

DEPARTMENT OF DEFENSE**Office of the Secretary****Manual for Courts-Martial**

AGENCY: Joint Service Committee on Military Justice (JSC).

ACTION: Notice of Summary of Public Comment Received Regarding Proposed Amendments to the Manual for Courts-Martial, United States, (1998 ed.).

SUMMARY: The JSC is forwarding final proposed amendments to the Manual for Courts-Martial, United States, (1998 ed.) (MCM) to the Department of Defense. The proposed changes concern the rules of procedure applicable in trials by courts-martial and implement the amendment to Article 19 of the Uniform Code of Military Justice contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000. Subject to limitations prescribed by the President, the amendment increased the jurisdictional maximum punishment at special courts-martial to confinement for one year and forfeitures not exceeding two-thirds pay per month for one year, vice the previous six-month jurisdictional limitation. The proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon," May 21, 1964, and do not constitute the official position of the Department of Defense, the Military Departments, or any other government agency.

ADDRESSES: Comments and materials received from the public are available for inspection or copying at the U.S. Air Force, Air Force Legal Services Agency, Military Justice Division, Room 202, 112 Luke Avenue, Bolling Air Force Base, Washington, DC 20332-8000, between 8 a.m. and 3:30 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Lt. Col. Thomas C. Jaster, U.S. Air Force, Air Force Legal Services Agency, 112 Luke Avenue, Room 343, Bolling Air Force Base, Washington, DC 20332-8000, (202) 767-1539; FAX (202) 404-8755.

SUPPLEMENTAL INFORMATION:**Background**

On April 4, 2000, the JSC published a Notice of Proposed Amendments to the Manual for Courts-Martial, (MCM) United States, (1998 ed.) and Notice of Public Meeting. On April 18, 2000, the public meeting was held and one individual provided oral comment. The JSC also received two letters

commenting on the proposed amendments.

Purpose

The proposed changes concern the rules of procedure applicable in trials by courts-martial and implement the amendment to Article 19 of the Uniform Code of Military Justice (UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000. Subject to limitations prescribed by the President, the amendment increased the jurisdictional maximum punishment at special courts-martial to confinement for one year and forfeitures not exceeding two-thirds pay per month for one year, vice the previous six-month jurisdictional limitation.

Discussion of Comments and Changes

The two written comments received were not supportive of the amendments. The first writer addressed problems he saw with the decision to expand the jurisdiction of special courts-martial. The second writer believed that Congress enacted incomplete legislation and, in doing so, upset the coherence and unity within the Uniform Code of Military Justice. The writer also believed that the JSC proposed amendments to implement the change to Article 19, UCMJ, created internal philosophical conflicts within the MCM provisions. He recommended withholding action on the proposed MCM amendments until Articles 54(c) and 66, UCMJ, were also amended to mandate verbatim transcripts and appellate review in cases involving a bad conduct discharge or confinement in excess of six months or forfeitures of pay in excess of six months. He recommended the MCM apply similar protections. The second writer also recommended that the current Discussion accompanying R.C.M. 1107(d)(1) addressing the mitigation of a bad conduct discharge be retained and suggested that the amendment to the analysis accompanying R.C.M. 1107 contained typographical errors.

The JSC has considered the oral and written comment provided and is satisfied that the proposed amendments are appropriate to implement the Congressional change to Article 19, UCMJ. However, the JSC has reexamined the analysis accompanying R.C.M. 1107 and has corrected the identified typographical errors. The JSC recognized the arguable tension between Article 19 as amended and Article 54(c)(1)(B) and took those matters into consideration prior to publication of the proposed amendments. After reconsidering the issues raised, the JSC

does not believe the proposed MCM amendments are internally inconsistent or upset the basic architecture of the UCMJ and will forward the proposed amendments to the Department of Defense.

All public comment received will be forwarded, along with the proposed amendments, to the Department of Defense.

Proposed Amendments After Consideration of Public Comment Received

The proposed amendments to the Manual for Courts-Martial are as follows:

Amend R.C.M. 201(f)(2)(B)(i) to read as follows:

"(i) Upon a finding of guilty, special courts-martial may adjudge, under limitations prescribed by this Manual, any punishment authorized under R.C.M. 1003 except death, dishonorable discharge, dismissal, confinement for more than 1 year, hard labor without confinement for more than 3 months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than 1 year."

