



New Executive Order; Release of Updated UCMJ, RCMs and MREs

Background. On 17 June 2015, the President signed Executive Order (EO) 13696, which implements significant changes to the Manual for Courts-Martial (MCM), most notably concerning the new Article 32 preliminary hearing, the victim’s right to be heard, and the victim’s right to make an unsworn statement at sentencing. Additionally, the Joint Service Committee on Military Justice (JSC) has released Supplementary Materials accompanying the MCM that amend a number of Discussion paragraphs and certain portions of the Analysis section of the MCM. Both the EO and the Supplementary Materials will be published in the Federal Register. For the most part, the EO implements existing changes to the Uniform Code of Military Justice (UCMJ) or to current case law that have been discussed in previous Practice Advisories. New and significant changes to the Rules for Courts-Martial (R.C.M.) or to the Military Rules of Evidence (M.R.E.) are listed in the blue text box. The JMJ web page contains the updated UCMJ, R.C.M., M.R.E., EO 13696, and the Supplementary Materials.

I. Executive Order 13696: Amendments to the Manual for Courts-Martial

Unless noted after the rule’s description, changes apply **immediately**. However, see the paragraph below for implementation guidance for on-going proceedings.

R.C.M.s Affecting Article 32 Preliminary Hearings

R.C.M. 404A: Establishes a disclosure requirement for certain information that must be provided to the defense before a preliminary hearing. This rule supersedes a similar rule within ALNAV 086/14.

R.C.M. 405: Implements changes to Article 32 and specifically precludes the use of the “constitutionally required” exception to M.R.E. 412 at a preliminary hearing. This rule supersedes a similar rule within ALNAV 086/14 for all preliminary hearings that begin after the EO was signed. Therefore, preliminary hearing officers appointed prior to the signing of the EO who will conduct a preliminary hearing after the EO was signed must be reappointed with a new appointing order that references R.C.M. 405.

R.C.M. 703: Removes the authority of the Article 32 preliminary hearing officer to issue subpoenas.

R.C.M. 1103A: Authorizes the preliminary hearing officer to seal matters and restricts who may view these matters.

R.C.M. 404(e), 406(b), 603(b), 703(e), 705(c), 706, 902(b), 905(b), 906(b), 912, 1103, 1106(b), and 1112(c) and Pt. IV, ¶¶ 57, 96, and 96a: Replace the term “pretrial investigation” with the term “preliminary hearing.”

R.C.M.s and M.R.E.s Affecting Victim Rights

R.C.M. 305: Implements Article 6b and gives the victim certain rights to be heard and to be notified of proceedings.

R.C.M. 702: Implements Article 49 limitations on when a deposition may be ordered and provides that a victim’s declination to testify at a preliminary hearing or to participate in a pretrial interview does not, per se, warrant a deposition.

Significant MCM Changes

RCM 1001A: Victim may provide unsworn statement at sentencing.

RCM 601: Transfer case to parallel CA.

R.C.M. 702: Limits when a victim deposition may be ordered to when not available to testify at court-martial.

MRE 404: Prohibits admission of general military character evidence for certain offenses.

MRE 513(d): Removes the “constitutionally required” exception.

Article 92: Increased max confinement where death or grievous bodily harm results from dereliction of duty.

Article 93: Increased max confinement to 2 years

R.C.M. 801(a): Implements Article 6b to require the military judge to appoint a representative to exercise the rights of certain victims.

R.C.M. 806(b): Implements Article 6b to provide a victim the right to confer with trial counsel and not to be excluded from proceedings absent judicial determination.

R.C.M. 906(b): Implements Article 6b to provide a victim the right to receive notice of, attend, and be heard on a motion hearing for release from pretrial confinement.

R.C.M. 1001(a), 1001A: 1001A is a new rule which provides that, at sentencing, the victim in a non-capital case may make an unsworn victim impact statement orally or in writing. If the victim exercises this right, the victim is not considered a witness for purposes of Article 42(b) and cannot be cross-examined.

R.C.M. 1107: Implements Article 60(d) to provide a victim the opportunity to submit post-trial matters for the convening authority's (CA) consideration.

M.R.E. 412, 513, 514: Implements *Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013) and provides the victim or the patient the right to be heard through counsel.

M.R.E. 514: Extends the victim advocate-victim privilege to the Department of Defense Safe Helpline's staff.

