

RESPONSE TO QUESTIONS FROM THE DEFENSE ADVISORY COMMITTEE ON INVESTIGATIONS, PROSECUTION AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED SERVICES (DAC-IPAD)

In December 2021, the President signed into law the National Defense Authorization Act for Fiscal Year 2022 (NDAA for FY22), which makes historic reforms to the military justice system. The Joint Service Committee on Military Justice (JSC) drafted proposed amendments to the Manual for Courts-Martial necessary to carry out these reforms as well as to make other improvements in the military justice system. The JSC offers the following responses to questions posed by the DAC-IPAD¹:

Topic #1: Preamble

1a. What is the purpose of adding language on deterrence and appropriate accountability to the preamble?

JSC Response: The two additions have long been recognized as purposes of the military justice system. *E.g., United States v. Lania*, 9 M.J. 100, 103-04 (C.M.A. 1980); *United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2011); *United States v. Blanks*, 77 M.J. 239, 243 (C.A.A.F. 2018).

1b. What is intended by the change and what prompted the change?

JSC Response: The FY22 NDAA drastically overhauled the military justice system, and thus, in reviewing the MCM, the JSC also updated the Preamble.

Topic #2: OSTC determination to “exercise authority”

2a. Can the new R.C.M. 103(12) include a requirement to document or notify designated persons when an STC “exercises authority over” covered, related, or known offenses?

JSC Response: The JSC does not anticipate adding a notification requirement to the RCMs and instead defers this type of notification to the Secretaries concerned.

2b. If this requirement is better suited in a different rule, please specify.

JSC Response: See above in 2a.

Topic #3: Communications among convening authorities, staff judge advocates, STC

3a. What is the purpose of subparagraph [R.C.M. 105](c)?

JSC Response: R.C.M. 105(c) recognizes that communication among STCs, convening authorities, and SJAs facilitates operation of the system, while incorporating and expanding 10 U.S.C. § 1044f(a)(3)(B)’s provision prohibiting the imposition of unlawful or unauthorized influence or coercion on the STCs’ exercise of their duties.

3b. Can the entire subparagraph (c) be deleted?

JSC Response: The JSC will consider that question when it adjudicates public comments.

3c. If subparagraph (c) is retained, can all three R.C.M. 105 subparagraphs (a), (b), and (c), require

¹ This response is not required by law, regulation, or policy and does not set any precedent for the JSC to respond to such questions in the future.

communications “free from unlawful or unauthorized influence or coercion?”

JSC Response: The JSC will consider the addition of the phrase to the other subparagraphs. Please note that R.C.M. 105(b) does not involve special trial counsel, thus making the 10 U.S.C. § 1044f(a)(3)(B) language inapplicable to that provision.

3d. Is there a reason the language “free from unlawful or unauthorized influence or coercion?” does not appear in subparagraphs (a) and (b)?

JSC Response: The JSC used the language from the FY22 NDAA for STCs and will consider whether to add the phrase to the other subparagraphs.

Topic #4: Reporting an offense

Recommendation: Change first sentence of RCM 301(c) to read: **“All reports of covered offenses shall be forwarded promptly to a special trial counsel.”**

JSC Response: The JSC acknowledges the public comment and will consider whether to amend this language.

Topic #5: Initial disposition by OSTC

5a. Why does the new R.C.M. 306A limit the victim’s right to express a preference as to jurisdiction only for sex-related offenses?

JSC Response: The language matches that in RCM 306(e), with the exception of updating the language to STC. RCM 306(e) implements section 534(b) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3367 (2014). That statute’s requirement was limited to “an alleged sex-related offense that occurs in the United States.” *Id.* The provision defined “alleged sex-related offense” by reference to 10 U.S.C. § 1044e(g), which, as subsequently amended and moved to 1044e(h), which refers to “a violation of . . . article 120, 120b, 120c, or 130 of the Uniform Code of Military Justice” or an attempt to commit one of those offenses).

5b. What law or policy prevents extending to the victim a right to express a preference as to jurisdiction for all covered offenses?

JSC Response: There is no law or policy requiring or preventing application of 306A(d)(2) to covered offenses other than 120, 120b, 120c, or 130, with the caveat that there may be no civilian criminal analog to some covered offenses.

5c. Can this rule be revised to consider the victim’s preference as to jurisdiction when an investigation is initiated upon a report of a sex-related or covered offense?

