April 13, 2020

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Submitted electronically via the Federal eRulemaking Portal

To the Members of the Joint Service Committee on Military Justice:

This correspondence is a public comment on the proposed changes to the Manual for Courts-Martial published in the Federal Register on February 11, 2020 (85 Fed. Reg. 7737) (Docket # DoD-2020-OS-0013).

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1. DISCLAIMER.

This comment is submitted in my personal capacity. This comment does not speak for, and should not be imputed to, any other individual or any organization, agency, or entity. Nothing in this correspondence necessarily reflects the policy or position of any military service, the Department of Defense, the U.S. Government, or any one or more of my clients.

2. PUBLIC COMMENT ON PROPOSED CHANGES TO THE MANUAL FOR COURTS-MARTIAL:

a. Do not expand the waiver rule in R.C.M. 910(j).

Section 1, Paragraph g, of the Annex to the public notice proposes to change Rule for Courts-Martial (R.C.M.) 910(j) to state that a guilty plea waives all objections and non-jurisdictional defects in the proceedings, rather than merely objections related to the factual issue of guilt.

The change should not be made.

Many serious yet non-jurisdictional errors may not be apparent at the time of a guilty plea. For example, exculpatory evidence may not be discovered until after the guilty plea, as occurred in United States v. Hawkins, 73 M.J. 605 (A. Ct. Crim. App. 2014). Similarly, circumstances that disqualify a military judge may not be discovered until later, as occurred in United States v. Springer, 79 M.J. 756 (A. Ct. Crim. App. 2020).¹

While it is certainly desirable to provide for finality in guilty pleas, the proposed change will not serve that objective. Rather, it will merely increase the prevalence of claims of ineffective assistance of counsel “to escape rules of waiver and forfeiture and raise issues not presented at trial.” Harrington v. Richter, 562 U.S. 86, 105 (2011).

¹ While Springer did not involve a guilty plea, such a plea likely would not have changed the CCA’s decision that the military judge was disqualified because the CCA did not “identif[y] any rulings or decisions in [the] case that appear to spring from [the circumstances of the disqualification].” 79 M.J. at 760.
b. Any good faith exception to R.C.M. 914 should require an affirmative showing of good faith, not merely the absence of bad faith.

Section 1, Paragraph h, of the Annex to the public notice proposes to change Rule for Courts-Martial (R.C.M.) 914 to add a good faith exception to the exclusion of testimony in the case of a lost statement of a witness. As drafted, the exception is captioned “failure to comply in good faith.” The substantive language of the proposed change, however, does not actually require good faith. Rather, it requires only the absence of bad faith.

The change should not be made as drafted.

While a rule-based good faith exception to the exclusion of testimony under R.C.M. 914 may be desirable, the proposed change goes too far. The decision in United States v. Muwwakkil, turned on negligent conduct, and the court found that “a finding of negligence may serve as the basis for a military judge to conclude that the good faith loss doctrine does not apply in a specific case.” 74 M.J. 187, 193 (C.A.A.F. 2015). The language of the proposed change, however, would lead to the opposite result. Under the proposed language, the good faith exception would apply so long as there is no bad faith or gross negligence; simple negligence would constitute good faith. However, the absence of bad faith is not the same as the existence of good faith, and a good faith exception should require an affirmative showing of good faith.

Furthermore, the proposed change (as drafted) likely conflicts with precedent involving the Jencks Act. Such conflict with a procedural rule used in the trial of criminal cases in the United States district courts should be avoided. See Article 36.

c. Do not change Mil. R. Evid. 311(c)(3).

In United States v. Perkins, 78 M.J. 381 (C.A.A.F. 2019), the court rejected a plain-language reading of the good faith exception to the requirement of a search warrant or authorization provided in Mil. R. Evid. 311(c)(3). Section 2, Paragraph a, of the Annex to the public notice proposes to change Mil. R. Evid. 311(c)(3) in a way that will conform the rule to CAAF’s decision.

The change should not be made.

The Military Rules of Evidence do not incorporate the deference afforded by the civil courts to a civil magistrate’s probable cause determination. See, generally, Illinois v. Gates, 462 U.S. 213, 238 (1983). Rather, Mil. R. Evid. 315(f)(1) states that search authorizations “must be based upon probable cause,” Mil. R. Evid 311(b)(1) states that a search in violation of the military rules is “unlawful,” and Mil. R. Evid. 311(d)(5)(A) requires the prosecution to prove that the evidence was obtained lawfully upon appropriate motion or objection. CAAF’s Gates-based conclusion in Perkins fails to incorporate that distinction.

