

The Executive Order Process







The Return of the Fingerpainter



75

32



178

Gambrills

Millersville

3

Gambrills Rd

Rockwell Rd

John Hopkins Rd

St. Stephens Church Rd

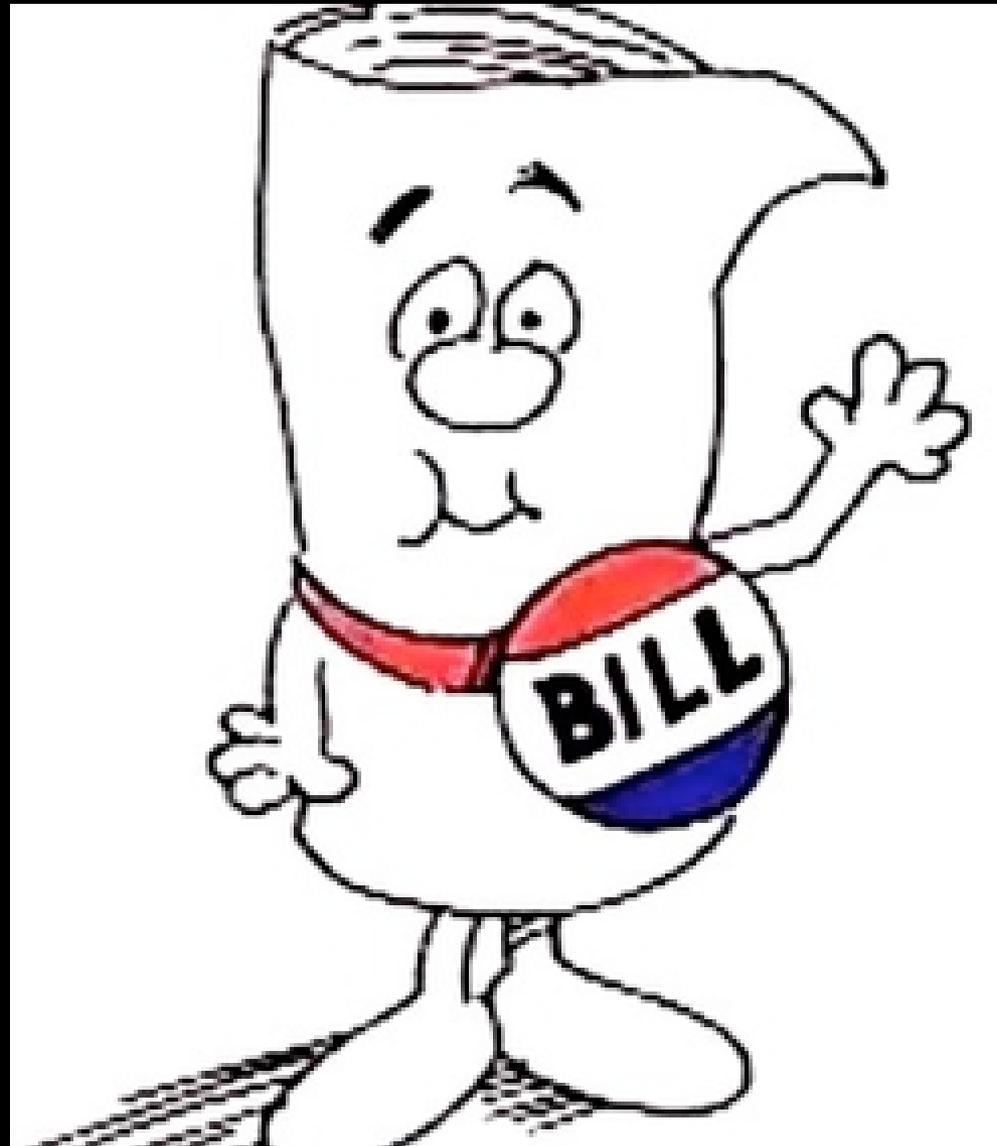
Ten y Club

424