JSC Response: The JSC will consider whether to amend this language in RCMs 306 and 306A.

Topic #6: Referral of charges by special trial counsel

Recommendation: Amend the last sentence of RCM 307A to read: **“Any person subject to the UCMJ may prefer charges, however, once the STC asserts jurisdiction over an offense, only the special trial counsel may prefer charges.”**

JSC Response: The JSC acknowledges the public comment and will consider whether to amend this language.

Topic #7: Disposition of charges by special trial counsel

7a. What risks does this revision pose to the fairness of the system?

JSC Response: The JSC welcomes any suggestions concerning appropriate rule changes in light of the final sentence of Article 24a(c)(2)(A), UCMJ, 10 U.S.C. 824a(c)(2)(A).

7b. How do the rules address or mitigate any of those risks?

JSC Response: The JSC welcomes any suggestions concerning appropriate rule changes in light of the final sentence of Article 24a(c)(2)(A), UCMJ, 10 U.S.C. 824a(c)(2)(A).

7c. Who has withholding authority as “a superior competent authority” within R.C.M. 401A? 7d. For example, would a Service TJAG be a superior competent authority?

JSC Response: “A superior competent authority” is only one which is in the chain of command of the STC. By operation of law, those individuals are limited to superior STCs; the applicable LSTC; the Secretary concerned; for STCs within the Department of Defense, the Secretary of Defense; and the President of the United States.

7e. Is there a reason that the rule does not explicitly define who may act as a withholding authority under R.C.M. 401A?

JSC Response: The JSC does not believe the list needs to be defined, as “a superior competent authority” under the UCMJ is only one which is in the chain of command of the STC.

Topic #8: Randomization when selecting panel members

8a. What is the purpose of this recommendation?

JSC Response: In line with recommendations from IRC Recommendation 1.7d, the DoD General Counsel tasked the JSC with proposing rule changes that would create a system under which members are randomly assigned to individual court-martial panels from a large pool of potential members pre-selected by the convening authority applying the criteria from Article 25, UCMJ. Please note that the National Defense Authorization Act for Fiscal Year 2022 did not amend Article 25.

8b. Did the JSC consider the feasibility and advisability of randomizing the process at an earlier stage, for example, when detailing members under RCM 503?

JSC Response: Yes, and the JSC recommended proposed changes to the RCMs based on the application of Article 25, UCMJ.

Topic #9: Victim Impact Statements

9a. Is the intent of this proposed change to allow a victim to recommend a specific sentence in their victim impact statement, or is the intent to provide military judges the discretion whether to allow such recommendations?

JSC Response: The JSC views the new language as mirroring the concepts in RCM 1001(d)(2)(A).

9b. If the intent is to allow a victim to make a specific sentence recommendation, did the JSC consider making this explicit within the text of R.C.M. 1001(c)(3), similar to how an accused is explicitly permitted to request a

specific sentence under R.C.M. 1001(d)(2)(A)?

JSC Response: The JSC will consider whether to recommend matching language.

9c. Is there a reason that three different definitions or descriptions of victim impact are necessary within R.C.M. 1001?

JSC Response: The JSC will review the differences and evaluate whether to make any proposed changes.

9d. Is it necessary or is there a simpler way? For RCM 1001(c)(2)(D)(ii):

JSC Response: The JSC welcomes any recommendations from the DAC-IPAD via the public comment process.

9e. Should the victim also have the right to be heard on an objection to the victim impact statement in a capital case when the victim has that right in a non-capital case?

JSC Response: The JSC notes there are heightened constitutional protections for an accused in death penalty cases. *See, e.g., Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005); *United States v. Thomas*, 46 M.J. 311, 314-15 (C.A.A.F. 1997); *United States v. Curtis*, 32 M.J. 252, 255 (C.M.A. 1991).

9f. Is there a reason for the disparity in the language between R.C.M. 1001(d)(1) and 1001(c)(5)(A)/1001(d)(2)(A), which are substantially similar, within the context of the rule?

JSC Response: The JSC will review the differences and evaluate whether to make any proposed changes.

Comment: The draft change adds a sentence stating that the crime victim's unsworn statement "may be made by the crime victim, by counsel representing the crime victim, or both"; however, 1001(c)(5)(B) includes a limitation "Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement."

9g. Did the JSC intentionally retain the "upon good cause shown" clause in subparagraph (B) for a particular reason?

JSC Response: The JSC will review the language and evaluate whether to make any proposed changes.