Preserving that distinction is important because a military commander with the power to authorize a search is not the equivalent of a civilian magistrate with the power to issue a search warrant. Furthermore, the President should not allow CAAF to abrogate his authority to prescribe the rules applicable to courts-martial by ratifying CAAF’s errors.
The current language of Mil. R. Evid. 311(c)(3) should remain, but with a clarification to emphasize that it be applied as written. Specifically, Mil. R. Evid. 311(c)(3)(B) should be modified to state (additions underlined):

the individual issuing the authorization or warrant actually had a substantial basis for determining the existence of probable cause, without regard to the belief of the person executing the authorization or warrant; and

**d. Do not add the proposed paragraph 108 to Part IV of the Manual for Courts-Martial.**

Section 3, Paragraph c, of the Annex to the public notice proposes to add a new Paragraph 108 to Part IV of the Manual for Courts-Martial listing the offense of sexual harassment under Article 134.

The change should not be made.

Sexual harassment is serious misconduct, however it is already adequately addressed under Articles 92 and 93. *See, for example, United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017); *United States v. Goodman*, 70 M.J. 396 (C.A.A.F. 2011); *United States v. Caldwell*, 75 M.J. 276 (C.A.A.F. 2016). Creating an Article 134 offense is unnecessary and may violate the preemption doctrine.

**3. SUGGESTED ADDITIONAL CHANGES TO THE MANUAL FOR COURTS-MARTIAL:**

**a. Clarify that the mere failure to object at trial is not a waiver.**

At the public hearing held on February 19, 2020, I commented that the proliferation of waiver is the greatest threat to the integrity of our military justice system and the public’s perception of fairness within the system.

Waiver is the intentional relinquishment or abandonment of a known right, and it is at the heart of the American legal system. Every guilty plea, for instance, involves numerous waivers: waiver of the right against self-incrimination, waiver of the right to a trial of the facts, and waiver of the right to confront the prosecution’s witnesses. Those waivers are made personally and voluntarily by the accused with full knowledge of their meaning and effect, and they are uncontroversial. Those waivers are not the problem. The problem are the waivers discovered on appeal.

Waivers discovered on appeal are not personal or voluntary decisions by the accused. They are errors or omissions by defense counsel; counsel who is typically a military lawyer senior in rank to the accused and who is often suspected by the accused to be just another part of the prosecution. When such waivers are discovered in appellate records – usually in the form of silence or the mere failure to object – informed members of the public are right to think that the military justice system is failing to protect the rights of servicemembers.
That is true whether or not some rule applicable to courts-martial uses the word waiver, because the Manual for Courts-Martial has long used the word **waiver** to mean **forfeiture**. Forfeiture is the penalty for failure to object at trial. When an accused – or, more accurately, when defense counsel – fails to object to an error at trial, the error is forfeited and plain error review applies on appeal. Under plain error review the accused will not win a new trial unless there is error, the error is plain or obvious, and the error caused material prejudice to a substantial right. Unlike waiver – which is the intentional relinquishment of a known right and eliminates the error entirely – forfeiture is the consequence of merely failing to object. Forfeiture, and the associated plain error standard, is a powerful incentive to make timely objections.

However, prior to the 2019 edition, the Manual for Courts-Martial did not actually used the word **forfeiture** to describe the consequence of a failure to object. Rather, in the entire 2016 edition of the Manual for Courts-Martial – including the discussion and the appendices – the word **forfeiture** was used to describe the punishments of forfeiture of pay or allowances in all but only two instances.

The first was the discussion following R.C.M. 804(c)(2) that referenced forfeiture of the right to be present when an accused absents himself from trial or disrupts the proceedings and is removed. The second was the analysis of RCM 912(f)(4) in Appendix 21 referenced forfeiting the right to make a peremptory challenge by not exercising the challenge. Every other reference to forfeiture was a reference to punishment, and decades of precedent established that the Manual used the word waiver imprecisely, where what was really intended was forfeiture.

However, in recent years that understanding began to change even though the rules did not. As a result, today there is a growing library of appellate decisions holding that the mere failure of defense counsel to object is a waiver of the accused’s rights. Those decisions pose two serious threats to the integrity and public perception of the military justice system.

The first threat is the actual erosion of the rights of the accused by mere inaction on the part of defense counsel. It is rough justice to find waiver of substantial rights in the mere failure of defense counsel to object, even when counsel is called upon to object, because there is a substantial difference between actual agreement and mere acquiescence. Put differently, not saying no is not the same thing as saying yes. Equivalent federal rules – like rule 12 of the federal rules of criminal procedure – recognize that fact, and state that the mere failure of the defense to make objections or motions renders them untimely, not waived.