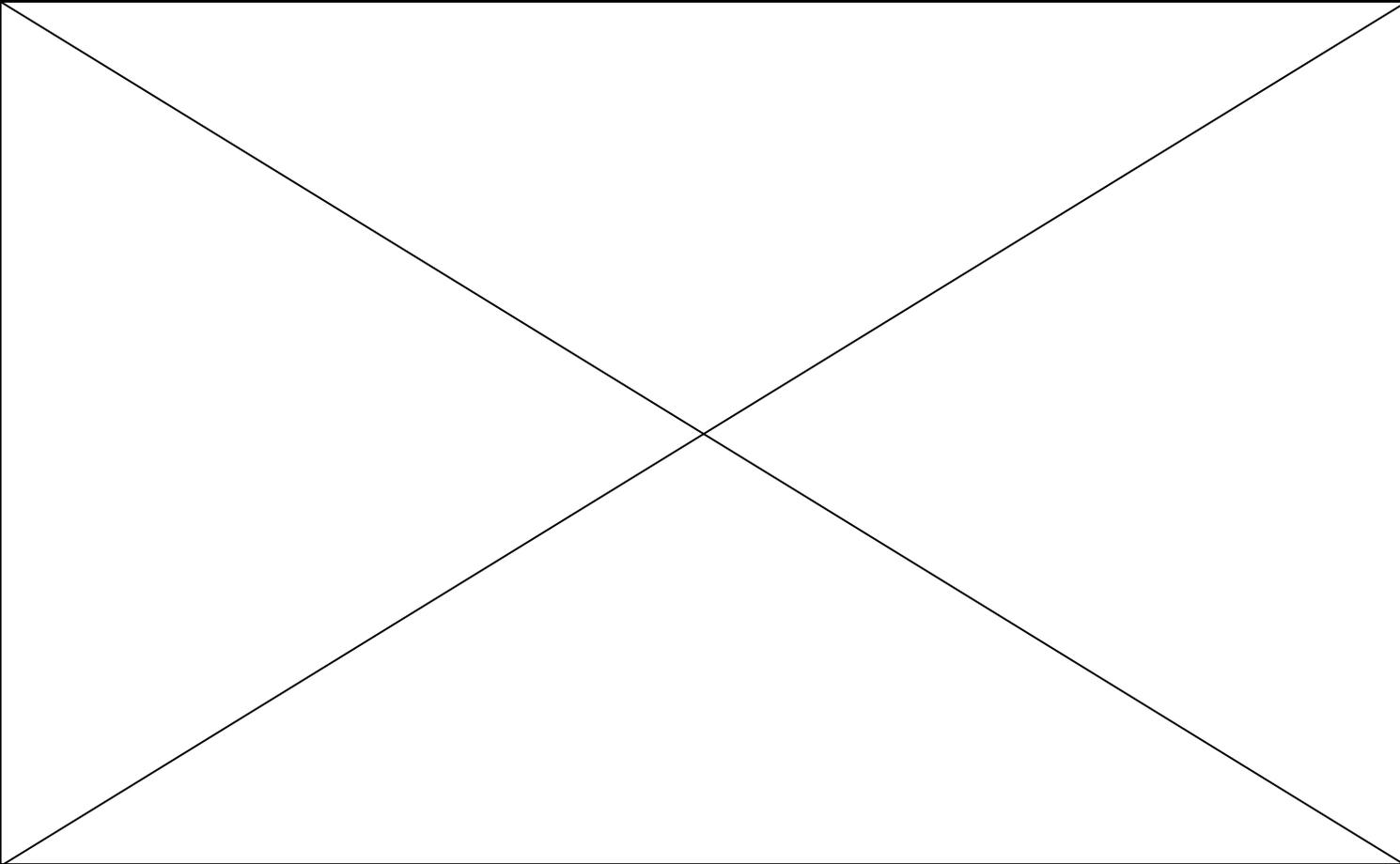
1. Authority to issue the MCM.
2. Contents of the MCM
3. Pt. IV of the MCM
4. Level of judicial deference to Pt. IV materials
5. (Time permitting) Quick look at Executive Order 13696 (June 17, 2015)

