DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by July 19, 2002.

Title, Form, and OMB Number: Procurement Technical Assistance Center Cooperative Agreement Performance Report; DLA Form 1806; OMB Number 0704–0320.

Type of Request: Reinstatement.

Number of Respondents: 89.

Responses per Respondent: 2.

Annual Responses: 178.

Average Burden Per Response: 7 hours.

Annual Burden Hours: 1,246.

Needs and Uses: The Defense Logistics Agency uses the report as the principal instrument for measuring the performance of Cooperative Agreements awards made under 10 U.S.C. Chapter 142. Each cooperative agreement award recipient submitted goals and objectives in their application that were subsequently incorporated into their cooperative agreement awards. The level of achievement of these goals and the funds expended in the process of conducting the program is measured by the report. The government's continued funding of a cooperative agreement and the decision to exercise an option award is based to a significant degree on the award holder's current performance as measured by the report. Information from the report is also used to identify programs that may be in need of assistance and/or increased surveillance.

Affected Public: Business or Other For-Profit; Not-For-Profit Institutions; State, Local or Tribal Government.

Frequency: Semi-Annually.

Respondents Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jackie Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: May 10, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 02–12505 Filed 5–17–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Manual for Courts-Martial; Proposed Amendments

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

ACTION: Notice of proposed amendments to the Manual for Courts-Martial, United States (2000 ed.) and notice of public meeting.

SUMMARY: The Department of Defense is considering recommending changes to the Manual for Courts-Martial, United States (2000 ed.) (MCM). The proposed changes constitute the 2002 annual review required by the MCM and DoD Directive 5500.17, ''Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' May 8, 1996. The proposed changes concern the rules of procedures and evidence and the punitive articles applicable in trials by courts-martial. These 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.

This notice also sets forth the date, time and location for the public meeting of the JSC to discuss the proposed changes.

This notice is provided in accordance with DoD Directive 5500.17, ''Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' May 8, 1996. This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

In accordance with paragraph III.B.4 of the Internal Organization and Operating Procedures of the JSC, the committee also invites members of the public to suggest changes to the Manual for Courts-Martial in accordance with the described format.

DATES: Comments on the proposed changes must be received no later than July 30, 2002 to be assured consideration by the JSC. A public meeting will be held on June 27, 2002 at 2 p.m. in Room 808, 1501 Wilson Boulevard, Arlington, VA 22209–2403.

ADDRESSES: Comments on the proposed changes should be sent to Major D. T. Brannon, Headquarters, U.S. Marine Corps (JAM), 2 Navy Annex, Room 5E618, Washington, DC 20380–1775.

FOR FURTHER INFORMATION CONTACT: Major D. T. Brannon, Executive Secretary, Joint Service Committee on Military Justice, Headquarters, U.S. Marine Corps (JAM), 2 Navy Annex, Room 5E618, Washington, DC 20380–1775, (703) 614–4250, (703) 695–0335 fax.

SUPPLEMENTARY INFORMATION: The proposed amendments to the MCM are as follows:

Amend R.C.M. 103(2) by deleting ''without'' and replacing with ''with'' and by deleting ''noncapital'' and replacing with ''capital.''

Amend the Analysis accompanying R.C.M. 103(2) by inserting the following prior to the discussion of subsection (3):

> ''200__ Amendment: This definition is based on *United States* v. *Mathews,* 16 M.J. 354 (C.M.A. 1983), and R.C.M. 1004, and is consistent with the numerous affirmative steps required of a convening authority in order to refer a court-martial case as capital. See R.C.M. 1004 and accompanying analysis at Appendix 21, R.C.M. 1004.''

Amend R.C.M. 201(f)(1)(A)(iii)(b) by substituting the following therefor:

> ''(b) The case has not been referred with a special instruction that the case is to be tried as capital.''

Amend the Analysis accompanying R.C.M. 201(f) by inserting the following prior to the discussion of subsection (f)(2):

> ''200__ Amendment: Subsection (1)(A)(iii)(b) was changed to reflect that a convening authority must affirmatively act to refer a capital punishment eligible offense for trial as a capital case.''

Amend R.C.M. 307(c)(4) by inserting the following at the end thereof:

> ''What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.''

Amend the Discussion accompanying R.C.M. 307(c)(4) by striking the first sentence.

Amend the Analysis accompanying R.C.M. 307(c)(4) by inserting the following prior to the discussion of subsection (c)(5):

''200 Amendment: The first sentence of the non-binding discussion was moved, en toto, to subsection (4) to reflect the decision of *United States* v. *Quiroz,* which identifies the prohibition against the unreasonable multiplication of charges as a ''a long-standing principle of military law. See United States v. Quiroz, 55 M.J. 334 (CAAF 2001).''

Amend R.C.M. 501(a)(1)(A) to read as follows:

''(A) A military judge and, except in capital cases, not less than five members.''

Amend R.C.M. 501(a)(1) by inserting the following subparagraph (C) to read as follows:

''(C) In all capital cases, a military judge and no fewer than twelve members, unless twelve members are not reasonably available because of physical conditions or military exigencies. If fewer than twelve members are reasonably available, the convening authority shall detail the next lesser number of reasonably available members under twelve, but in no event fewer than five. In such a case, the convening authority shall state in the convening order the reasons why twelve members are not reasonably available.''