Amend R.C.M. 201(f)(2)(B)(ii) to read as follows:

"(ii) A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged by a special court-martial unless:

(a) Counsel qualified under Article 27(b) is detailed to represent the accused; and

(b) A military judge is detailed to the trial, except in a case in which a military judge could not be detailed because of physical conditions or military exigencies. Physical conditions or military exigencies, as the terms are here used, may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to detail a military judge. If a military judge cannot be detailed because of physical conditions or military exigencies, a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may be adjudged provided the other conditions have been met. In that event, however, the convening authority shall, prior to trial, make a written statement explaining why a military judge could not be obtained. This statement shall be appended to the record of trial and shall set forth in detail the reasons why a

military judge could not be detailed, and why the trial had to be held at that time and place.”

Amend the analysis accompanying R.C.M. 201(f) by inserting the following before the discussion of subsection (3):

“2000 Amendment: Subsections (f)(2)(B)(i) and (f)(2)(B)(ii) were amended to remove previous limitations and thereby implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law No. 106–65, 113 Stat. 512 (1999). Subject to limitations prescribed by the President, the amendment increased the jurisdictional maximum punishment at special courts-martial to confinement for one year and forfeitures not exceeding two-thirds pay per month for one year, vice the previous six-month jurisdictional limitation.”

Amend the seventh paragraph of the Discussion accompanying R.C.M. 601(e)(1) to read as follows:

“The convening authority should acknowledge by an instruction that no bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may be adjudged when the prerequisites under Article 19 will not be met. See R.C.M. 201(f)(2)(B)(ii). For example, this instruction should be given when a court reporter is not detailed.”

Amend the first paragraph of the Discussion accompanying R.C.M. 808 to read as follows:

“Except in a special court-martial not authorized to adjudge a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, the trial counsel should ensure that a qualified court reporter is detailed to the court-martial. Trial counsel should also ensure that all exhibits and other documents relating to the case are properly maintained for later inclusion in the record. See also R.C.M. 1103(j) as to the use of videotapes, audiotapes, and similar recordings for the record of trial. Because of the potential requirement for a verbatim transcript, all proceedings, including sidebar conferences, arguments, and rulings and instructions by the military judges, should be recorded.”

Amend the sixth paragraph of the Discussion accompanying R.C.M. 1003(b)(2) to read as follows:

“At a special court-martial, if a bad-conduct discharge and confinement are adjudged, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during that period of confinement. If only confinement is adjudged, and that

confinement exceeds six months, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during the period of confinement. If only a bad conduct discharge is adjudged, Article 58b has no effect on pay.”

Amend R.C.M. 1103(b)(2)(B)(i) to read as follows:

“(i) Any part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments which may be adjudged by a special court-martial; or”

Amend the analysis accompanying R.C.M. 1103(b)(2)(B) by inserting the following before the discussion of subsection (2)(C):

“2000 Amendment: Subsection (2)(B) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law No. 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. R.C.M. 1103(b)(2)(B) was amended to prevent an inconsistent requirement for a verbatim transcript between a general court-martial and a special court-martial when the adjudged sentence of a general court-martial does not include a punitive discharge or confinement greater than six months, but does include forfeiture of two-thirds pay per month for more than six months but not more than 12 months.”

Amend R.C.M. 1103(c) to read as follows:

“(c) Special courts-martial.

(1) Involving a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months. The requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D), and (b)(3) of this rule shall apply in a special court-martial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged.

(2) All other special courts-martial. If the special court-martial resulted in findings of guilty but a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, was not adjudged, the requirements of subsections (b)(1), (b)(2)(D), and (b)(3)(A)–(F) and (I)–(M) of this rule shall apply.”

Amend the analysis accompanying R.C.M. 1103(c) by inserting the following before the discussion of subsection (e):

“2000 Amendment: Subsection (c) was amended to implement the

amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. R.C.M. 1103(c) was amended to conform the requirements for a verbatim transcript with the requirements of Article 19 for a “complete record” in cases where the adjudged sentence includes a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months.”

Amend R.C.M. 1103(f)(1) to read as follows:

“(1) Approve only so much of the sentence which could be adjudged by a special court-martial, except that no bad-conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months, may be approved; or”

Amend the analysis accompanying R.C.M. 1103(f) by inserting the following before the discussion of subsection (g):

“2000 Amendment: Subsection (f)(1) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. R.C.M. 1103(f)(1) was amended to include the additional limitations on sentence contained in Article 19, UCMJ.”

