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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2018–OS–0039]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Notice of proposed amendments to the Manual for Courts-Martial, United States (2016 ed.) and notice of public meeting.

SUMMARY: The Department of Defense requests comments on proposed changes to the Manual for Courts-Martial, United States (2016 ed.) (MCM). The proposed changes concern the rules of procedure and evidence applicable in trials by courts-martial as well as amendments to portions of the MCM discussing the punitive articles of the Uniform Code of Military Justice. The approval authority for these changes is the President. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.01, “Preparing, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony,” June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

DATES: Comments on the proposed changes must be received no later than [INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. A public meeting for comments will be held on July 11, 2018, at 1:30 p.m. in the United States Court of Appeals for the Armed Forces building, 450 E Street, NW, Washington DC 20442-0001.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

• *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

• *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Lieutenant Alexandra Nica, JAGC, USN, Executive Secretary, JSC, (202) 685-7058, alexandra.nica@navy.mil. The JSC website is located at <http://jsc.defense.gov>.

SUPPLEMENTARY INFORMATION: This notice is provided in accordance with DoD Instruction 5500.17, “Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,” February 21, 2018.

The JSC invites members of the public to comment on the proposed changes; such comments should address specific recommended changes and provide supporting rationale.

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

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.

The proposed amendments to the MCM are as follows:

Section 1. Part II of the Manual for Courts-Martial, United States as amended by EO 13825 is further amended as follows:

(a) R.C.M. 705(d)(1) is amended and reads as follows:

“(1) *In general.* Subject to such limitations as the Secretary concerned may prescribe pursuant to R.C.M. 705(a), a plea agreement that limits the sentence that can be imposed by the court-martial for one or more charges and specifications may contain:

(A) a limitation on the maximum punishment that can be imposed by the court-martial;

(B) a limitation on the minimum punishment that can be imposed by the court-martial;

(C) limitations on the maximum and minimum punishments that can be imposed by the court-martial; or,

(D) a specified sentence or portion of a sentence that shall be imposed by the court-martial.”

(b) R.C.M. 916(e) is amended and reads as follows:

“(e) *Self-defense.*

(1) *Homicide or assault cases involving deadly force.* It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

(2) *Certain aggravated assault cases.* It is a defense to assault with a dangerous weapon or assault in which substantial or grievous bodily harm is inflicted that the accused:

(A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) In order to deter the assailant, offered but did not actually inflict or attempt to inflict substantial or grievous bodily harm.

(3) *Other assaults.* It is a defense to any assault punishable under Article 89, 91, or 128 and not listed in paragraphs (e)(1) or (2) of this rule that the accused:

(A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force that the accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than the force inflicting substantial or grievous bodily harm.”

(c) R.C.M. 920(g) is new and reads as follows:

“(g) *Waiver.* Instructions on a lesser included offense shall not be given when both parties waive such an instruction. After receiving applicable notification of those lesser included offenses of which an accused may be convicted, the parties may waive the reading of a lesser included offense instruction. A written waiver is not required. The accused must affirmatively acknowledge that he or she understands the rights involved and affirmatively waives the instruction on the record. The accused’s waiver must be made freely, knowingly, and intelligently. In the case of a joint or common trial, instructions on a lesser included offense shall not be given as to an individual accused when that accused and the government agree to waive such an instruction.”

(d) R.C.M. 1208(c) is new and reads as follows:

“(c) *Effective date of sentences.* The effective date of portions of a sentence adjudged at a new trial, other trial, or rehearing shall be calculated without regard to any previous adjudged sentence. The effective dates shall not relate back to any previously adjudged sentence.”

Section 2. Part III of the Manual for Courts-Martial, United States as amended by EO 13825 is further amended as follows:

(a) Mil. R. Evid. 315(b)(3) is new and reads as follows:

“(3) “Warrant for Wire or Electronic Communications” means a warrant issued by a military judge pursuant to 18 U.S.C. §§2703(a), (b)(1)(A), or (c)(1)(A) in accordance with 10 U.S.C. §846(d)(3) and R.C.M. 309(b)(2) and R.C.M. 703A.”

(b) Mil. R. Evid. 315(d) is amended and reads as follows:

“(d) *Who May Authorize.* A search authorization under this rule is valid only if issued by an impartial individual in one of the categories set forth in subdivisions (d)(1), (d)(2), and (d)(3). Only a military judge may issue a warrant for wire or electronic communications under this rule. An otherwise impartial authorizing official does not lose impartiality merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartiality merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; ~~or~~

(2) *Military Judge or Magistrate.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned; or

(3) *Other competent search authority.* A competent, impartial official as designated under regulations by the Secretary of Defense or the Secretary concerned as an individual authorized to issue search authorizations under this rule.”

Section 3. Part IV of the Manual for Courts-Martial, United States as amended by EO 13825 is further amended as follows:

(a) Paragraph 20.c is amended as follows:

“c. Explanation.

(1) *In general.* The prevention of inappropriate sexual activity by trainers, recruiters, and drill instructors with recruits, trainees, students attending service academies, and other potentially vulnerable persons in the initial training environment is crucial to the maintenance of good order and military discipline. Military law, regulation, and custom invest officers, non-commissioned officers, drill instructors, recruiters, cadre, and others with the right and obligation to exercise control over those they supervise. In this context, inappropriate sexual activity between recruits/trainees and their respective recruiters/trainers is inherently destructive to good order and discipline.

(2) *Prohibited activity.* The responsibility for identifying relationships subject to this offense and those outside the scope of this offense is entrusted to the individual Services to determine and specify by appropriate regulations. This offense is intended to cover those situations which involve the improper use of authority by virtue of an individual’s position in either a training or recruiting environment. Not all contact or associations are prohibited by this article. Service regulations must consider circumstances where pre-existing relationships (for example, marriage relationships) exist. Additionally, this offense only criminalizes activity

occurring when there is a training or recruiting relationship between the accused and the alleged victim of this offense.

(3) *Knowledge*. The accused must have actual or constructive knowledge that a person was a “specially protected junior member of the armed forces” or an “applicant for military service” (as those terms are defined in this offense). Knowledge may be proved by circumstantial evidence.

(4) *Consent*. Consent is not a defense to this offense.”

(d) Paragraph 69.c.(1) is amended and reads as follows:

“(1) “Access” means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer, computer system, or computer network.”

(e) Paragraph 89.c.(2) is amended and reads as follows:

“(2) *Personnel action*. For purposes of this offense, “personnel action” means—

(a) any action taken against a Servicemember that affects, or has the potential to affect, that Servicemember’s current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards, or training, relief or removal, separation, discharge, referral for mental health evaluations, and any other personnel actions as defined by law or regulation, such as DoD Directive 7050.06 (17 April 2015); or,

(b) any action taken against a civilian employee that affects, or has the potential to affect, that person’s current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay,

benefits, awards, or training, relief and removal, discharge, and any other personnel actions as defined by law or regulation such as 5 U.S.C. § 2302.”

Dated: June 21, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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