Amend R.C.M. 805(b) is amended by replacing the current second sentence with the following:

''No general court-martial proceeding requiring the presence of members may be conducted unless at least 5 members are present, or in capital cases, at least twelve members are present except as provided in R.C.M. 501(a)(1)(C), where twelve members are not reasonably available because of physical conditions or military exigencies. No special court-martial proceeding requiring the presence of members may be conducted unless at least 3 members are present except as provided in R.C.M. 912(h).''

Amend R.C.M. 1003(b) (2) by deleting ''foreign'' and substituting ''hardship'' therefor.

Amend the Analysis accompanying R.C.M. 1003(b) (2) by inserting the following paragraph:

''200____Amendment: Hardship Duty Pay (HDP) superseded Foreign Duty Pay (FDP) on 3 February 1999. HDP is payable to members entitled to basic pay. The Secretary of Defense has established that HDP will be paid to members (a) for performing specific missions, or (b) when assigned to designated areas.''

Amend R.C.M. 1004(b) by inserting the following after ''(1) Notice.'' and before ''Before'':

''(A) Referral. The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided:

(i) that the convening authority has otherwise complied with the notice requirement of subsection (B); and

(ii) that if the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy.

(B) Arraignment.''

Amend the analysis accompanying R.C.M. 1004(b) by substituting the following paragraph for the current first paragraph:

''200____Amendment: Subsection (1) (A) is intended to provide early and definitive notice that the case has been referred for trial as a capital case. Subsection (1) (B) is intended to provide the defense written notice of the aggravating factors it intends to prove, yet afford some latitude to the prosecution to provide later notice, recognizing that the exigencies of proof may prevent early notice in some cases.''

Insert the following new R.C.M. 1103A to read as follows:

''Sealed exhibits and proceedings. If the record of trial contains exhibits, proceedings, or other matter ordered sealed by the military judge, the trial counsel shall cause such materials to be sealed so as to prevent indiscriminate viewing or disclosure. Trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the military judge, and inserted at the appropriate place in the original record of trial. Copies of the record shall contain appropriate annotations that matters were sealed by order of the military judge and have been inserted in the original record of trial. Except as provided in the following subsections to this rule, sealed exhibits may not be opened by any party.

(1) Examination of sealed matters. For the purpose of this rule, ''examination'' includes unsealing the sealed documents, reading, viewing, or manipulating them in any way. ''Examination'' under this rule does not include photocopying, photographing, duplicating, or disclosing in any manner in the absence of an order from appropriate authority.

(A) Prior to authentication. Prior to authentication of the record by the military judge, sealed materials may not be examined in the absence of an order from the military judge based on good cause shown.

(B) Authentication through action. After authentication and prior to disposition of the record of trial pursuant to Rule for Courts-Martial 1111, sealed materials may not be examined in the absence of an order. Such order may be issued from the military judge upon a showing of good cause at a post-trial Article 39a session directed by the Convening Authority.

(C) Reviewing and appellate authorities.

(i) Reviewing and appellate authorities may examine sealed matters when those authorities determine that such action is reasonably necessary to a proper fulfillment of their responsibilities under the Uniform Code of Military Justice, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure or rules of professional responsibility.

(ii) Reviewing and appellate authorities shall not, however, disclose sealed matter or information in the absence of:

(a) Prior authorization of the Judge Advocate General in the case of review under Rule for Courts-Martial 1201 (b); or

(b) Prior authorization of the appellate court before which a case in pending in the case of review under Rules for Courts-Martial 1203 and 1204.

(iii) In those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.

(iv) The authorizing officials in paragraph (ii) above may place conditions on authorized disclosures in order to minimize the disclosure.

(v) Reviewing and appellate authorities include:

(a) Judge advocates reviewing records pursuant to Rule for Courts-Martial 1112;

(b) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to Rule for Courts-Martial 1201(b);

(c) Appellate government counsel;

(d) Appellate defense counsel;

(e) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(f) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(g) The Justices of the United States Supreme Court and their professional staff; and

(h) Any other court of competent jurisdiction.''

Insert the following Analysis to accompany new R.C.M. 1103A:

''200____Amendment: The 1998 amendments to the Manual for Courts-Martial introduced the requirement to seal M.R.E. 412 (rape shield) motions, related papers, and the records of the hearings, to ''fully protect an alleged victim of [sexual assault] against invasion of privacy and potential embarrassment.'' MCM Appendix 22, p. 36. As current rule 412(c)(2) reads, it is unclear whether appellate courts are bound by orders sealing 412 information issued by the military judge. *See, e.g., United States* v. *Stirewalt,* 53 M.J. 582 (C.G.C.C.A. 2000).

On a larger scale, the effect and scope of a military judge's order to seal exhibits, proceedings, or materials is similarly unclear. Certain aspects of the military justice system, particularly during appellate review, seemingly mandate access to sealed materials. For example, appellate defense counsel have a need to examine an entire record of trial to advocate thoroughly and knowingly on behalf of a client. Yet there is some uncertainty about appellate defense counsel's authority to examine sealed materials in the absence of a court order.

