at the time of the court-martial may, when taking the action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a sentence of confinement for life without eligibility for parole that has been ordered executed. The Secretary concerned may, however, suspend or remit the unexecuted part of a sentence of confinement for life without eligibility for parole only after the service of a period of confinement of not less than 20 years. The commander of the accused who has the authority to convene a court-martial of the kind which adjudged the sentence may suspend or remit any part of amount of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial which does not include a bad-conduct discharge regardless of whether the person acting has previously approved the sentence. The ''unexecuted part of any sentence'' includes that part which has been approved and ordered executed but which has not actually been carried out.

*Amend the analysis accompanying R.C.M.* 1108 by inserting the following at the end thereof:

*200 Amendment:* Subsection (b) was amended to conform to the limitations on Secretarial authority to grant clemency for military prisoners serving a sentence of confinement for life without eligibility for parole contained in section 553 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106–398,1 14 Stat. 1654, Oct 30, 2000.

*Amend R.C.M. 1305(c) to read as follows:*

(c) *Authentication.* The summary court-martial shall authenticate the record by signing the original record trail.

*Amend the analysis accompanying R.C.M. 1305(c) by inserting the following prior to the discussion of subsection (d):*

*200 Amendment:* This subsection was amended to require that summary courts-martial authenticate the original record of trial, as is currently the procedure for special and general courts-martial.

*Amend R.C.M. 1306(b)(1) to read as follows:*

(1) *Who shall act.* Except as provided herein, the convening authority shall take action in accordance with R.C.M. 1107. The Convening authority shall not take action before the period prescribed in R.C.M. 1105(c)(2) has expired, unless the right to submit matters has been waived under R.C.M. 1105(d).

*Amend the analysis accompanying R.C.M. 1306(b) by inserting the following prior to the discussion of subsection (c):*

*200 Amendment:* The cross-reference to subsection R.C.M. 1105(c)(3) is amended to R.C.M. 1105(c)(2) to conform to the 1987 Change 3 amendment that re-designated R.C.M. 1105(c)(3) as R.C.M. 1105(c)(2).

*Amend Mil. R. Evid. 103(a)(2) to read as follows:*

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the military judge makes a definitive ruling on the record admitting or excluding evidence, either at or before trail, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the Untied States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

*Amend the analysis accompany Mil. R. Evid. 103(a) by inserting the following prior to the discussion of subsection (b):*

*200 Amendment:* Subdivision 9a)(2) was modified based on the amendment to Fed. R. Evid 103(a)(2), effective 1 December 2000, and is virtually identical to its Federal Rule counterpart. It is intended to provide that where an advance ruling is definitive, a party need not renew an objection or offer of proof at trial. Otherwise, renewal is required.

*Amend Mil. R. Evid. 404(a) to read as follows:*

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution;

(2) *Character of alleged victim.* Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or assault case to rebut evidence that the alleged victim was an aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.

*Amend the analysis accompanying Mil R. Evid 404(a) by inserting the following prior to the discussion of subsection (b):*

*200 Amendment:* Subdivision (a) was modified based on the amendment to Fed. R. Evid. 404(a), effective 1 December 2000, and is virtually identical to its Federal Rule counterpart. It is intended to provide a more balanced presentation of character evidence when an accused attacks the victim's character. The accused opens the door to an attack on the same trait of his own character when he attacks an alleged victim's character, giving the members an opportunity to consider relevant evidence about the accused's propensity to act in a certain manner. The words ''if relevant'' are added to subdivision (a)(1) to clarify that evidence of an accused's character under this rule must meet the requirements of Rules 401 and 403. The drafters believe this addition addresses the unique use of character evidence in courts-martial. The amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609, nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415.

*Amend Mil. R. Evid. 701 to read as follows:*

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based in scientific, technical, or other specialized knowledge within the scope of Mil. R. Evid. 702.

*Amend the analysis accompanying Mil. R. Evid. 701 by inserting the following at the end thereof:*

*200 Amendment:* Rule 701 was modified based on the amendment to Fed. R. Evid. 701, effective 1 December 2000, and is taken from the Federal Rule without change. It prevents parties from proffering an expert as a lay witness in an attempt to evade the gatekeeper and reliability requirements of Rule 702 by providing that testimony cannot qualify under Rule 701 if it is based on ''scientific, technical or other special knowledge within the scope of Rule 702.

*Amend Mil. R. Evid. 702 to read as follows:*

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

*Amend the analysis accompanying Mil. R. Evid. 702 by inserting the following at the end thereof:*

*200 Amendment:* Rule 702 was modified based on the amendment to Fed. R. Evid. 702, effective 1 December 2000, and is taken from the Federal Rule without change. It provides guidance for courts and parties as to the factors to consider in determining whether an expert's testimony is reliable in light of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999) (holding that gatekeeper function applies to all expert testimony, not just testimony based on science).

*Amend Mil. R. Evid. 703 to read as follows:*

The facts or data in the particular case upon which an expert bases an opinioin or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the members by the proponent of the opinion or inference unless the military judge determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect.