The Executive Order Process

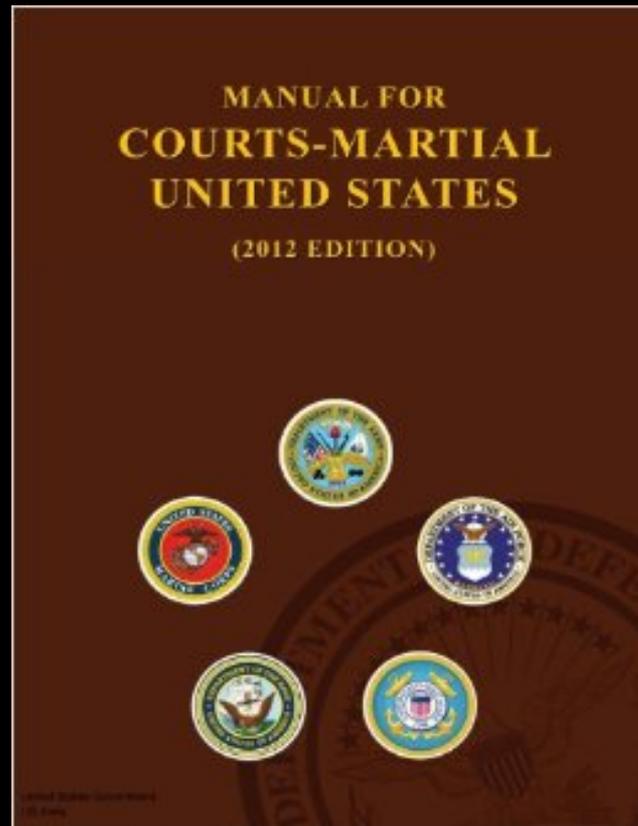








President's Authority to Issue Executive Orders Prescribing the Manual for Courts-Martial



United States Constitution



United States Constitution



Art. I, § 8, cl. 14:

“The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces”

Delegation of Authority to the President

Article 36:

Delegates to the President
authority to prescribe pretrial,
trial, and post-trial procedures,
including rules of evidence.

Delegation of Authority to the President

Article 56:

Delegates to the President
authority to prescribe maximum
punishments for court-martial
offenses (except for death-
eligible offenses).

United States Constitution

Art. II, § 1

“The executive Power shall be vested in a President of the United States of America.”



