

## **EXECUTIVE SUMMARY OF PROPOSED CHANGES TO THE MANUAL FOR COURTS-MARTIAL**

In December 2021, the President signed into law the National Defense Authorization Act for Fiscal Year 2022 (NDAA for FY22), which makes historic reforms to the military justice system. The Joint Service Committee on Military Justice (JSC) drafted proposed amendments to the Manual for Courts-Martial necessary to carry out these reforms as well as to make other improvements in the military justice system. The JSC offers the following Executive Summary of the proposed draft amendments<sup>1</sup>:

1. Part I – Preamble: Amended to recount the history of the evolving military justice system and to add well-established purposes of the military justice system.

2. Part II – Rules for Courts-Martial:

a. Multiple Rules are substantially amended to account for the authorities of special trial counsel and other changes enacted by the NDAA for FY22, Title V, Subtitle D, Pub. L. No. 117-81 (2021). Multiple Rules also have conforming amendments to account for the roles of special trial counsel. Particularly noteworthy changes are highlighted hereinafter. R.C.M. 301 requires all allegations of “covered offense” be promptly forward to special trial counsel. Amendments to R.C.M.s 303, 304, 401, and 403 and the new rules at R.C.M.s 303A, 306A, and 403A pertain to initial actions and disposition by special trial counsel.

b. R.C.M. 503 is amended to require the convening authority to provide a list of detailed members to the military judge to randomize in accordance with R.C.M. 911, which is amended to address randomization and assembly of the court-martial panel. R.C.M. 912A is also amended to account for the randomization process in R.C.M. 911. The court-martial member selection process must comport with article 25 of the Uniform Code of Military Justice, 10 U.S.C. § 825, which the NDAA for FY22 did not amend.

c. R.C.M. 404A, covering initial disclosures, is removed and substantially incorporated into R.C.M.s 308 and 405(d).

d. R.C.M. 703(d) is amended to allow but no longer require the defense to request funding of expert witnesses and consultants by the Government, to expand the types of defense requests that may be raised before the military judge, and to require notice by both parties for expert witnesses.

e. R.C.M. 703(g) is added to allow defense to request a subpoena for witnesses from the military judge, *ex parte*, after referral. It also requires the military judge to issue such subpoena if the witness’s testimony is determined to be relevant and necessary.

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<sup>1</sup> This Executive Summary is not required by law, regulation, or policy and does not set any precedent for the JSC to release Executive Summaries in the future.

- f. R.C.M. 912B is amended to clarify member excusal and impanelment of alternate members can only occur prior to the start of deliberations.
  - g. R.C.M. 925 is added to identify which sentencing rules apply at a court-martial.
  - h. R.C.M. 1001 is amended to clarify the rights of a crime victim during sentencing.
  - i. R.C.M. 1002 is amended to incorporate sentencing parameters and criteria.
  - j. R.C.M. 1004 is re-written to consolidate the rules pertaining to sentencing in capital cases while also amending member voting.
  - k. R.C.M. 1104(e) is amended to require notice to victims of certain post-trial motions and hearings.
  - l. R.C.M. 1117 is amended to account for appeals under the sentencing parameters and criteria.
3. Part III – Military Rules of Evidence:
- a. Multiple Rules are amended to account for the role of special trial counsel.
  - b. Mil. R. Evid. 311(d) is amended to include references to omitting a material fact knowingly and intentionally or with reckless disregard for the truth.
  - c. Mil. R. Evid. 404(b) and Mil. R. Evid. 803(16) are amended to align with the Federal Rules of Evidence.
4. Part IV – Punitive Articles: ¶3.b.(4) is amended to align with the proposed R.C.M. 920(g) allowing the parties to waive instructions on a lesser included offense.
5. Part V – Nonjudicial Punishment Procedures: ¶1 is amended to provide clarifying language regarding the burden of proof.
6. Appendix 12A – Art. 79(b)(2) Offenses: the prefatory language and chart are amended to provide notice of factually similar lesser included offenses designated by the President, pursuant to Article 79(b)(2), UCMJ, that are “reasonably included” in the greater offense.