M.R.E. 615(e): Implements Article 6b and provides the victim the right not to be excluded from court-martial proceedings unless the military judge determines that the victim's testimony would be materially altered by attending.

R.C.M.s Affecting Convening Authority Decisions

R.C.M. 201(f): Implements changes to Article 18 to limit court-martial jurisdiction over penetrative sexual assault offenses, and attempts to commit such offenses, to general courts-martial. *Only applies to offenses committed after 23 June 2014.*

R.C.M. 601(g): Creates a new rule, permitting CAs to transfer charges to a parallel CA for disposition under certain circumstance. As one example, if the original CA is deploying and the accused is remaining behind, the CA may transfer an ongoing case to another CA.

R.C.M. 1105 and 1107: Implements changes to Article 60(b) to limit the convening authority's power to alter the findings and sentences of courts-martial; prohibit consideration of matters concerning the victim's character that were not admitted into evidence; require the convening authority to issue a written explanation for setting aside any finding of guilty or disapproving, commuting, or suspending any part of the sentence; and authorize correction of any type of error (instead of only clerical errors) in a convening authority's action. *The limitations on Convening Authority's Action apply to offenses committed after 23 June 2014, but these limitations do not apply to straddling cases. For a detailed explanation of the changes to Article 60, please see Practice Advisory 4-15.*

R.C.M. 1301(c): Implements changes to Article 18 to prohibit summary courts-martial from exercising jurisdiction over certain sex offenses. *Only applies to offenses committed after 23 June 2014.*

Additional Changes to Evidentiary Rules and Enumerated Articles

M.R.E. 404: Prohibits admission of general military character evidence for purposes of offenses charged under Articles 120–123a, 125–127, and 129–132, or attempts to commit those offenses, and any other offense for which it is not relevant to an element. *As is explained in more detail below, this only applies in courts-martial in which the accused was arraigned after the EO was signed.*

M.R.E. 513(d): Removes the “admission or disclosure of a communication is constitutionally required” exception. *As explained in more detail below, this only applies in courts-martial in which the accused was arraigned after the EO was signed.*

M.R.E. 513(e), 514(e): Establishes a four-part test—similar to the *U.S. v. Klemick*, 65 M.J. 576 (NMCCA 2006) test—that must be satisfied before a military judge may conduct an in camera review of evidence falling within the privileges and requires any disclosure of that evidence to be narrowly tailored. *As explained in more detail below, this only applies in courts-martial in which the accused was arraigned after the EO was signed.*

Article 81: Includes conspiracies to violate the law of war. *Only applies to offenses committed after 17 October 2006.*

Article 92: Increases the maximum punishment for derelictions of duty that result in death or grievous bodily harm. *Only applies to offenses committed after 16 June 2015.*

Article 93: Maximum punishment increased to 2 years. *Only applies to offenses committed after 16 June 2015.*

Impact of Executive Order 13696 on On-Going Proceedings and Hearings

As stated in EO 13696, any non-judicial 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 *U.S. v. Nicholas*, 6 C.M.R. 27 (USCMA 1952). Stated more plainly, if a discrete military justice event began before EO 13696 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 17 June

2015, the new rules would not take effect for that trial. The same applies to preliminary hearings convened under the procedures prescribed in ALNAV 086/14 and that began before 17 June 2015. However, the new rules do apply to the next military justice event that occurs after 17 June 2015. For example, the new rules will not apply at a preliminary hearing already in progress, but would apply to the referral and throughout the course of the trial.

Links to Updated UCMJ, R.C.M.s, M.R.E.s, EO 13696, and Supplementary Materials

Military Justice Branch (JMJ): [http://www.hqmc.marines.mil/sja/Branches/MilitaryJusticeBranch\(JMJ\).aspx](http://www.hqmc.marines.mil/sja/Branches/MilitaryJusticeBranch(JMJ).aspx).

Points of Contact

Military justice policy questions may be directed to the Head, JMJ, LtCol Angela Wissman at angela.wissman@usmc.mil or (703)693-9005; Deputy Head (Policy and Legislation), JMJ, Maj Eldon W. Beck at eldon.beck@usmc.mil (703)614-1513; or Maj Mark D. Sameit, OIC, Trial Counsel Assistance Program at mark.sameit@usmc.mil or (703)693-8955.