United States Constitution



Art. II, § 2, cl. 1

“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

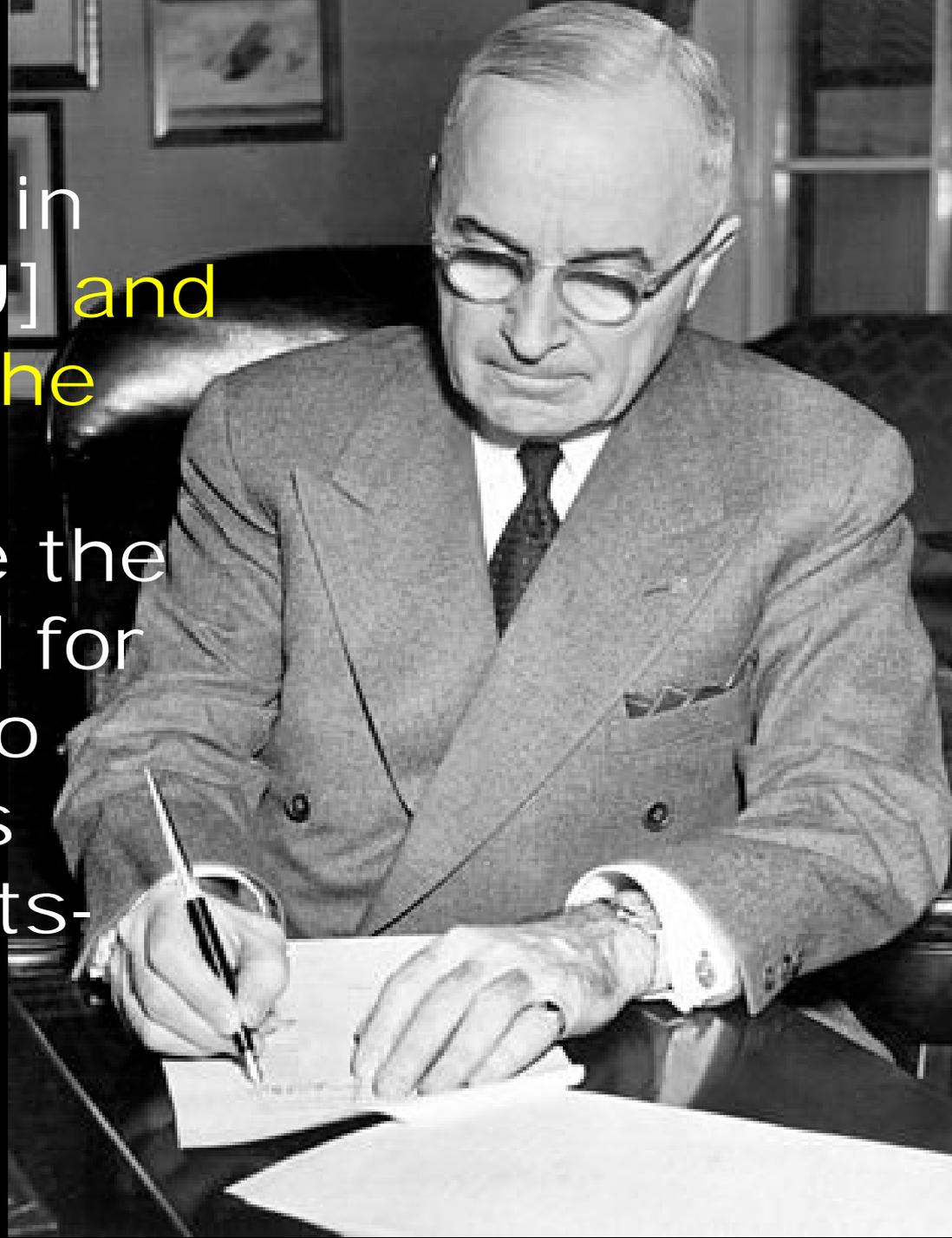
Swaim v. United States,
165 U.S. 553, 558
(1897), holds that the
President is authorized,
“as commander in chief,
to validly convene a
general court-martial”
even when not
statutorily empowered
to do so.



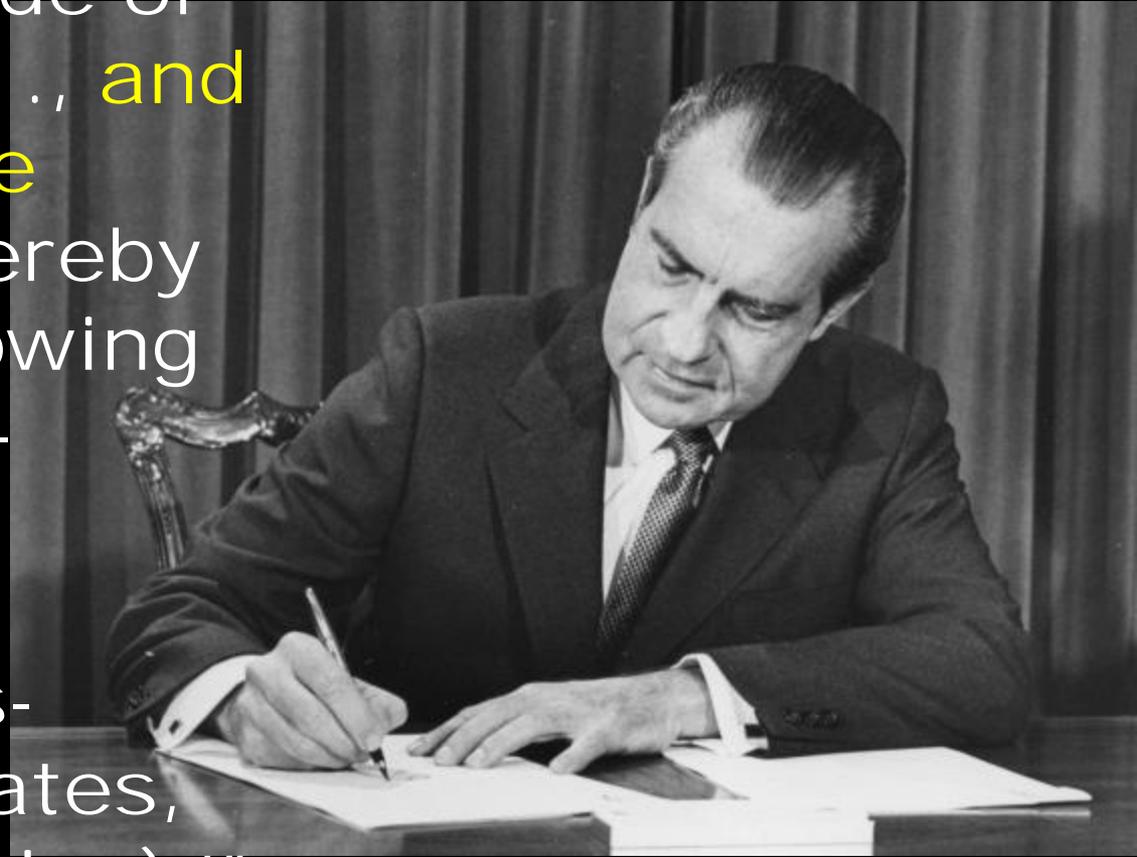
Executive
Order 10214,
Promulgating
1951 Manual
for Courts-
Martial