Amend R.C.M. 1104(a)(2)(A) to read as follows:

“(A) Authentication by the military judge. In special courts-martial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged and in general courts-martial, except as provided in subsection (a)(2)(B) of this rule, the military judge present at the end of the proceedings shall authenticate the record of trial, or that portion over which the military judge presided. If more than one military judge presided over the proceedings, each military judge shall authenticate the record of the proceedings over which that military judge presided, except as provided in subsection (a)(2)(B) of this rule. The record of trial of special courts-martial in which no bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, was adjudged shall be authenticated in accordance with regulations of the Secretary concerned.”

Amend the analysis accompanying R.C.M. 1104(a) by inserting the

following before the discussion of subsection (b):

“2000 Amendment: Subsection (a)(2)(A) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. R.C.M. 1104(a)(2)(A) was amended to ensure that the military judge authenticates all verbatim records of trial at special courts-martial.”

Amend R.C.M. 1104(e) to read as follows:

“(e) Forwarding. After every court-martial, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action, provided that in case of a special court-martial in which a bad-conduct discharge or confinement for one year was adjudged or a general court-martial, the convening authority shall refer the record to the staff judge advocate or legal officer for recommendation under R.C.M. 1106 before the convening authority takes action.”

Amend the analysis accompanying R.C.M. 1104(e) by inserting the following at the end of the discussion of subsection (e):

“2000 Amendment: Subsection (e) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. This amendment reflects the change to R.C.M. 1106 for special court-martial with an adjudged sentence that includes confinement for one year.”

Amend R.C.M. 1106(a) to read as follows:

“(a) In general. Before the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial or a record of trial by special court-martial which includes a sentence to a bad-conduct discharge or confinement for one year, that convening authority’s staff judge advocate or legal officer shall, except as provided in subsection (c) of this rule, forward to the convening authority a recommendation under this rule.”

Amend the analysis accompanying R.C.M. 1106(a) by inserting the following before the discussion of subsection (b):

“2000 Amendment: Subsection (e) was amended to implement the

amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. This amendment requires all special courts-martial cases subject to appellate review to comply with this rule.”

Amend the second paragraph of the Discussion accompanying R.C.M. 1107(d)(1) to read as follows:

“When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial. When mitigating confinement or hard labor without confinement, the convening authority should use the equivalencies at R.C.M. 1003(b)(6) and (7), as appropriate. One form of punishment may be changed to a less severe punishment of a different nature, as long as the changed punishment is one that the court-martial could have adjudged. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for up to one year (but not vice versa). A pretrial agreement may also affect what punishments may be changed by the convening authority.”

Amend R.C.M. 1107(d)(4) to read as follows:

“(4) Limitations on sentence based on record of trial. If the record of trial does not meet the requirements of R.C.M. 1103(b)(2)(B) or (c)(1), the convening authority may not approve a sentence in excess of that which may be adjudged by a special court-martial, or one which includes a bad-conduct discharge, confinement for more than six months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than six months.”

Amend the analysis accompanying R.C.M. 1107(d) by inserting the following at the end of the discussion of subsection (d):

“2000 Amendment: The Discussion accompanying subsection (d)(1) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. R.C.M. 1107(d)(4) was amended to include the additional limitations on sentence contained in Article 19, UCMJ.”

Amend R.C.M. 1109(e) and (e)(1) to read as follows:

“(e) Vacation of a suspended special court-martial sentence wherein a bad-conduct discharge or confinement for one year was not adjudged.

(1) In general. Before vacating the suspension of a special court-martial punishment that does not include a bad-conduct discharge or confinement for one year, the special court-martial convening authority for the command in which the probationer is serving or assigned shall cause a hearing to be held on the alleged violation(s) of the conditions of suspension.”

Amend the analysis accompanying R.C.M. 1109(e) by inserting the following at the end of the discussion of subsection (e):

“2000 Amendment: Subsection (e) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial.”

Amend R.C.M. 1109(f) and (f)(1) to read as follows:

“(f) Vacation of a suspended special court-martial sentence that includes a bad-conduct discharge or confinement for one year.

(1) The procedure for the vacation of a suspended approved bad-conduct discharge or of any suspended portion of an approved sentence to confinement for one year, shall follow that set forth in subsection (d) of this rule.”

Amend the analysis accompanying R.C.M. 1109(f) by inserting the following at the end of the discussion of subsection (f):

“2000 Amendment: (f) Vacation of a suspended special court-martial sentence that includes a bad-conduct discharge or confinement for one year. Subsection (f) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106–65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. This amendment reflects the decision to treat an approved sentence of confinement for one year, regardless of whether any period of confinement is suspended, as a serious offense, in the same manner as a suspended approved bad-conduct discharge at special courts-martial under Article 72, UCMJ and R.C.M. 1109.”