*Amend the analysis accompanying Mil. R. Evid. 703 by inserting the following at the end thereof:*

*200 Amendment:* Rule 703 was modified based on the amendment to Fed. R. Evid. 703, effective 1 December 2000, and is virtually identical to its Federal Rule counterpart. It limits the disclosure to the members of inadmissible information that is used as the basis of an expert's opinion. *Compare* Mil. R. Evid. 705.

*Amend Mil. R. Evid. 803(6) to read as follows:*

*Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of act, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 902(11) or any other statute permitting certification in a criminal proceeding in a court of the United States, unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. The term ''business'' as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph area enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

*Amend the analysis accompanying Mil. R. Evid. 803(6) by inserting the following prior to the discussion of subsection (7):*

*200 Amendment:* Rule 803(6) was modified based on the amendment to Fed. R. Evid. 803(6), effective 1 December 2000. It permits a foundation for business records to be made through certification to save the parties the expense and inconvenience of producing live witnesses for what is often perfunctory testimony. The Rule incorporates federal statutes which allow certification in a criminal proceeding in a court of the United States (*See e.g.* 18 U.S.C. section 3505, Foreign records of regularly conducted activity). The Rule does not include foreign records of regularly conducted business activity in civil cases as provided in its Federal Rule counterpart. This Rule works together with Rule 902(11).

*Insert Mil. R. Evid. 902(11) to read as follows:*

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Mil. R. Evid. 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

*Insert the following new analysis accompanying Mil. R. Evid. 901(11) after the discussion of subsection (10):*

*200 Amendment:* Rule 902(11) was modified based on the amendment to Fed. R. Evid. 902(11), effective 1 December 2000, and is taken from the Federal Rule without change. It provides for self-authentication of domestic business records and sets forth procedures for preparing a declaration of a custodian and other qualified witness that will establish a sufficient foundation for the admission of domestic business records. This Rule works together with Mil. R. Evid. 803(6).

*The amendment to the Federal Rules of Evidence, effective in United States District Courts, December 1, 2000, creating Rule 901(12) is not adopted.*

*Amend the analysis accompanying Mil. R. Evid. 1102 by inserting the following at the end thereof:*

*200 Amendment:* The amendment to the Federal Rules of Evidence, effective in United States District Courts, December 1, 2000, creating Rule 902(12) is not adopted. Federal Rules 301, 302, and 415, were not adopted because they are applicable only to civil proceedings.

*Amend Part IV, para 45(b)(2) by deleting para 45(b)(2)(c) and inserting the following after para 45(b)(2)(b):*

(Note: Add one of the following elements)

(c) That at the time of the sexual intercourse the person was under the age of 12.

(d) That at the time of the sexual intercourse the person had attained the age of 12 but was under the age of 16.

*Amend the analysis accompanying Part IV, para 45(b) by inserting the following prior to the discussion of subsection (c):*

b. *Elements.*

*200 Amendment:* Paragraph 45(b)(2) was amended to add two distinct elements of age based upon the 1994 amendment to paragraph 45(e). *See also* concurrent change to R.C.M. 307(c)(3) and accompanying analysis.

*Amend Part IV, para 45(f) to read as follows:*

f. *Sample specifications.*

(1) *Rape.*

In that _____(personal jurisdiction data), (at/on board—location)(subject-matter jurisdiction data, if required), on or about_____20____, rape_____, (a person under the age of 12)(a person who had attained the age of 12 but was under the age of 16).

(2) *Carnal Knowledge.*

In that_____(personal jurisdiction data), did, (at/on board—location)(subject-matter jurisdiction data, if required), on or about_____20 , commit the offense of carnal knowledge with _____, (a person under the age of 12)(a person who attained the age of 12 but was under the age of 16).

*Amend the analysis accompanying Part IV, para 45(f) by inserting the following at the end of subsection (e):*

*200 Amendment:* Paragraph 45(f)(2) was amended to aid practitioners in charging the two distinct categories of carnal knowledge created in 1994. For the same reason paragraph 45(f)(1) was amended to allow for contingencies of proof because carnal knowledge is a lesser-included offense of rape if properly pleaded. *See also* concurrent change to R.C.M. 307(c)(3) and accompanying analysis.

*Amend Part IV, para 51(b) to read as follows:*

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(Note: Add any of the following as applicable)

(2) That the act was done with a child under the age of 12.

(3) That the act was done with a child who had attained the age of 12 but was under the age of 16.

(4) That the act was done by force and without the consent of the other person.

*Amend the analysis accompanying Part IV, para 51(b) by inserting the following prior to the discussion of subsection (c):*

b. *Elements.*

*200 Amendment:* Paragraph 51(b) was amended by adding two factors pertaining to age based upon the 1994 amendment to paragraph 51(e) that created two distinct categories of sodomy involving a child. *See also* concurrent change to R.C.M. 307(c)(3) and accompanying analysis.

*Amend Part IV, para 51(f) 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_____20____, commit sodomy with_____, (a child under the age of 12)(a child who had attained the age of 12 but was under the age of 16)(by force and without the consent of the said_____).