"By virtue of the authority vested in me by the [UCMJ] and as President of the United States, I hereby prescribe the following Manual for Courts-Martial, to be designated as 'Manual for Courts-Martial, United States, 1951.'"



“By virtue of the authority vested in me by the Uniform Code of Military Justice . . . , and as President of the United States, I hereby prescribe the following Manual for Courts-Martial, to be designated as ‘Manual for Courts-Martial, United States, 1969 (Revised edition).’”





“By virtue of the authority vested in me as President by the Constitution of the United States and by [the UCMJ], I hereby prescribe the following Manual for Courts-Martial, to be designated as ‘Manual for Courts-Martial, United States, 1984.’”

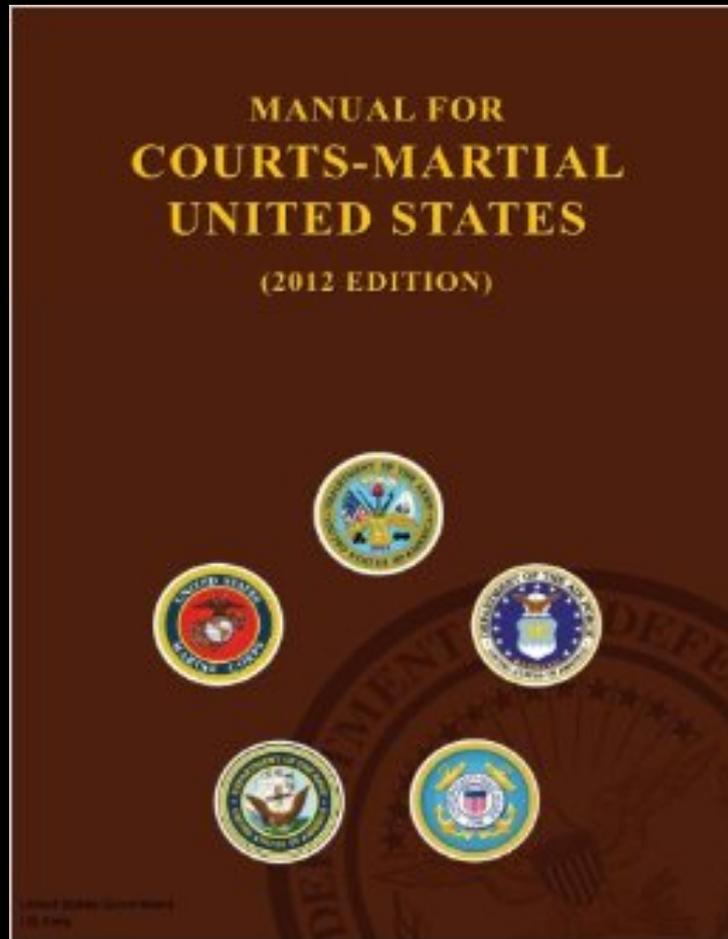


“By the authority vested in me **as President by the Constitution and the laws of the United States of America**, including [the UCMJ], and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:”

Loving v.
United States,
517 U.S. 748
(1996)



Contents of the MCM



Contents of the MCM

MCM Preamble, ¶ 4

“The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Part I-V).”