Amend the Discussion accompanying R.C.M. 1109(f) to read as follows:

“An officer exercising special court-martial jurisdiction may vacate any suspended punishments other than an

approved suspended bad-conduct discharge or any suspended portion of an approved sentence to confinement for one year, regardless of whether they are contained in the same sentence as the bad-conduct discharge or confinement for one year. See Appendix 18 for a sample of a Report of Proceedings to Vacate Suspension of a Special Court-Martial Sentence including a bad-conduct discharge or confinement for one year under Article 72, UCMJ, and R.C.M. 1109 (DD Form 455)."

Amend the title to Appendix 18 to read as follows:

"Report of Proceedings to Vacate Suspension of a General Court-Martial or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge or Confinement for One Year Under Article 72, UCMJ, and R.C.M. 1109 (DD Form 455)."

Amend R.C.M. 1110(a) to read as follows:

"(a) In general. After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge or confinement for one year, the accused may waive or withdraw appellate review."

Amend the analysis accompanying R.C.M. 1110(a) by inserting the following at the end of the discussion of subsection (a):

"2000 Amendment: Subsection (a) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for

Fiscal Year 2000, Public Law 106-65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial."

Amend the Discussion accompanying R.C.M. 1110(a) to read as follows:

"Appellate review is not available for special courts-martial in which a bad-conduct discharge or confinement for one year was not adjudged or approved or for summary courts-martial. Cases not subject to appellate review, or in which appellate review is waived or withdrawn, are reviewed by a judge advocate under R.C.M. 1112. Such cases may also be submitted to the Judge Advocate General for review. See R.C.M. 1201(b)(3). Appellate review is mandatory when the approved sentence includes death."

Amend R.C.M. 1111(b) to read as follows:

"(1) Cases including an approved bad-conduct discharge or confinement for one year. If the approved sentence of a special court-martial includes a bad-conduct discharge or confinement for one year, the record shall be disposed of as provided in subsection (a) of this rule.

(2) Other cases. The record of trial by a special court-martial in which the approved sentence does not include a bad-conduct discharge or confinement for one year shall be forwarded directly to a judge advocate for review under R.C.M. 1112. Four copies of the order promulgating the result of trial shall be forwarded with the record of trial, unless otherwise prescribed by regulations of the Secretary concerned."

Amend the analysis accompanying R.C.M. 1111(b) by inserting the following at the end of the discussion:

"2000 Amendment: R.C.M. 1111(b) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106-65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. The amendment ensures all special courts-martial not requiring appellate review are reviewed by a judge advocate under R.C.M. 1112."

Amend R.C.M. 1112(a)(2) to read as follows:

"Each special court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 1110 or in which the approved sentence does not include a bad-conduct discharge or confinement for one year; and"

Amend the analysis accompanying R.C.M. 1112 by inserting the following at the end of the discussion:

"2000 Amendment: R.C.M. 1112(a)(2) was amended to implement the amendment to 10 U.S.C. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106-65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. The amendment ensures all special courts-martial not requiring appellate review are reviewed by a judge advocate under R.C.M. 1112."

Amend Page A8-19, Left Margin Entry to Note 100 to read as follows:

Advice in GCMs and SPCMs in which BCD or confinement for one year is adjudged.	[Note 100. In cases subject to review by a Court of Criminal Appeals, the following advice should be given. In other cases proceed to Note 101 or 102 as appropriate.]
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Amend Page A8-21, Left Margin Entry to Note 102 to read as follows:

SPCM not involving a BCD or confinement for one year	[Note 102. In special courts-martial not involving BCD or confinement for one year, the following advice should be given.]
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Amend Page A17-4, first note to paragraph d, to read as follows:

"[Note. Orders promulgating the vacation of the suspension of a dismissal will be published by departmental orders of the Secretary concerned. Vacations of any other suspension of a general court-martial sentence, or of a special court-martial sentence which as approved and affirmed includes a bad-conduct discharge or confinement for one year,

will be promulgated by the officer exercising general court-martial jurisdiction over the probationer (Article 72(b)). The vacation of suspension of any other sentence may be promulgated by an appropriate convening authority under Article 72(c). See R.C.M. 1109.]"

Dated: June 22, 2000.

L.M. Bynum,
Alternate OSD Federal Register, Liaison Officer, Department of Defense.
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