The second threat is that the proliferation of waiver invites an avalanche of claims of ineffective assistance of counsel to escape the consequences of waiver. Detailed military defense counsel – who litigate the majority of courts-martial – will face the majority of those claims. That will not only undermine the public’s confidence in their performance of their duties, but it will also cause them to engage in otherwise unnecessary litigation.

Accordingly, I respectfully make two recommendations.

First, I recommend that you review the Rules for Courts-Martial and the Military Rules of Evidence (including Section III of the Mil. R. Evid.) that use the word waiver, and replace waiver with forfeiture `wherever possible.
Second, I recommend modifying R.C.M. 801(g) as follows (additions underlined):

(g) Effect of failure to raise defenses or objections. Waiver is the intentional relinquishment of a known right by the accused. Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute forfeiture unless the applicable rule provides that failure to raise the defense or objection constitutes waiver. The mere failure to object at trial, even when called upon to object, shall not constitute waiver.

Those changes will not result in a windfall for any accused because the ordinary consequences of forfeiture will still apply and plain error is a high burden. Those changes also will not overwhelm the military appellate courts with claims of error because they will merely stop the recent proliferation of waiver into areas where forfeiture historically applied. Instead, those changes will conform military practice with federal practice, provide appropriate protections to the accused, avoid an avalanche of claims of ineffective assistance of counsel, and bolster public confidence in the fairness of the military justice system.

b. Clarify that a convening authority is required to act on the sentence in a case where the accused is convicted of an offense involving conduct occurring prior to January 1, 2019.

In paragraph 6(b) of Executive Order 13825, the President\(^2\) limited the application of the Military Justice Act of 2016 in cases involving offenses occurring prior to January 1, 2019 (the effective date of the Act). The limitations include requiring a convening authority to apply certain parts of the version of Article 60 in effect at the time of the earliest offense of which the accused was convicted. One of those is the part that “requires action by the convening authority on the sentence.” EO 13825, § 6(b)(1). Another of those is the part that “authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.” EO 13825, § 6(b)(5). Accordingly, while MJA16 eliminated the requirement that the convening authority act on the sentence (and allowed a convening authority to take no action), Executive Order 13825 requires a convening authority to explicitly approve, disapprove, commute, or suspend the sentence in any case with an offense that predates January 1, 2019.

Unfortunately, that requirement is not reflected in the Manual for Courts-Martial, and it has been overlooked in numerous cases.

Accordingly, a new R.C.M. 1110A should be created, stating:

Rule 1110A. Requirement to act on the sentence in certain cases

(a) If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article

\(^2\) Exercising his authority under § 5542 of the Military Justice Act of 2016.
60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority, in addition to the suspending authority in Article 60a(c) as enacted by the MJA, to the extent that Article 60:

(1) requires action by the convening authority on the sentence;

(2) permits action by the convening authority on findings;

(3) authorizes the convening authority to modify the findings and sentence of a court-martial, dismiss any charge or specification by setting aside a finding of guilty thereto, or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification;

(4) authorizes the convening authority to order a proceeding in revision or a rehearing; or

(5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

(b) The convening authority’s action under this rule shall be in accordance with such regulations as the Secretary concerned may prescribe. If it is impracticable for the convening authority to act under this rule, the convening authority shall, in accordance with such regulations as the Secretary concerned may prescribe, forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

c. Restore appellate counsel’s right to review the complete record of trial.

Rule for Courts-Martial 1113(b) limits the ability of appellate counsel to review sealed matters attached to the record of trial. There is no rational justification to allow appellate military judges to review the complete record of trial but not afford a similar right to appellate counsel (who may outrank the judges themselves). Furthermore, protective orders are more than adequate to protect the privacy interests of victims, witnesses, and others whose private affairs may become part of a record of trial by court-martial.

The former rule - R.C.M. 1103A - was established in 2005 and reflects the considered judgment of the President informed by the decisions of the Court of Appeals for the Armed Forces in United States v. Romano, 46 M.J. 269 (C.A.A.F. 1997), and United States v. Rivers, 49 M.J. 434 (C.A.A.F. 1998). There were no new circumstances that warrant changing that settled, functional, and practical rule. Accordingly, the former rule should be restored.
d. Eliminate binding minimum sentences in plea agreements.

The rules for plea agreements should not permit binding minimum sentences for at least two reasons.

First, such minimums undermine the sentencing discretion of a court-martial. That discretion is an essential part of military justice. It ensures that the sentence reflects the conscience of the military community, is the product of a neutral and detached view of the facts and circumstances of the accused’s misconduct, and is based on evidence presented in an adversarial proceeding. Undermining that discretion weakens the ability of the military justice system to ensure good order and discipline in the armed forces, because a court-martial “is an instrument of justice and in fulfilling this function it will promote discipline.” Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army (the Powell Report), at 12 (1960).