Contents of the MCM

MCM Preamble, ¶ 4 (Discussion)

“The Department of Defense, in conjunction with the Department of Homeland Security, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis, and various appendices.”

Materials included in Pt. IV

Punitive Articles

- a. Text of statute
- b. Elements
- c. Explanation
- d. Lesser included offenses
- e. Maximum punishment
- f. Sample specifications



BALANCE
of
POWER

United States v. Miller,
67 M.J. 87, 89 (C.A.A.F. 2008)
(internal citations omitted)



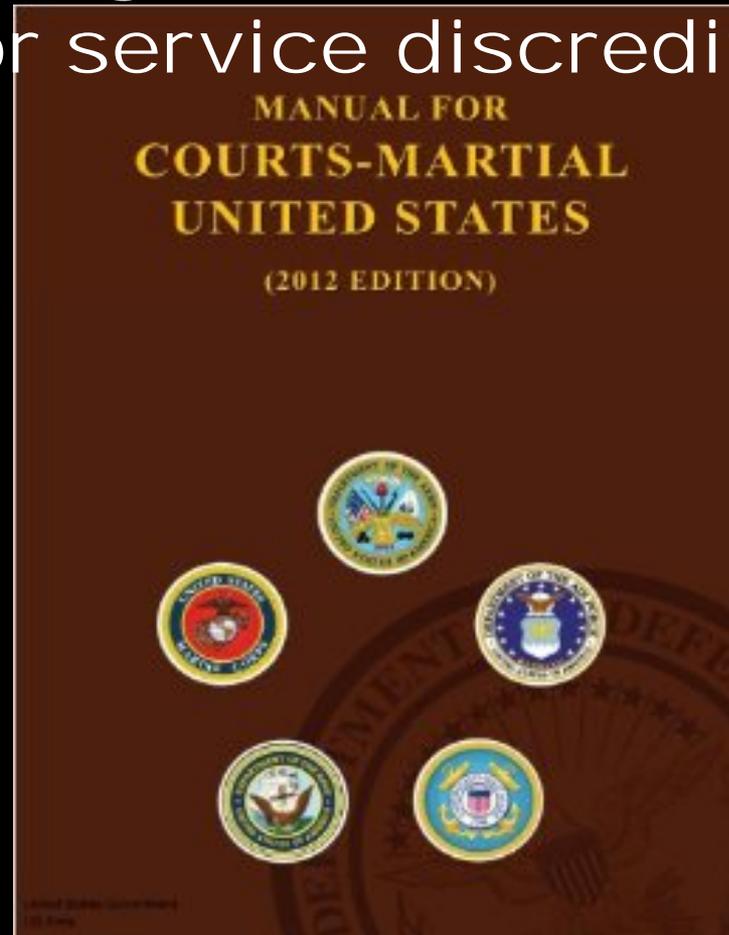
"Although *MCM* explanations of offenses are not binding on this Court, they are generally treated as persuasive authority, to be evaluated in light of this Court's precedent."

United States v. Mance, 26 M.J. 244, 252 (C.M.A. 1988)



"Of course, while the views of the drafters of the various Manuals in writing the provisions just discussed and those of the President in promulgating them are important, they are not binding on this Court in fulfilling our responsibility to interpret the elements of substantive offenses—at least, those substantive crimes specifically delineated by Congress in Articles 77 through 132 of the Code, 10 U.S.C. §§ 877-932, respectively."

President can identify additional criminal conduct under Article 134, limited to instances in which that conduct is prejudicial to good order and discipline and/or service discrediting



United States v. Guess, 48 M.J. 69,
71 (C.A.A.F. 1998)



"Part IV of the Manual includes sections on the elements of proof necessary to make out offenses under the UCMJ. Although the President's interpretation of the elements of an offense is not binding on this Court, absent a contrary intention in the Constitution or a statute, this Court should adhere to the Manual's elements of proof."