*Amend the analysis accompanying Part IV, para 45(f) by inserting the following at the end of subsection (e):*

*200 Amendment:* Paragraph 51(f) was amended to aid practitioners in charging the two distinct categories of sodomy involving a child created in 1994. *See also* concurrent change to R.C.M. 307(c)(3) and accompanying analysis.

*Amend Part IV, para 57(c)(2)(B) to read as follows:*

(b) *Material matter.* The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving false testimony with respect to the credibility of a material witness or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue.

*Amend the analysis accompanying Part IV, para 57(c)(2)(B) by inserting the following before the discussion of subsection (d):*

*200 Amendment:* Subsection (2)(b) was amended to comply with *United States* v. *Gaudin*, 515 U.S. 506 (1995), which held that when materiality is a statutory element of an offense, it must be submitted to the jury for decision. Materiality cannot be removed from members' consideration by an interlocutory ruling that a statement is material. *See also, Gaudin at* 521, (''It is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another.''); and *at* 517, (''The prosecution's failure to provide minimal evidence of materiality, like its failure to provide minimal evidence of any other element, of course raises a question of 'law' that warrants dismissal.'').

*Amend Part IV, para 100a(c)(1) to read as follows:*

(1) *In general.* This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or grevious bodily harm to others.

*Amend Part IV, para 100a(f) 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 _____ 20____, wrongfully and (recklessly)(wantonly) engage in conduct, to wit: (describe conduct), conduct likely to cause death or grievous bodily harm to _____.

*Amend the analysis accompanying Part IV, para 100a by inserting the following at the end thereof:*

*200 Amendment:* The sample specification was amended to add the word ''wantonly'' to make the sample specification consistent with the elements. The phrase ''serious bodily harm'' has been changed to read ''grievous bodily harm'' in the sample specification to parallel the language in the elements. Similarly, in the *Explanation*, the phrase ''serious injury'' was modified to read ''grievous bodily harm.'' The format of the sample specification was also modified to follow the format of other sample specifications in the MCM.

*Insert DoD Directive 5500.17, ''The Roles and Responsibilities of the Joint Service Committee (JSC) on Military Justice'' as Appendix 26.*

Members of the public are hereby invited to submit proposals for changes to the Manual for Courts-Martial for consideration by the JSC. All submissions should be rceived by the close of the public comment period in order to be considered in the next annual review cycle. Proposals should include reference to the specific provision you wish changed, a rational for the proposed change, and specific and detailed proposed language to replace the current language. Incomplete submissions may not be considered. The individual or agency submitting each proposal will be notified in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, reject it, table, or accept it.

Dated: May 31, 2001.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 01–14152 Filed 6–5–01; 8:45 am]

**BILLING CODE 5001–08–M**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Meeting of the U.S. Naval Academy Board of Visitors

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Notice of partially closed meeting.

**SUMMARY:** The U.S. Naval Academy Board of Visitors will meet to make such inquiry as the Board shall deem necessary into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the Naval Academy. During this meeting inquiries will relate to the internal personnel rules and practices of the Academy, may involve on-going criminal investigations, and include discussions of personal information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The executive session of this meeting will be closed to the public.

**DATES:** The meeting will be held on Monday, June 11, 2001, from 8:30 a.m. to 11:45 a.m. The closed Executive Session will be from 10:50 a.m. to 11:45 a.m.

**ADDRESSES:** The meeting will be held in the Bo Coppedge Dining Room of Alumni Hall at the U.S. Naval Academy.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Commander Thomas E. Osborn, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402–5000, telephone number (410) 293–1503.

**SUPPLEMENTARY INFORMATION:** This notice of a partially closed meeting is provided per the Federal Advisory Committee Act (5 U.S.C. App. 2). The executive session of the meeting will consist of discussions of information which pertain to the conduct of various midshipmen at the Naval Academy and internal Board of Visitors matters. Discussion of such information cannot be adequately segregated from other topics, which precludes opening the executive session of this meeting to the public. In accordance with 5 U.S.C. App. 2, section 10(d), the Secretary of the Navy has determined in writing that the special committee meeting shall be partially closed to the public because they will be concerned with matters as outlined in section 552(b)(2), (5), (6), and (7) of title 5, U.S.C. Due to unavoidable delay in administrative processing, the normal 15 days notice could not be provided.

Dated: May 31, 2001.

**J.L. Roth,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 01–14290 Filed 6–5–01; 8:45 am]

**BILLING CODE 3810–FF–U**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before August 6, 2001.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 31, 2001.

**John Tressler,**

*Leader, Regulatory Information Management, Office of the Chief Information Officer.*

### Office of Student Financial Assistance Programs

*Type of Review:* Revision.

*Title:* Federal PLUS Loan Program Application Documents.

*Frequency:* On Occasion.

*Affected Public:* Businesses or other for-profit; Individuals or household; Not-for-profit institutions.

*Reporting and Recordkeeping Hour Burden:*