Second, such minimums prevent truly individualized sentences. Disparate sentences for seemingly-similar offenses are problematic only to the most superficial observer. An informed observer realizes that the relatively wide range of adjudged sentences in courts-martial are a desirable feature of the military justice system. Whether adjudged by members or by a military judge, a court-martial sentence is the product of the unique circumstances of a particular accused and his or her specific misconduct. The fact that, for example, two sentences for unauthorized absence are different is proof that each sentence is based on the actual facts of each absence, not on the application of some rigid formula that treats all offenders as if they are the same.

After all:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime.


The former scheme for plea agreements – where a convening authority and an accused agree upon only a set maximum punishment, with no set minimum – functioned well for many decades, and there was no reason to radically alter it with the rules in the 2019 edition of the Manual for Courts-Martial authorizing agreements that set minimum or specific punishments. Article 53a did not require such a radical change, nor did the realities of modern court-martial sentencing justify it. Similarly, Article 53a does not require that the sentence limitation portion of a plea agreement be disclosed to the military judge prior to its acceptance.

The failed experiment of binding minimum sentences in plea agreements should be abandoned in favor of agreements with only a set maximum punishment. Alternatively, a military judge should have the explicit authority to adjudge a sentence below the agreed-upon minimum (subject to an appeal of the sentence under Article 56(d)).
e. Ensure consistency in prosecutions under Clause 1 and Clause 2 of Article 134.

Paragraphs 91.c.(2)(a) and 91.c.(3) of Part IV of the Manual for Courts-Martial should be made consistent with respect to the severity of the conduct constituting a violation of Article 134, by adding certain language to the definition of conduct of a nature to bring discredit upon the armed forces.

Specifically, paragraph 91.c.(3) should be amended to read (additions underlined):

(3) Conduct of a nature to bring discredit upon the armed forces (clause 2). This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. However, see R.C.M. 203 concerning subject-matter jurisdiction. “Discredit” means to injure the reputation of the armed forces, and not merely conduct which is undesirable or unfavorable to the armed forces only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the armed forces could be regarded as discrediting in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the discredit is reasonably direct and palpable.

f. Clarify that Government counsel ordinarily represents either the prosecution or the appellate government division, and not the Government at large.

Part II of the Manual for Courts-Martial contains numerous references to the prosecution as one side in a court-martial. See, for example, R.C.M. 701(a)(3)(A), 701(a)(5)(A), 701(A)(6)(D), 703(a), 703(c)(1), 901(d)(1), 905(c)(2)(B), 907(b)(3)(B), 910(g), 913(b), 913(c)(1)(A), 913(c)(1)(C), 916(b)(1), 917(a), 917(d), 921(c)(4), 1001(a)(1), 1001(b), 1001(c)(5)(A), 1001(d)(1), 1001(d)(2)(A), 1001(d)(2)(C), 1001(e), 1001(h), 1004(b)(1)(B), 1201(c)(2), 1304(b)(2)(E)(ii), 1304(b)(2)(E)(iii), and 1307(c).

That designation conforms to the practice of the civil courts.

Common practice in courts-martial, however, is for trial counsel to refer to themselves as the government.

Considering the unique nature of a court-martial proceeding, where all participants are Government employees (and, in many cases, all or nearly all are commissioned officers), it is improper for trial counsel to refer to themselves as the Government. They are, and they should refer to themselves as, the prosecution.

Furthermore, because the arguments of the appellate government divisions are not directed by a central authority, it is improper for counsel assigned to the appellate government divisions to refer to themselves as the Government. They are, and they should refer to themselves as,
representatives of their respective appellate government division. Such reference would resolve the incongruity of CAAF’s Rule 26(a) which permits the appellate government divisions to file *amicus curiae* briefs without invitation; if each division represents the Government, then this rule allows the Government to file multiple *amicus curiae* briefs in support of itself.

Accordingly, R.C.M. 103(17)(B) should be amended with a second sentence that states: “Such counsel shall be referred to as the prosecution and not the Government.”

Additionally, R.C.M. 1202(b)(1) should be rewritten to state:

(1) Appellate Government counsel. Appellate Government counsel shall represent the appellate government division to which assigned before the Court of Criminal Appeals or the United States Court of Appeals for the Armed Forces when directed to do so by the Judge Advocate General concerned. Appellate Government counsel may represent the United States before the United States Supreme Court when requested to do so by the Attorney General.

g. Increase procedural protections for a person accused of contempt.