United States v. Davis, 47 M.J. 484, 486
(C.A.A.F. 1998)



“We note that we are not bound by the President's interpretation of the elements of substantive offenses [citing Mance]. Article 36(a), UCMJ, 10 U.S.C. § 836(a), gives the President express authority to promulgate rules under Parts II and III of the Manual. Part IV of the Manual is not expressly governed by Article 36(a).

United States v. Davis, 47 M.J. 484, 486
(C.A.A.F. 1998)



“Nonetheless, where the President unambiguously gives an accused greater rights than those conveyed by higher sources, this Court should abide by that decision unless it clearly contradicts the express language of the Code.”

United States v. Davis, 47 M.J. 484, 486-87 (C.A.A.F. 1998)



"We hold that an unloaded pistol is not a dangerous weapon under the President's interpretation of Article 128. Since this interpretation is favorable to appellant and not inconsistent with the language of Article 128, we will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution."

United States v. Guess, 48 M.J. 69,
71 (C.A.A.F. 1998)



"Where the President's narrowing construction is favorable to an accused and is not inconsistent with the language of a statute, 'we will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution.'"

Executive Order 13696 (June 17, 2015)



Executive Order 13696

Amends RCMs:

1. Incorporates NDAA for FY 2014 jurisdictional limits for trial of alleged penetrative sexual assaults and attempts to commit such assaults;
2. Requires notice to the victim of an alleged offense of the 7-day review of pretrial confinement and provides the right to be reasonably heard, including through counsel;

Executive Order 13696

Amends RCMs:

3. Provides victims the right to notice of release of alleged offender from pretrial confinement;
4. Provides victims the right to notice of alleged offender's escape from pretrial confinement;
5. Provides victims the right to notice of and be heard at (including through counsel) a motion for the accused's release from pretrial confinement;

Executive Order 13696

Amends RCMs:

6. Establishes pre-preliminary hearing disclosure obligations;
7. Establishes preliminary hearing rules, including inapplicability of constitutionally required exceptions to MREs 412 and 513 and inability of preliminary hearing officer to order production of communications falling under psychotherapist-patient privilege or victim advocate-victim privilege;

Executive Order 13696

Amends RCMs:

8. Authorizes convening authorities to pass cases to “parallel convening authorities” (carries out recommendation of DLPB);
9. Limits depositions to exceptional circumstances where it is in the interest of justice to preserve testimony for use at an Article 32 or trial; a victim’s declination to testify at a 32 or submit to a defense interview does not constitute an exceptional circumstance; deposition officers must, if practicable, be judge advocates;

Executive Order 13696

Amends RCMs:

10. Precludes preliminary hearings officers from issuing subpoenas;
11. Implements Article 6b's requirement for appointment of a representative to exercise an incompetent victim's rights;
12. Precludes victim's exclusion from a court-marital absent clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at the proceeding;

Executive Order 13696

Amends RCMs:

13. Provides victim with a reasonable right to confer with the trial counsel;
14. Permits victims to make unsworn victim impact statement before sentencing in non-capital cases;
15. Limits who may access sealed materials and the purposes for which they may do so;

Executive Order 13696

Amends RCMs:

16. Amends R.C.M. 1107 to reflect statutory limitations on CAs' authority to alter the findings and sentence.

Executive Order 13696

Amends MREs:

1. MRE 404 amended to preclude admissibility of general military character evidence for specified non-military offenses, as well as any other offense for which general military character is not relevant to an element;
2. MREs 412, 513, and 514 amended to provide that the victim's/patient's right to be heard includes the right to be heard through counsel;

Executive Order 13696

Amends MREs:

3. MRE 513 amended to broaden definition of psychotherapist;
4. MRE 513 amended to delete exception for evidence that is constitutionally required (widespread debate over implications);
5. MREs 513 and 514 amended to provide threshold for in camera reviews;
6. MRE 514 amended to include communications with the Safe Helpline.

Executive Order 13696

Amends Pt. IV:

1. Pt. IV's descriptions of conspiracy amended to address conspiracies to violate the law of war;
2. Maximum punishment for dereliction of duty enhanced where the dereliction results in death or grievous bodily harm (implements recommendation of DLPB);
3. Maximum confinement for maltreatment of a subordinate increased from 1 year to 2.

