



New Executive Order Changes to Parts I, II, and IV of Manual for Courts-Martial (MCM)

Background

On 16 September 2016, the President signed Executive Order (EO) 13740, which implements changes to Parts I, II, and IV of the Manual for Courts-Martial (MCM). This EO implements changes originating from a number of sources, including the Fiscal Year 2011, 2012, 2014, and 2015 National Defense Authorization Acts (NDAAAs). This EO was published in the Federal Register on 22 September 2016 and is posted on the Military Justice Branch and Joint Service Committee on Military Justice (JSC) webpages. These changes apply immediately; however, see page 3 for guidance for ongoing proceedings.

Additionally, within the next few weeks, the JSC will release Supplementary Materials accompanying the MCM that amend a number of Discussion paragraphs and Appendices of the MCM. These Supplementary Materials will be published in the Federal Register and posted on the Military Justice Branch and JSC webpages.

Part I of the MCM: Preamble

¶4 of the Preamble clarifies the non-binding nature of supplementary materials in the MCM and establishes a naming convention for the various published editions of the MCM.

Part II of the MCM: Rules for Courts-Martial

R.C.M. 201(c) reflects the amendments to a court-martial's contempt power enacted by section 542 of the FY11 NDAA.

R.C.M. 307(c)(3) and Pt. IV, ¶¶60.c.(6)(a) require a specification alleging a violation of Article 134 expressly allege one of that article's terminal elements.

R.C.M. 307(c)(4) distinguishes the concepts of unreasonable multiplication of charges, multiplicity, and punishment limitations arising therefrom.

R.C.M. 701(e) and 703(a) requires defense counsel to request any interview of an alleged victim of a sex-related offense through the victim's counsel, and to conduct any such interview only in the presence of government counsel, counsel for the victim, or victim advocate. (Implements section 1704 of FY14 NDAA, as amended by section 531 of FY15 NDAA).

R.C.M. 906(b)(12) provides guidance concerning remedies for the unreasonable multiplication of charges for findings and sentencing purposes.

Significant MCM Changes

R.C.M. 307(c)(3) and Pt. IV, ¶¶60
Require Art. 134 specifications to expressly allege a terminal element.

R.C.M. 701(e) and 703(a)
Require defense counsel to request any interview with an alleged victim of a sex-related offense through the victim's counsel, and to conduct interviews with certain persons present.

Pt. IV, ¶¶43.c.(5)(b) and 44.b.(2)(d)
Reflect the elimination of consensual sodomy as an Art. 125 offense.

Pt. IV, ¶¶45, 45b, and 45c

- Provide elements, explanations, and sample specifications for Articles 120, 120b, and 120c.
- Implement mandatory minimum sentence of dismissal or dishonorable discharge for rape and sexual assault and rape and sexual assault of a child.

Pt. IV, ¶90
Establishes the offense of indecent conduct, which does not require the presence of another person (unlike earlier offense of indecent acts with another).

R.C.M. 907(b)(3) provides guidance concerning when two charges are multiplicitous with one another.

R.C.M. 916(b)(1), 916(b)(3) and (4), 916(j), and 920(e)(5)(D) reflect changes to the law governing burdens of proof as to defenses enacted by section 541 of the FY12 NDAA.

R.C.M. 916(b), 1004(c)(7)(B), and 1004(c)(8) reflect section 541 of the FY12 NDAA's enactment of a separate UCMJ article, Article 120b, criminalizing rape and sexual assault of a child, and the FY14 NDAA's elimination of consensual sodomy as an Article 125 offense.

R.C.M. 1004(c)(9) reflects that rape is no longer a capital offense and establishes as an aggravating factor for any capital offense that the accused was also convicted of (A) an Article 120b offense in which the victim was under the age of 12, or (B) an Article 120 or 120b offense in which the accused maimed or attempted to kill the victim.

Part IV of the MCM: Punitive Articles

Pt. IV no longer lists lesser included offenses in each paragraph explaining a punitive offense.

Pt. IV, ¶3.b. (Article 79) provides guidance, consistent with Court of Appeals for the Armed Forces case law, for determining when one offense is a lesser included offense of another, and refers to the MCM's new Appendix 12A (in pending Supplementary Materials), which provides non-binding guidance concerning specific greater and lesser-included offenses.

Pt. IV, ¶¶43.c.(5)(b) and 44.b.(2)(d) (Articles 118 and 119) reflect the elimination of consensual sodomy as an Article 125 offense per section 1707 of the FY14 NDAA.

Pt. IV, ¶¶45, 45b, and 45c (Articles 120, 120b, and 120c) provide elements, explanations, and sample specifications for Articles 120, 120b, and 120c, and implement the FY14 NDAA's enactment of the mandatory minimum sentence of dismissal or dishonorable discharge for rape and sexual assault and rape and sexual assault of a child.

Pt. IV, ¶51 (Article 125) reflects the FY14 NDAA's elimination of consensual sodomy as an Article 125 offense and the creation of a mandatory minimum sentence for forcible sodomy.

Pt. IV, ¶60.b (Article 134 – General Article) provides additional guidance concerning the proof necessary to establish a violation of one or more of Article 134's terminal elements.

Pt. IV, ¶60.c.(6) (Article 134 – General Article) provides additional guidance concerning necessary language in a specification alleging an offense under Article 134, clauses 1 and 2 (conduct to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces), and clause 3 (prosecution for a non-capital federal offense) of Article 134. The language formerly in ¶60.c.(6)(c) was moved to ¶60.c.(6)(a).

Pt. IV, ¶¶61, 62, 64–86, 89, 91-100, and 102–113 (Article 134 offenses) include Article 134 terminal elements in the sample specifications.

Pt. IV, ¶61 (Article 134 – Animal abuse) broadens the former abuse of a public animal offense into a comprehensive animal abuse offense.

Pt. IV, ¶64 (Article 134 – Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking) reflects the FY14 NDAA's elimination of consensual sodomy as an Article 125 offense.

Pt. IV, ¶90 (Article 134 – Indecent conduct) establishes the offense of indecent conduct, which, unlike the earlier offense of Indecent Acts with Another, does not require the presence of another person.

Pt. IV, ¶97 (Article 134 – Pandering and prostitution) broadens pandering and prostitution to include committing any sexual act—rather than solely sexual intercourse—for compensation.

Impact of Executive Order 13740 on Ongoing Proceedings and Hearings

As stated in EO 13740, any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action commenced prior to the signing of the EO shall not be invalidated by the new rules, and, if still in progress, may proceed as if the new rules had not yet come into effect. *See also United States v. Nicholas*, 6 C.M.R. 27 (USCMA 1952). Stated more plainly, if a discrete military justice event began before EO 13740 was signed, the rules that applied to the event when it began continue to apply until the event concludes. Therefore, if an accused was arraigned before 16 September 2016, the new rules would not take effect for that trial. Regarding whether certain changes to the MCM are subject to the *Ex Post Facto* Clause of the U.S. Constitution, see *United States v. Roberts*, 2016 CCA LEXIS 379 (N-M.C.C.A. June 28, 2016).

Links to Executive Order 13740

- <https://www.federalregister.gov/documents/2016/09/22/2016-22962/2016-amendments-to-the-manual-for-courts-martial-united-states>
- [http://www.hqmc.marines.mil/sja/Branches/MilitaryJusticeBranch\(JMJ\).aspx](http://www.hqmc.marines.mil/sja/Branches/MilitaryJusticeBranch(JMJ).aspx), References, UCMJ, MCM
- <https://jsc.defense.gov/>

Enclosure: (1) Executive Order 13740

Points of Contact

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