The rule is designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same

information. The rule favors an approach relying on the integrity and professional responsibility of those functionaries, and assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place. Should disclosures become necessary, then the party seeking disclosure is directed to an appropriate judicial or quasi-judicial official or tribunal to obtain a disclosure order.''

Amend Manual for Courts-Material, Part IV, Paragraph 14c(2)(a), by inserting the following new subparagraph (ii) and renumbering existing subparagraphs (a)(ii) through (iv) as (a)(iii) through (v):

''(ii) Determination of lawfulness. The lawfulness of an order is a question of law to be determined by the military judge.''

Amend Manual for Courts-Martial, Part IV, Paragraph 109, by deleting the current text and replacing with the following:

''109. Article 134—Threat or Hoax Designed or Intended To Cause Panic or Public Fear

a. Text. See paragraph 60.

b. Elements.

(1) Threat.

(a) That the accused communicated certain language;

(b) That the information communicated amounted to a threat;

(c) That the harm threatened was to be done by means of an explosive, weapon of mass destruction, biological, or chemical agent, substance, or weapon, or hazardous material;

(d) That the communication was wrongful; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) Hoax.

(a) That the accused communicated or conveyed certain information;

(b) That the information communicated or conveyed concerned an attempt being made or to be made by means of an explosive, weapon of mass destruction, biological, or chemical agent, substance or weapon, or hazardous material to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;

(c) That the information communicated or conveyed by the accused was false and that the accused then knew it to be false;

(d) That the communication of the information by the accused was malicious; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation:

(1) Threat. A ''threat'' means an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required.

(2) Explosive. ''Explosive'' means gunpowder, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other explosive compound, mixture, or similar material.

(3) Weapon of mass destruction. A weapon of mass destruction is a device designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; or any weapon involving a disease organism; or any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.

(4) Biological agent. The term ''biological agent'' means any micro-organism (including bacteria, viruses, fungi, rickettsiac, or protozoa), pathogen, or infectious substance, and any naturally occurring, bioengineered, or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method production, that is capable of causing—

(i) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(ii) deterioration of food, water equipment, supplies, or materials of any kind; or

(5) Chemical agent, substance, or weapon. A chemical agent, substance or weapon refers to a toxic chemical and its precursors and or a munition or device, specifically designed to cause death or other harm through toxic properties of those chemicals which would be released as a result of the employment of such munition or device, and any equipment specifically designed for use directly in connection with the employment of such munitions or devices.

(6) Hazardous material. A substance or material (including explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas, or mixture thereof) or a group or class of material designated as hazardous by the Secretary of Transportation.

(7) Malicious. A communication is ''malicious'' if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

d. Lesser included offenses.

(1) Threat

(a) Article 134—communicating a threat

(b) Article 80—attempts

(c) Article 128—assault

(2) Hoax. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeitures of all pay and allowances and confinement for 10 years.

f. Sample specifications.

(1) Threat.

In that _____ (personal jurisdiction data) did, (at/on board—location) on or about _____20____, wrongfully communicate certain information, to wit: _____, which language constituted a threat to harm a person or property by means of a(n) [explosive, weapon of mass destruction, biological agent or substance, chemical agent or substance and/or (a) hazardous material[s])].

(2) Hoax.

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____ 20 ____, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully [(kill) (injure) (intimidate) _____] [(damage) (destroy) _____] by means of a(n) [explosion, weapon of mass destruction, biological agent or substance, chemical agent or substance, and/or (a) hazardous material(s)], to wit: _____, which information was false and which the accused then knew to be false.''

Amend the Analysis accompanying Punitive Article 134, Paragraph 109, subparagraph c, by inserting the following at the end thereof:

''200 ____ Amendment: This paragraph has been expanded to annunciate the various means by which a threat or hoax is based. Whereas explosives were the instruments most commonly used in the past, new types of weapons have developed. These devices include weapons of mass destruction, chemical agents, biological agents, and hazardous materials.''

Amend the Analysis accompanying Punitive Article 134, Paragraph 109, subparagraph e, by inserting the following at the end thereof:

''200 ____ Amendment: This amendment increases the maximum punishment currently permitted under paragraph 109 from 5 years to 10 years. Ten years is the maximum period of confinement permitted under 18 U.S.C. 844(e), the U.S. Code section upon which the original paragraph 109 is based.

Amend the Analysis accompanying Punitive Article 90 by inserting the following new subparagraph c(2)(a)(ii) and renumbering existing subparagraphs (a)(ii) through (iv) as (a)(iii) through (v):

''200____ Amendment: The Court of Appeals for the Armed Forces held that the lawfulness of an order is a question of law to be determined by the military judge, not the trier of fact. See United States v. New, 55 M.J. 95 (C.A.A.F.).''

Dated: May 14, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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DEPARTMENT OF DEFENSE

Office of the Secretary

Board of Visitors Meeting

AGENCY: Defense Acquisition University, DoD.