Willfully disobeys a lawful writ, process, order, rule, degree, or command issued with respect to the proceeding.


Additional procedural protections for a person accused of contempt are required in light of that Congressional expansion of the contempt power.

Particularly, the ability of a court-martial to address contempt summarily under R.C.M. 809(b) should be limited. A reasonable limitation is to permit a court-martial acting summarily to issue no more than a finding of contempt without punishment. Without such limitation, a military judge will have the power to summarily punish a violation of his or her orders; seemingly the only military officer in the entire United States Armed Forces with such power.

Additionally, the contempt power was utilized by military judges within the Navy-Marine Corps Trial Judiciary relatively recently to address conduct by judge advocates serving as detailed defense counsel. Those instances involved the threat of contempt in response to minor procedural missteps by junior officers with relatively little legal experience. In one case a company grade military defense counsel was ordered to appear for a contempt hearing because she was less than five minutes late to an Article 39(a) session. In another case, an accused excused one of the two company grade military defense counsel detailed to his case from an Article 39(a) session, but
the absent counsel was ordered to show cause why he should not be held in contempt because he inadvertently failed to file an advance notice of his absence in accordance with a local rule of practice. In a third case, a contempt hearing was held because just a few days before trial a company grade defense counsel requested an examination of the accused under R.C.M. 706 based on newly-discovered information (the request was granted).

Such use of the contempt power in response to minor and unintentional transgressions by junior counsel is improper, borders on tyrannical and abusive, and reveals the need for limits on the appropriate use of this expanded power.

Accordingly, the following new subparagraphs (1) and (2) within the proposed R.C.M. 809(a) are respectfully proposed:

(1) Use of the contempt power is limited to willful disobedience of the lawful writ, process, order, rule, decree, or command of the court-martial. Except in extraordinary circumstances, a specific warning shall be given to an alleged offender before any conduct may form the basis of a contempt proceeding under this rule.

(2) Personnel of courts-martial, including counsel, shall not be subject to contempt proceedings for any conduct unless the alleged offender is given a warning describing with particularity the allegedly contemptuous conduct, is afforded a reasonable opportunity to comply with the warning, and willfully fails to comply with the warning.

h. Limit the use of personal identifiers in court-martial documents.

The use of certain personal information, such as social security numbers, the names of minors, dates of birth, financial account numbers, and home addresses is unnecessary to the administration of military justice and risks misuse of this information for improper purposes. Accordingly, the creation of a new R.C.M. to restrict the use of this data is advisable. The following text of a proposed rule is respectfully suggested:

Rule 110. Use of personal information.

All parties shall refrain from including, and shall redact as necessary, the following personal information from the charge sheet, allied papers, pleadings, exhibits, and other documents attached to the record of trial: social security numbers or any portion thereof, the names of minors, dates of birth, financial account numbers, and home addresses. Where omission or redaction would prejudice a party, the military judge may order sealed any such matters or order other appropriate relief.
i. Require production of a privilege log when any entity that is represented by counsel asserts an evidentiary privilege.

R.C.M. 701(f) states that:

(f) Information not subject to disclosure. Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel’s assistants and representatives.

This rule should be amended to include the following additional sentence:

However, any entity represented by counsel and asserting an evidentiary privilege other than the classified information privilege under Military Rule of Evidence 505 shall, at the time of the assertion of the privilege, give written notice to each party of the general description of the privileged matter (sufficient to permit identification for the purpose of litigation) and of the specific legal basis for the assertion of the privilege.

This additional sentence will require creation and production of a privilege log by any entity represented by counsel at a court-martial. The exception for classified information addresses the consequence that the mere fact of the existence of classified information may itself be classified information subject to the privilege.

j. Restrict the Government to the privileges contained in Military Rules of Evidence 505, 506, and 507.

The Government is “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). The privileges for classified information (Mil. R. Evid. 505), government information other than classified information (Mil. R. Evid. 506), and the identity of informants (Mil. R. Evid. 507) are sufficient to protect any official matters deserving of protection from disclosure in a court-martial. Accordingly, those privileges should be the only privileges available to the Government, and the following new Military Rule of Evidence 501(e) is respectfully suggested:

(e) Privileges available to the Government. The Government may assert only the Classified Information privilege (rule 505), the Government Information Other than Classified Information privilege (rule 506), and the Identity of Informants privilege (rule 507). Nothing in this Rule shall be construed to limit the ability of trial counsel so assert a privilege on behalf of a third-party where authorized.
Thank you for the opportunity to submit these matters.

Respectfully,

Zachary Spilman