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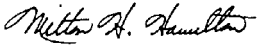
Legal Services

Trial Procedure

By Order of the Secretary of the Army:

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Summary. This pamphlet is intended to provide legal information and reference material, and does not purport to promulgate Department of the Army policy. Comments and suggested legal solutions concerning laws, regulations, decisions, or other matters represent the opinions of individual legal specialists and are in no sense mandatory. Laws, regulations, and decisions published prior to 1 October 1990 generally have been considered and included in the text.

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Part One

The Participants in Courts-Martial

Chapter 1

Introduction

1-1. General

This text is designed primarily for the lawyer participating in courts-martial. The text's scope is accordingly limited to court-martial procedural rules. There is, however, no absolute dichotomy between substantive and procedural rules in criminal trials. Consequently, although the text focuses on procedure, it nevertheless touches upon such substantive areas as evidence. The distinction between procedure and substance is somewhat artificial, but the nature of the President's power to promulgate rules for courts-martial requires that we attach considerable weight to the characterization of a rule as procedural or substantive.

1-2. Format

The text has five parts. Part one concerns the qualifications and roles of the various participants in a court-martial, such as the convening authority, the military judge, and the court members. The discussion of these subjects is intended merely as an introductory treatment; other publications analyze the participants' roles in greater detail.¹ Parts two through four focus on court-martial trial procedures. The organization is a chronological approach to processing and adjudicating court-martial charges. Finally, part five is a detailed analysis of professional responsibility matters of interest to the military attorney.

1-3. The rule-making power

a. Source and nature. It is important to understand both the sources of procedural rules and the nature of the rule-making power. The Constitution grants Congress the power "to make Rules for the Government and Regulation of the land and naval Forces."² In exercising this power as to courts-martial, Congress has conferred certain authority upon the President.

In article 36 of the Uniform Code of Military Justice,³ Congress gave the President the power to prescribe procedures in courts-martial. As originally enacted in 1950, article 36 provided that:

(a) The procedure including modes of proof, in cases before courts-martial ... may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this Code.⁴

The President initially exercised his authority under article 36 by promulgating the Manual for Courts-Martial, United States, 1951.⁵ Subsequently, the President issued the Manual for Courts-Martial, United States, 1969 (revised edition)⁶ and most recently, the Manual for Courts-Martial, United States, 1984.⁷

Courts have recognized these manuals as a valid exercise of the President's rule-making power. In one case, the United States Supreme Court declared that the Manual is the "guidebook that summarizes the rules of evidence applied by court-martial review boards."⁸ In another case, the Court commented that "the Manual ... has the force of law

¹ For example, DA Pam 27-9, Military Judges' Benchbook (1 May 1982) (C3, 15 Feb. 1989), [hereinafter Benchbook] provides detailed guidance for the preparation of instructions.

² U.S. Const. art. I, § 8, cl. 14.

³ Uniform Code of Military Justice art. 36, 10 U.S.C. § 836 (1982) [hereinafter UCMJ]. The Uniform Code of Military Justice will be referred to in text as the Code or UCMJ.

⁴ Act of May 5, 1950, chap. 169 § 1 (art. 36), 64 Stat. 120. There is some controversy whether, in his capacity as Commander-in-Chief, the President could have promulgated rules for courts-martial even if Congress had not delegated authority to the President. Compare Snedeker, Military Justice Under the Uniform Code 39 (1953) with Everett, Military Justice in the Armed Forces of the United States 8 (1956). On balance, it seems probable that the Constitution's authors intended to place this power beyond the Executive's reach. See Levy v. Resor, 37 C.M.R. 399, 403 (C.M.A. 1967); United States v. Smith, 32 C.M.R. 105, 117 (C.M.A. 1962).

⁵ Exec. Order No. 10,214, 3 C.F.R. 409 (1949-1953 Comp.).

⁶ Exec. Order No. 11,476, 34 Fed. Reg. 10,503 (1969). The President also prescribed the Manual for Courts-Martial, United States, 1969, Exec. Order No. 11,430, 33 Fed. Reg. 13,503 (1968). The enactment of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968), however, which made substantial changes to the military justice system, required that the new Manual be immediately revised. The Military Justice Act of 1968 and Manual for Courts-Martial, 1969 (rev. ed.) became effective 1 August 1969.

⁷ Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984). The Manual for Courts-Martial will be referred to in text as the Manual or MCM. When necessary to clarify the particular edition of the Manual being cited the following forms will be used: MCM, 1951; MCM, 1969 (rev. ed.); MCM, 1984. The Rules for Courts-Martial in the 1984 Manual will be cited as R.C.M.

⁸ United States v. Augenblick, 393 U.S. 348 (1969).